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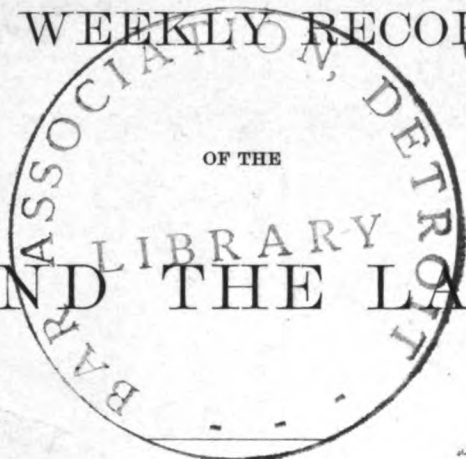
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THE ALBANY LAW JOURNAL:

A WEEKLY RECORD

LAW AND THE LAWYERS.



CONDUCTED BY

ISAAC GRANT THOMPSON.

VOL. XVII.

FROM JANUARY TO JULY, 1878.

10164

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THE ALBANY LAW JOURNAL:

A WEEKLY RECORD OF THE LAW AND THE LAWYERS.

The Albany Law Journal.

ALBANY, JANUARY 5, 1878.

CURRENT TOPICS,

THE Governor's Message contains several excellent suggestions, which we trust will meet the approval of the legislature, as they certainly must that of all honest and intelligent citizens. His statements that "there are too many small offices in the towns, the incumbents of which can only be paid by illegal or exorbitant fees and petty exactions;" that "needless criminal complaints and legal proceedings are instituted that constables, justices and jailors may receive the fees of such prosecutions;" and that "services performed and not performed are charged at double rates, and often several times," are strictly true as to almost every county in the State, and the recommendation that the superfluous offices be cut off, and that the bills of petty officials be taxed by the county judge, is a good one. The evil of special legislation has been set forth in numerous gubernatorial communications, and the Constitution is full of provisions designed to prevent it; yet His Excellency finds that it is still unchecked, especially in the direction of village charter amendments, which the legislature is asked not to pass hereafter. The governor believes that there has been too much legislation for the city of New York, which is probably so, as upward of twenty-four hundred laws have been enacted relating thereto in about twenty years. A new excise law is recommended which shall be "reasonable in its limitations and restraints, clear and explicit in all its provisions, and above all complete in itself, to be uniformly, steadily and constantly enforced." The law, as it now exists, was, until the decision of the Court of Appeals, misunderstood in an important point by those dealing in intoxicating drinks and by the officials charged with carrying it out, and the governor thinks it would be unjust to hold the dealers disobeying it to penalties as for a willful

violation of the law. He says: "The legislature is bound to make its enactments explicit and easy to be understood," which is a proper rule enough, but one that has not heretofore been often put in practice. The laws governing insurance, "passed for the mutual protection of insurer and insured," are claimed not to have been eminently successful, and in some instances to have worked positive harm. The statutes relating to deposits of securities in this and other States and the rules relating to the dissolution of companies are criticised. The statutes regulating savings banks are also unfavorably commented upon, and amendment suggested.

The governor gives as a reason for his failure to approve the supplementary chapters of the new Code, that he did not have time to read them during the thirty days given him after the adjournment of the legislature, and he did not feel authorized to approve what he had not read. He is not in favor of the new Code, for the reason that "this new system can only be continued at the expense of another long period of doubt and litigation over its proper construction, which will cost the people of the State many millions of dollars. Already serious questions of this sort have been brought before the courts." He further says: "The great question will be presented to you whether the new system can be so far superior to the old as to justify you in committing the whole administration of civil justice to the confusion of construction from which it has just emerged. The courts, under the old system, which they understand, are already burdened with labors beyond endurance, and it seems unwise to precipitate upon them a mass of practice litigation which must necessarily retard still more their accumulated load of business. I submit to your careful reflection the proposition that this grave subject would be best disposed of by the repeal of the partial Code which went into effect on the first of September, and the re-enactment of the Code which was in force up to that date, to be amended, from time to time, as experience may suggest."

The woman question is troubling the authorities and the courts of the District of Columbia. A woman having been permitted to act as attorney and counselor at law in the District, others of the female sex are encouraged to apply for various public positions heretofore held by men only. The office of notary public was first sought for, and this avenue to power and emolument being opened to female applicants, the next attempt was made on the office of constable, and a formidable petition was last week presented to the Supreme Court of the District, asking it to appoint a Mrs. Dundore to a vacancy then existing. The petition was brought before the court by the lady lawyer, Mrs. Belva A. Lockwood, whose professional employment seems chiefly to be arguing for the admission of her sex to public offices before various committees, courts and other bodies. The court said that the matter was one of unusual importance, and would "receive respectful consideration" on the part of the court. It is therefore possible that the constabulary of the Federal capital will hereafter be composed in part of women. For ourselves, we do not see what objection can be raised to the appointment of women to such a position by a court which freely admits them to the more important places of attorney and counselor. We perceive also that the ladies of California are asking for a law permitting them to act as notaries public, and that there is a strong probability of the passage of such a law. If the whole matter were submitted to the decision of the intelligent part of the female sex generally, there would be no change in the present rules. It is only a few agitators, male and female, who care anything about a change; but they make a considerable noise, and are sometimes given what they ask for for the sake of peace.

According to the report of the comptroller, there has been no money in the State treasury to pay the salaries of the Court of Arbitration in New York since September 30, 1876. The suggestion of the comptroller that so long as the laws creating this court are upon the statute books, the appropriation called for by them should be made, is reasonable; but the fact that the appropriation was overlooked indicates that there is very little general interest in the court, and that the experiment which was made in its establishment has not succeeded.

Notwithstanding the most strenuous protestation and earnest entreaty of the lawyers and the business men of the third judicial district, the governor persists in his determination to assign Mr. Justice Ingalls to the General Term of the First Department. Why, no one less than a governor can probably tell. Mr. Justice Ingalls is one of the very best circuit judges in the State, and there are too few good ones to spare any of them for the General Term; besides,

considering the judicial force, there is more business to be transacted in the third than in the first district. New York city contains about as many judges of superior courts, as there are in all England, while the third district will be left with two judges, one of whom is in poor health and the other of whom is away ever and anon, holding circuit in New York. We may, however, congratulate the New York bar on the appointment. Mr. Justice Ingalls is a thoroughly able and conscientious judge, and a gentleman without reproach.

The service of an injunction by telegraph is certainly a novel proceeding, and that such service should be held sufficient to bring a party into contempt for disobeying the injunction is somewhat remarkable. Yet, on a motion recently made before Vice-Chancellor Malins to commit an auctioneer who, after receiving a telegram notifying him that a sale he was about to make had been enjoined, by the advice of a barrister disregarded the notice and made the sale, the court said that the telegram was sufficient to bring home to the auctioneer the fact that the injunction had been issued, though, as he had, in making the sale, acted under the advice of counsel, he was only required to apologize to the court and pay costs. The English papers, both law and otherwise, severely criticise the decision, and we think with reason.

NOTES OF CASES.

IN the case of *Hovey v. McDonald*, decided on the 8th ult. by the Supreme Court of the District of Columbia, at General Term, the defendant had been, by an order of the court, directed to return certain moneys previously paid to him out of a fund in the hands of the court, under an order which was afterward set aside. Defendant failed to comply with the order to repay, and a motion was made to punish him for contempt. He had, however, placed himself out of the jurisdiction of the court, so that the moving papers could not be served on him, and his attorney and counsel would not admit service. The court held that, while as a rule personal service of motion papers is necessary to bring a party into contempt, if, after disobedience to the order of the court, he flees its jurisdiction, he cannot be permitted further to prosecute or defend his suit until he purges his contempt. Accordingly, an order was made that, unless within a time designated, the defendant should comply with the order, his answer be stricken out, and the cause proceed as if no answer had been interposed. The course taken was the only one open to the court, and is sustained by numerous authorities. See *Maddock's Ch. Pr.* (Hartford ed., 1827), 403; *Harrison's Pr. in Ch.* 202; 1 *Daniel's Ch. Pr.* 554; *Vowles v. Young*, 9 Ves. 193; *Williamson v. Carnon*, G. & J. 184. In *Brinkley v. Brinkley*, 47 N. Y. 49, where the party

had left the jurisdiction of the court, it is said that the court is not limited to fine and imprisonment as a means of enforcing its orders. "Inasmuch as, after the commencement of the action, he has gone out of the jurisdiction, it would not have availed to have ordered him fined or committed. But it had control over its own proceedings, and could refuse to the defendant the benefit of them when asked as a favor, until he purged himself of his contempt." See, also, *Ellingwood v. Stevenson*, 1 Sandf. Ch. 366; *Johnson v. Penney*, 1 Paige, 646; *Rogers v. Patterson*, 4 id. 450; *Evans v. Van Hale*, Clarke, 17. But the rule that one in contempt shall not be heard applies only to matters of favor, and not to those of strict right; and he is also entitled to be heard if his object is to get rid of the order or other proceedings which placed him in contempt. *Morrison v. Morrison*, 5 Hare, 590; *Chuck v. Cremer*, Cooper's Cas. Temp. Cot. 205; *Odell v. Hart*, 1 Moll. 492. See, also, *Stone v. Byrne*, 5 Brown's Cas. 209; *Latham v. Latham*, 1 Sw. & Tris. 299.

In *Harris v. Newell*, 2 N. W. Rep. 68, determined on the 20th of November last by the Supreme Court of Wisconsin, it is decided that where one signs a note as surety, it is his duty, and not that of the creditor, to see that the principal performs, and that a surety is not released at law by a failure of the creditor to proceed upon being notified by him to do so, though in some cases equity will interfere at his suit to compel the principal to pay the debt, or to compel the creditor to proceed against the principal. In *Wright v. Simpson*, 6 Vesey, Jr. 714, it is said that, as between the creditor and the surety, the creditor assumes no obligation of active diligence against the principal, and it is the business of the surety, not of the creditor, to see that the principal performs. But because the surety has no privity in the contract of the principal, and because the creditor or the principal may prejudice the surety by delay, equity will sometimes interfere in behalf of the surety, either against the principal, to compel him to pay the debt, or against the creditor, to compel him to proceed at law to collect it from the principal. 1 Story's Eq. Jur., § 327; *Hayes v. Ward*, 4 Johns. Ch. 153; *Bishop v. Day*, 13 Vt. 81. In *Pain v. Packard*, 13 Johns. 174, it is held, in conflict with the doctrine of the principal case, that notice by a surety to a creditor to proceed against the principal, and failure of the creditor to proceed, to the injury of the surety, will operate to discharge the surety from liability. See, also, acknowledging the same rule, *Remsen v. Beekman*, 25 N. Y. 552; also *King v. Baldwin*, 17 Johns. 384. But Chancellor Kent, in *King v. Baldwin*, 2 Johns. Ch. 554, says: "The established doctrine is, that mere delay in calling on the principal will not discharge the surety, provided that delay be unaccompanied with any settled or binding contract for that purpose.

And Chancellor Walworth, in *Warner v. Beardsley*, 8 Wend. 194, criticises the doctrine in *Pain v. Packard*, and says that case was decided without argument, and that two at least of the judges who concurred in it afterward dissented from it. In Pennsylvania the doctrine agrees with that of *Pain v. Packard*, but it is said that the reason of this was, that there was no court of chancery to enable the surety to proceed in his own name and compel payment. See *Dehuff v. Turbitt*, 3 Yeates, 157; *Cope v. Smith*, 8 S. & R. 110; *Gardner v. Feroce*, 15 id. 28; *Weisel v. Sponster*, 18 Penn. St. 460.

In *Hall v. Stephens*, 5 Cent. L. J. 530, just decided by the Supreme Court of Missouri, the meaning of the word "family" is passed upon. A testator devised certain land to "Hiram Stephens and family." The court held that this gave the fee of the lands to the recipient named and to his wife and children also. See *Wylie's Case*, 6 Coke, 16, where it was held that a devise to one and his children, the latter living at the date of the will, carried an estate in joint tenancy; and *In re Terry's Will*, 19 Beav. 580, where the word "family" is held to mean "children," unless some circumstance either in the will or in the condition of the parties prevent such construction. There were orphan children only in that case. In *Barnes v. Patch*, 8 Ves. 604, the words, "remainder of my estate to be equally divided between" the "families" of two persons named, were held to embrace the respective children of the families, one of the persons named having pre-deceased the testator. In *Executors of White v. White*, 30 Vt. 338, where the will gave a sum to the son of testator for the support of himself and family and for no other purpose, it was held that the word "family" included wife and children of the son. But bequests to the "family" of one have been held void for uncertainty (*Harland v. Trigg*, 1 Bro. C. C. 142; *Doe v. Joinville*, 3 East, 172; *Robinson v. Wadlow*, 8 Sim. 134); though the bequest will be upheld if it can be made out from the subject-matter, or the context of the will, what the testator intended by the word "family." *Doe v. Smith*, 5 M. & S. 126; *Parkinson's Trusts*, 1 Sim. (N. S.) 242. In *Woods v. Woods*, 1 My. & Cr. 401, it was held that a bequest to one's wife toward the support of her "family," gave the children such an interest in the estates devised as to enable them to maintain a bill in their own names to protect such interest. See, also, *Beales v. Crisford*, 13 Sim. 592. The word "family" has been held to mean presumptively the heir. *Counden v. Clerke*, Hob. 29; *Chapman's Case*, Dyer, 833b; *Wright v. Atkyns*, 17 Ves. 255; *Griffiths v. Evan*, 5 Beav. 241. The usual rule is, however, to exclude parents. *Barnes v. Patch*, 8 Ves. 604; *Mackleroth v. Bacon*, 5 id. 159; *Blackwell v. Bull*, 1 Keen, 176; *James v. Lord Wynford*, 2 Sm. & Gif. 350. But it has been extended to include all who might be embraced in the term "next of kin." *Williams v. Williams*, 1 Sim. (N. S.) 358; *In re Maxon*, 4 Jur. (N. S.) 407.

RUFUS CHOATE.

VIII.

IT is well known that when Professor Webster was charged with the murder of Dr. Parkman, Mr. Choate declined to act as his counsel. The case attracted universal attention, and every development in it was watched with eagerness. Mr. Choate's refusal to defend excited profound surprise, and even disappointment in professional circles, and much conjecture was indulged in as to the reasons which withheld him from participation in a trial for which he was peculiarly fitted, and which was regarded as one of his best opportunities for distinction. But nothing has been done hitherto to bring to light his motives. All that Professor Brown says in his *Life*, is that he, "for reasons which he judged satisfactory, declined." This excited rather than satisfied curiosity.

Whatever reasons may have existed for silence on the subject having passed away, it seems now proper, as due to Mr. Choate's memory, that all doubt should, if possible, be removed. Entertaining this view, Mr. Edward Ellerton Pratt, Mr. Choate's son-in-law, and the Hon. Otis P. Lord, Judge of the Supreme Court of Massachusetts, an intimate personal and professional friend of Mr. Choate, have kindly furnished the following statements for this use:

Mr. Pratt says: "Mr. Franklin Dexter, one of the leaders of the bar of New England, was greatly interested in Professor Webster's case, believed that he was innocent, and was persistently earnest that Mr. Choate should defend him on that ground. The Hon. Charles Sumner, also holding that view, urged Mr. Choate to undertake the defense, as he expressed it, 'in the interest of humanity,' and was quite angry with him for refusing. At that time the testimony taken before the coroner was known; that taken by the grand jury by whom the indictment had been found, was not publicly known. The question of the Professor's guilt or innocence was the absorbing topic, and the excitement in all classes of society was intense.

"Mr. Dexter was determined to secure Mr. Choate's services, and, after much study of the case, called upon him by appointment, one evening, to lay before him what he called its merits. Mr. Choate listened to him, as a juror might have done, for nearly three hours, and, as he afterward told me, it was one of the most vigorous and persuasive arguments he had ever heard. That estimate may well be accepted, when we remember Mr. Dexter's admitted ability, his friendship for Professor Webster, and his belief that if Mr. Choate could be secured as counsel, the accused man might be saved.

"The argument, which had been listened to without question or interruption, having closed, Mr.

Choate walked up and down his library several times, and then, pausing before Mr. Dexter, who was keenly observing him, said, 'Brother Dexter, how do you answer this question, and this?' I cannot state the points thus presented, but my general recollection is that those questions presented inherent difficulties underlying the defense. Mr. Dexter, as if transfixed, sat musing deeply, his head bent upon his hand, for several minutes, and, finally, as if hopeless of finding an answer, and seeking relief, he rose suddenly and said, 'Brother Choate, have you read ——'s book? If not, do so, and you will find it charming. Mr. Choate accepted his changed mood, parted from him soon after with a kindly expression of interest, and the subject was never alluded to afterward between them.

"I had these details partly from Mrs. Choate and partly from Mr. Dexter. The time which has elapsed since then is so long, nearly thirty years, that I can only give this general statement."

Judge Lord says:

"I had a conversation with Mr. Choate on this subject. It was more than twenty years ago, and, of course, it is impossible to reproduce precisely his language, but the interview was substantially this: I said to Mr. Choate: 'Is it true that you refused to defend Professor Webster?' to which his reply was, not in direct terms, but by implication, that he did not absolutely refuse, but that they did not want *him*. Pausing for a while, he added: 'There was but one way to try that case. When the attorney-general was opening his case to the jury, and came to the discussion of the identity of the remains found in the furnace with those of Dr. Parkman, the prisoner's counsel should have arisen, and, begging pardon for the interruption, should have said, substantially, that in a case of this importance, of course, counsel had no right to concede any point, or make any admission, or fail to require proof,' and then have added: 'But we desire the attorney-general to understand, upon the question of these remains, that *the struggle will not be there!* But, assuming that Dr. Parkman came to his death within the laboratory on that day, we desire the government to show whether it was by visitation of God, or whether, in an attack made by the deceased upon the prisoner, the act was done in self-defense, or whether it was the result of a violent altercation. Possibly the idea of murder may be suggested, but not with more reason than apoplexy, or other form of sudden death. As the prisoner himself cannot speak, the real controversy will probably be narrowed to the alternatives of justifiable homicide, in self-defense, and manslaughter by reason of sudden altercation.'"

"Having said this, he added: 'But Professor Webster would not listen to any such defense as that,' accompanying the statement with language

tending to show that the proposed defense was rejected both by the accused and his friends and advisers.

"He then said that the only difficulty in that defense was to explain the subsequent conduct of Dr. Webster, and proceeded with a remarkable and subtle analysis of the motives of men, and the influences which govern their conduct, to show that the whole course of the accused after the death could be explained by a single mistake as to the expediency of disclosing what had happened instantly; that hesitation, or irresolution, or the decision: 'I will not disclose this,' adhered to for a brief half hour, might, by the closing in of circumstances around him, have compelled all that followed. Having concealed the occurrence, he was obliged to dispose of the remains, and would do so in the manner suggested, and with the facilities afforded by his professional position. He concluded: 'It would have been impossible to convict Dr. Webster of murder with that admission.'

"I suggested to him that the possession of his note by Dr. Webster, as paid, was an awkward fact. He said: 'Yes, but it might seem to become a necessity after his first false step of concealment.' He added: 'Dr. Parkman was known to have been at the hospital. When, how soon, and under what circumstances, and to explain what statements made by him, he thought it expedient to say he had paid the note, or to obtain the possession of it would never appear. It was simply an incident, whose force could be parried, if he could obtain credit for the position that the concealment was a sudden and impulsive afterthought which took possession of and controlled him in all his subsequent conduct.'"

We have in these statements the desired testimony touching Mr. Choate's attitude in respect to that most important case. It is apparent from them that, while accepting the theory that a lawyer is not at liberty to withhold his services absolutely in a criminal case, he yet did not think him bound to go into court contrary to his own conscientious convictions to assert what he does not believe to be true, or to take a line of defense which he conceives to be futile or unjust. His refusal to appear, as explained by these gentlemen, is consistent with the practice which, as a humane man and self-sacrificing counselor, he exemplified throughout life, and is in keeping with the doctrine of an advocate's duty as asserted by Erskine and others.

J. N.

After this lapse of time, we think ourselves fortunate in being able to present the recollections of two venerable men who were classmates of Mr. Choate at Dartmouth — the Hon. H. K. Oliver, Mayor of Salem, and Dr. W. C. Boyden, of Beverly, Mass.

J. N.

CITY OF SALEM, MASS.,
MAYOR'S OFFICE, August 24, 1877. }

DEAR SIR — Your favor of the 26th of July brings vividly to my mind's eye

The face, the form, the man so true,
That the heart leaps enraptured at the view,

of my valued-above-price, and beloved college friend, the late Rufus Choate, whose marvelous mental endowments and intellectual power of grasp and retention were the wonder and admiration of us all at Dartmouth. Your note so quickened my mind's eye that it again sees his manly and attractive figure and strangely winning face,—and my mind's ear, that it again hears his deeply-resonant, sweet-toned and impressive voice, wakening many a reminiscence of his gentleness of temper and disposition, his warm sympathies, his innate sense of right, his refined courtesy, his completeness as a gentleman, his love of all that was beautiful in life, in nature and in art, his attraction in person, voice and manner, his wonderful mental gifts, his marvelous memory, his thoroughness and exactness as a scholar, and the symmetrical finish of him in all that makes a good and great man.

My first acquaintance with him dates from the month of August, 1816, when—he then being at the beginning of his Sophomore year—I joined the Junior class at Dartmouth College. I had passed my first two years at Harvard, entering in 1814, a youngling of not quite fourteen years of age. My father, Rev. Daniel Oliver (D. C. 1785), then of Boston, intended me for a clergyman of his own denomination, a Calvinist of the severer type, but becoming uneasy at the alleged tendency of Harvard toward Unitarianism, and probably feeling the pressure of the greater expense thereat, transferred me to Hanover. I relinquished my old associations at Harvard with deepest regret, having formed many strong attachments to both officers and classmates, and many close friendships with lads of my own age. These were all sundered, and I confess that, when removed so great a distance from home, (a stage-journey then of two days, though now accomplished in five hours), and thrown among entire strangers, the most intense and depressing nostalgia possessed and tormented me. But the transplanted roots after awhile found genial soil, and, under kindnesses without number, began to feed from the new earth. A few weeks domiciled me among my new associates, while efforts at creating favorable impressions, both personal and scholarly, and the excitement attending the fact of the existence at Hanover, at one and the same time (1816-17), of a "Dartmouth College" with its corps of teachers and over a hundred students, and a "Dartmouth University," with its duet of teachers and its corporal's guard of students, helped me to think less of home and more

of surroundings and duty, and I gradually became self-reliant and settled down to my work.

Of those whose sympathy and active kindness helped to lift me out of my slough of despond, I recall many a now departed friend, but none with more earnest gratitude than him of whom I write, at whose room, in the house of Prof. Ebenezer Adams, I was a frequent visitor.

He was a member of the class (1819), next below my own (1818), and about a year older than myself, but of an almost incredible maturity of mind. Being from my own State, and from the county in which I was born (though reared in Boston), he encouraged me by considerate and timely sympathies, and stimulated me, as he did all of us, by his unyielding pertinacity at study, his success in work, his richness of attainment and his brilliancy of scholarship. Yet such was the simplicity of his character, his manifest unconsciousness of superiority, his freedom of intercourse with us all, his exuberance of friendly grasp, his genial outflow in companionship, — "medicines that he gave us to make us love him," — that each of us, delighted by his finish as a man, charmed by his consummateness as a scholar, and drawn to him by the loveliness of his disposition, the purity and strength of his moral influence, was at all times ready to exclaim, like the shepherd in Virgil's Eclogue:

"*Non equidem invidio, miror magis!*"

A passage describing Cicero has often come to my memory when I have thought of Choate: "*Quum eas artes disceret, quibus atas puerilis solet ad humanitatem informari, ingenium ejus ita illuxit, ut eum aequales e schola redeuntes, medium, tanquam regem circumstantes, domum deducereat; imo, eorum parentes, pueri famâ commoti, in ludum literarium ventitabant, ut eum viserent.*" Him we looked upon as "*facile princeps inter principes,*" no man in either of the classes then in college, being even named with him in rate of scholarship. In fact, we did not count him in at all in rating scholarship, but set him apart, and above us all, as on a pedestal by himself, "himself his only parallel."

His persistent method of study seemed to the rest of us to have crystallized into an abiding habit, definite in manner and form, and determinate in purpose and result. I have often seen him, when I called at his room, in the act of delving at his books. His large and well-shaped head usually rested upon his hands, his elbows upon the table, he often passing the fingers of both hands through the profuse growth of his dark, curly hair. His eyes were also dark, with a mild, yet penetrating look, always, as I remember, having a suggestion of sadness, as did, at all times, the dark features of his expressive face, giving out a peculiar look, which enchained one's attention and interest by its very

pensiveness of tone, in marked contrast, not seldom with many a sudden playful or witty utterance (he, all the while, gentle and in quiet repose), which flashed out in surcharge of unharmed humor, with no effervescence of laughter, nor uproar of boisterous merriment.

There was a custom in our day, of assignment, by the president, on each alternate Wednesday evening, in chapel, after prayers, of subject-themes to two or three members of the senior and junior classes alternately, the essays thereon to be read in chapel on the next Wednesday fortnight. These readings were open to the general public, and ordinarily there was plenty of room. But when it was Choate's turn, the chapel was crowded to repletion, the gentlemen and ladies and even the youth of the village, flocking to hear the brilliant essayist, led captive by his grasp of the subject, his eloquent diction, his beautiful imagery and the charm of his profuse illustration, all set forth with a fertility of language that showed his ready command of an unsurpassed range of words, and of unsurpassed skill in their use. At times, and always at the appropriate and fitting time, his sense of humor unconsciously operative, perhaps even to himself, yet none the less animate, (quiet and gentle it always was), lighted up his features with an infectious smile as he set forth some absurdity in a manner so luminous and palpable, that the air of the chapel, usually still and solemn, seemed to undulate with the soft murmuring of a restrained merriment. And yet no man whom I ever knew was more tender in feeling, or had in him less of the assailing spirit of ridicule, or more of affluent charity and good will to all mankind, he seeming to delight in making men happy, and so keeping them. If the phrase be permissible, his humor was characterized by a sort of stately dignity, which, while it fitted the occasion and the object, most felicitously illustrated his intent, yet had nothing in it of harshness. It lacerated no one's feelings, nor provoked fretful retort or acrimonious repartee.

Wholly free was he also from any self-complacent ostentation of conscious superiority in talent or acquirement over his college mates, so free that I doubt whether he himself thought that any such superiority existed, manifest though it was to all the rest of us, and we so often ourselves manifesting our sense of it, that one would suppose that he himself could not have failed to find it out. But neither in college nor in the after-life, so far as I know, did he give token of any such cognition. To us his companionship was a benediction of constant influence, illustrated by both act and word; and we sought his society as we would seek for a haven of agreeable repose, of comfort and relief, no one feeling dwarfed by either his bearing, his demeanor, his acts or his words, but, on the contrary, encouraged

and incited to individual better trying and better doing.

As I said, I was not of his class, that more intimate association blessing the class of 1819; yet his influence, both personal and as a scholar, was operative with every member of the seven classes that enjoyed a college life with him — an influence that, seeming but small in his earlier college life, assumed, before the end of the first year, a power and reach far beyond that of any other member of college. His preparation had been a little imperfect, and he did not, therefore, give then the real impress of what he was, of what he was to be, and what he soon became. Having once taken root, and feeling the power and strength of the wider instruction under which his own power and strength were being evoked, he grew with marvelous rapidity. His facility at concentrating his mind upon any given subject, and acquiring all that was to be acquired about such subject, fairly exhausted it, being something which to the rest of us was without parallel, and in every department of study rapidly putting him far in advance of his fellows. The general standard by which scholarship among us was to be measured, received from him a positive and most noticeable elevation by what he achieved, excellence rising to a higher grade, and mediocrity becoming less esteemed. This influence was felt among both officials and undergraduates, and it began to be realized that the old rule of the arithmetics, that "more required more," was making men work harder and with more of a will, and that a decided new departure had been taken, never thereafter to be ignored, and from which there was to be no retrogression. And yet the hindrances that, in our time, impeded both teachers and taught, were of the most perplexing, aggravating and discouraging nature. President Wheelock and the board of trustees had got together by the ears, the issue of their contest bringing him to grief and to deposition from his office. A new president, Rev. Francis Brown, was elected, and time was required for him to get well into harness, and to make the college feel the power and push of that healthful influence which he afterward so admirably and efficiently exerted. Never was college official more beloved and revered. The new rival institution created by the State legislature, had been duly inaugurated, had been put into possession of the college seal, the college library, its only building and its only chapel. We lads had looked out for the two libraries of the college societies, the Fraternity and the Social Friends, and quickly and safely removed them from the college buildings to private quarters; and when Professors Dean and Carter, of the university, with a horde of village roughs, knowing nothing of such removal, broke into the library room of the Social Friends, in the second story of the southern end of the college

building, the members of the Fraternity, then in session, hearing the crash of axes and crowbars — *valde ego memini, nam eorum fui pars* — rushed to the rescue and made prisoners of the whole crowd, sending home the "*ignobile vulgus*," but imprisoning Dean and Carter until they pledged their honor to us captors that they would "never do so again." They were then escorted to their homes, each by a trio of collegians, I, small chap as I was, being one, so honored, I suppose, because, having first rushed to the library from the Fraternity room, I had announced the cause of the disturbing noise. Neither the names of those two professors, nor that of Allen, president of the new university, will be found in the Triennial Government Catalogue of Dartmouth, they being unrecognized interlopers. In fact, the whole creation of the university was a political trick and unsubstantial fraud, "a thing of shreds and patches," which, at the bidding of the Supreme Court of the United States, after Webster's great argument, like the ghost of poor lost Creusa,

— *lenues recessit in auras,*
— *nee post oculis est redditæ nostris,*—

the "unsubstantial pageant faded," and "not a rack behind."

But it was a disturbing element for a couple of years, and could not but occupy our thoughts and conversation, and unfavorably affect our studyings and the methods and thoroughness of our instructings. I remember well the poverty of our illustrative apparatus, and the ingenious devices to which Prof. Adams was compelled to resort, to supplement its incompleteness. Not seldom was he constrained to leave to our imaginations the practical demonstration of some principle in natural philosophy. So, too, were we without the college library, which, though then small, had nevertheless many valuable books of reference, which would greatly have helped us over and through many a difficult passage in our classics. As for recitation rooms and a chapel, we got them in the village wherever we could. The whole situation was a tangle of embarrassments; and if there ever was an actual "pursuit of knowledge under difficulties," it was at Dartmouth College at the period 1815-1818, when Choate was an undergraduate.

But the extraordinary state of affairs itself, the sympathy of the college instructors toward the struggling and loyal students, and the sympathy of the students toward faithful, zealous and self-sacrificing teachers, generated a spirit of the most earnest, and therefore successful, industry, and I have always believed that the good order, the persistent obedience, the thoughtful fidelity to work, and the unbroken friendship which characterized the intercourse of teachers and taught, supplemented by the strong religious influence which then pervaded the institution, were all ministrations which helped to

turn our then evil into great good for us all. Our successors at the college can never realize the weight of the troubles that embarrassed and impeded us, nor the joy when those troubles passed away. May they, in her prosperity, be as faithful to her, as were we in her deepest adversity.

*Salve Dartmouthensis mater!
Salve quoque quisque frater!
Alma mater quam amamus—
Cujus nomen celebramus.
Cujus gloria cordi cuique,
Cujus laudes sunt ubique.*

But to return: Graduating in 1818, I left Choate behind me as Senior, he graduating in 1819, with the valedictory, an address which verified to the full his pre-eminent power of scholarship, the breadth and extent of his fields of reading and of thought, his comprehensive grasp of fact and power of statement, and the magnetism of his oratory, passages in it not only eliciting the most demonstrative applause, but moving hearts in sympathy and many an eye to tears.

He served afterward, though I think but a single year, as tutor, and then commenced a course of study at the Law School at Cambridge, continuing it in the office at Washington of Mr. Wirt, Attorney-General of the United States. His fidelity in study and his purity of life when an undergraduate, characterized him while preparing for his life profession. I lost sight of him mainly during these years, having myself elected and entered upon the work of a teacher in the Public Latin School of this city. He, however, reappeared in our neighborhood, opening his office in Danvers, that portion of the town now called Peabody, it being practically a suburb of Salem. Here, though under the discouragements that always attend early professional life, he laid the foundation of his future success, by a fidelity in small things, which proved his fitness to be entrusted with the conduct of greater. Our avocations lying in different fields, I met him but occasionally, yet there was always beaming forth from him the same genial and friendly recognition that had so often made me happy in college, and I always have considered it, and shall always continue to consider it, as one of the highest happinesses and privileges of a not short life, that I was permitted, for so many years, to enjoy the good will and the friendship of so good, so pure, so noble a man as Rufus Choate.

Very truly yours,

HENRY K. OLIVER,

D. C. et H. C., 1818.

Dr. Boyden says of Mr. Choate:

"We entered college together in 1815. He was between fifteen and sixteen years of age, very youthful and engaging in appearance, modest and unpretentious in manner. He had been fitted for college in a rather desultory way, his preliminary studies with the minister, the doctor and the schoolmaster,

having been interrupted by seasons of work on his father's farm. He had spent a short time at Hampton Academy just before coming to Dartmouth. Several students, fresh from Andover, entered at the same time. They were more fully prepared than he, and, at the start, showed to better advantage in their recitations. But, by and by, some of these began to fall from their first estate, and it was remarked about the same time, that 'that young Choate in the corner, recited remarkably well.' Before the end of the first term he was the acknowledged leader of the class, and he maintained that position until graduation, without apparent difficulty. No one pretended to rival him, nor did he invite comparison. He paid little attention to the proficiency of his fellow students. His talk was of eminent scholars of other countries and of former times, and they seemed the objects of his emulation. One European scholar being mentioned as having committed to memory the Greek primitives, Choate seems to have accepted the suggestion as a valuable one. A few weeks afterward I was in his room, and he asked me to hear him recite. I took a book and listened to him, page after page, in the Greek primitives, repeated without ostentation, but merely, to all appearance, to test himself.

"He did not limit his studies to the curriculum. After the first year he read a great deal beyond the prescribed course, especially in Cicero, of whose works he thus went over several, and took up besides some of the Greek authors.

He neglected athletic exercises almost entirely. His chief relaxations from study were of a social character. He would get half a dozen of the students in his room, and, refreshments being obtained, would give himself up with them to having a 'good time.'

"In the public exercises of the college he attracted much attention. If he had an oration to deliver, the audience was always eager to hear it, and generally was rewarded by a masterly effort.

"As we adopted different professions, he the law and I medicine, I had few opportunities of witnessing the displays of his maturer powers, much to my regret. But our personal intimacy was very great, and continued through life.

"I had, from the first, no doubt that he would strive for and attain the foremost rank in his profession. When he commenced practice in Salem, we had two or three old lawyers, of whom Mr. Thorndyke was one. I said to him, 'Mr. Choate is not in the Superior Court yet' (his time not having expired in the Common Pleas), 'but I know him very well, and he will be at the head of the Essex bar as soon as he can get there.' The old lawyer looked at me with surprise and incredulity, but I had the pleasure of hearing him, before many years had elapsed, admit the fulfillment of my prophecy.

"During the earlier years of his practice, he sometimes spoke to me of his aspirations, one of which was to be one of our chief justices. He was offered a judgeship afterward, but never could afford to accept.

"His professional income he spent lavishly. He gave away a great deal, and neglected, in many instances, to collect or to charge for his services. He was careless in payment, too, but never to the point of injustice. Having borrowed a sum of money when a young man, he retained it for many years, always paying interest, though it is certain he could have repaid the principal many times over if it had been necessary. Finally I, as the representative of one of the heirs of the lender, had occasion to ask for the money, and it was paid at once. When paying the interest he said to me on one occasion: 'You have had some trouble about this; I will give you your law,' and he did, both advice and service, when needed. I had occasion to know much of his benefactions, as I was sometimes his almoner. Some instances of his generosity I communicated to Mr. Brown when he was preparing his book.

"His love of study lasted through life, and he accounted it as one of his chief blessings. In speaking to me of his son one day, he held up his hand and said: 'I would give that finger if it would make him love study as I do.'

"The humorous side of his character has been to so great an extent that on which the public attention has been hitherto fixed, that it needs no illustration. But his evenness of temper is worth remarking. He was always agreeable, genial, companionable, playful even, toward those with whom he was intimate. I could never be long in his company without hearing some enlivening pleasantry.

"I do not think Mr. Choate was fitted to be a leader in politics. He was constitutionally timid and conservative. Given a leader, like Webster, he was a useful and zealous supporter. Let him have a question to argue, and if he felt that the country was his client, he waxed eloquent and sought eagerly for victory. During Webster's life-time he initiated no policy. The latter, on his death-bed, told Choate: 'You have a great future before you if you go with the party and direct them.' Choate could go with the party; he could even go against it; but the instinct of leadership was weak in him; to control the party was work to which he was not fitted, an up-hill labor.

"It is exceedingly difficult to describe or to characterize such a man. He was unlike any other I have known. Webster seemed to be a good deal like other folks, only there was more of him. But Choate was peculiar, a strange, beautiful product of our time, not to be measured by reference to ordinary men."

THE NEED OF REFORM IN OUR FEDERAL JUDICIAL SYSTEM.

AT the annual dinner of the Chicago Bar Association, on the 27th ult., Judge Dillon, of the United States Circuit Court, made these remarks:

"Such an association as this does not exist for its members alone. In this country our material interests are so closely interlaced as not to be marked or defined by municipal or State lines. Whatever good fruit you secure for yourselves, you inevitably secure for all.

"On such occasion as this, Mr. President, it ought not to be forgotten that there are many causes in this country which operate with great force to produce an imperfect system of jurisprudence; and, therefore, the duty of the lawyer and judge to guard, as far as possible, against such a result, is a duty of imperative obligation. I shall mention only one or two of these causes. One of them grows out of our duplex system of State and Federal Government, and is unavoidable. Forty State courts of last resort and as many Federal courts sitting in the same States with concurrent jurisdiction, cannot, without great learning and infinite care, build up a harmonious and symmetrical system of jurisprudence. The difficulty in the way of the judges is seriously increased by the burdensome and exacting pressure of their duties. They lack, in general, neither learning nor industry; their chief want is the want of time.

"I shall not speak of myself, but in illustration of what I am saying, I may, perhaps fitly, refer to the nature and extent of my judicial labors. The other circuits are in the same situation. The lawyers who practice in Judge Drummond's court need no information concerning his great labors.

"The trans-Mississippi Federal Circuit embraces seven States, and extends in an unbroken reach of territory from the British possessions on the north to Louisiana and Texas on the south; from the Mississippi on the east to and including the Rocky Mountains on the west. It comprises the States of Minnesota, Iowa, Nebraska, Kansas, Missouri, Arkansas and Colorado. In each of these States there are two terms a year, and in one of them four terms, making sixteen terms annually. With the exception of Arkansas and Colorado, I have for the last eight years attended twice a year the terms of court in each of these States and in Arkansas and Colorado, since its admission, invariably once each year, and sometimes twice. The distances actually traveled are immense; not less than 10,000 miles a year. The distance from St. Paul, where one can almost cast a stone across the Mississippi to Arkansas, where the stream has broadened into a mighty and majestic river, bearing the commerce of twelve States, and on whose lordly bosom hostile fleets have contended, is vast. And the distance from the great city of St. Louis to where Denver serenely sits, sentinelled and begirt by the lofty and snow-clad peaks of the Rocky Mountains, is scarcely less.

"The dockets are crowded with causes, original and appellate, of great variety and importance, civil and criminal, at law and in equity, in admiralty and in bankruptcy. And this is only typical of the condition of the other circuits. With so much work and with so little time for deliberate and sedate consideration, mistakes must be numerous. But the fault lies not so much with the overworked judges, as with the faulty system which imposes such vast labors upon them. The State judges generally are almost equally over-

burdened. Hence we inevitably have a constantly increasing mass of decisions, State and Federal, many of which must be erroneous, and which, while standing as precedents, bear pernicious fruits.

"Judges, State or Federal, do not forget the weighty advice of old Bulstrode, so quaintly expressed in the dedication of his second volume, in the time of the Commonwealth, over two hundred years ago, 'That as laws are the anchors of the republic, so the judicial reports are as the anchors of the laws, and, therefore, *'ought to be well weighed before put out.'*' Judges do not forget this advice, but the trouble is that they find it impracticable, for want of time, to follow it. The result is, that the Supreme Court has nine hundred cases on its calendar, and, with all the industry of its judges, is three years in arrears.

"Feeling, as I have felt for years, the force of the trials, private and public, which inevitably spring out of this condition of things, I have learned with extreme satisfaction that so far as the Federal courts are concerned, an eminent citizen of this State, who for many years adorned its bench, until he was transferred to the Supreme Court of the United States, and who is now a senator in Congress, is actively lending the weight of his great character and ripe experience to a needed reform.

"And the only practical point to the remarks which I am having the honor to make in this distinguished presence is, that I trust the Bar Association of this Imperial city will pronounce its judgment in favor of the proposed legislation of Senator Davis, and warmly aid him in securing its adoption."

RECOVERY OF MONEY PAID ON INCOMPLETE ILLEGAL CONTRACT.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF NEW YORK, DECEMBER, 1877.

KNOWLTON V. CONGRESS AND EMPIRE SPRING COMPANY.

When payments are made upon an illegal contract and the parties are *in part delicto*, a recovery can be had as for money had and received, where the illegality is in the contract itself and that contract is not executed. In such case there is a *locus penitentiae*, the *delictum* is incomplete and the contract may be rescinded by either party.

A corporation in which plaintiff was a stockholder and trustee illegally instituted proceedings to increase its stock, plaintiff participating in such proceedings and subscribing for stock. By the agreement of subscription it was provided that payments on the new stock should be made to the corporation as called for by the directors, and that in case of failure to pay within sixty days, the party failing should forfeit all previous payments. Plaintiff paid the first call but failed to pay the second, and a forfeiture was declared against him, but before any scrip was issued for any of the increased stock the project to increase the stock was abandoned. Held, in an action thereafter brought to recover the money paid on the first call, that the *locus penitentiae* was still open to plaintiff and he might recover. *Knowlton v. Empire Spring Co.*, 57 N. Y. 518, dissented from.

ACTION to recover back money paid on subscription to shares of corporate stock. The facts appear in the opinion.

WALLACE, J. This case comes here by removal from the State court after a decision adverse to the plaintiff by the Commission of Appeals, reversing the judgment of the Supreme Court in favor of plaintiff, and ordering a new trial. 57 N. Y. 518.

The plaintiff seeks to recover \$13,980 paid by him to the defendant upon a subscription for shares of its capital stock. The defendant, by the action of its di-

rectors and stockholders, instituted proceedings for an increase of its capital, and the subscription agreement was prepared and executed in furtherance of that object. It has been assumed in the arguments of counsel that these proceedings were illegal, as in contravention of the statute under which the defendant was organized, and constructively fraudulent as to the public and all stockholders not assenting thereto, and the decision of the case in the State courts has been adjudicated upon this assumption. The plaintiff was a stockholder and trustee of the defendant, and participated actively in these proceedings.

The subscription agreement provided that the subscribers should pay the defendant for the new shares in installments as called for by the directors, and, upon failure to pay any call for sixty days, should forfeit all sums theretofore paid upon the subscription. Plaintiff paid the sum in controversy upon the first call under the subscription, but failed to respond to subsequent calls for more than sixty days. After a resolution had been passed by the directors forfeiting plaintiff's rights for delinquency, but before any scrip was issued for the new stock, and while the proceedings were inchoate, the stockholders resolved to abandon the project to increase the stock, and pursuant to this action the directors adjusted with parties who held receipts for payments under the subscription by giving them the bonds of the defendant issued for that purpose.

No bonds were tendered to the plaintiff. He demanded repayment of the money paid upon the subscription, and, being refused, brought this action.

If the subscription agreement was valid the plaintiff can have no redress, but must be held to his stipulation to forfeit the payment for his delinquency in responding to subsequent calls. The defendant had become entitled to the plaintiff's money by the terms of the subscription agreement at the time it concluded to abandon the scheme for increasing its capital, and, however hard and inequitable it may seem that defendant should retain this money, while abandoning the project for which it was received, its legal right so to do is clear. On the other hand, if the subscription was executed as part of an illegal scheme, it is void in all its conditions and the defendant can take nothing under color of the forfeiture stipulated for. The sole question in any view, therefore, is whether the plaintiff will be permitted to recover money paid in partial performance of an illegal transaction. The defendant has no right to the money unless that of possession under circumstances which deny to the plaintiff the assistance of the court in reclaiming it.

Certain propositions applicable to the present case are not debatable.

Courts of justice refuse to entertain any application to enforce a contract or transaction which is immoral or subversive of public policy, or in contravention of a statute. Where the transaction has been consummated or the contract has been executed, if the parties to it are *in part delicto*, neither will be permitted to recover money or property delivered to the other in furtherance of it.

When the law which the transaction contravenes is designed for the coercion of one party or the protection of the other, or where one party is the principal offender and the other acquiesces by constraint of circumstances, the parties are not *in pari delicto*, and the lesser offender will be relieved, although the illegal transaction has been consummated.

So far there is no diversity of opinion among text-writers or in the reported cases. Another proposition of controlling importance in this case, advanced by all the commentators and sanctioned by many decisions, has been denied by the high authority of the Commission of Appeals, which is, that when the contract or transaction is but partially performed, there is a *locus penitentiae*, and either party may rescind.

In deciding the present case the Commission of Appeals (Dwight, Commissioner, dissenting) have held that money paid by one party in part performance of an illegal transaction cannot be recovered back where both parties are *in pari delicto*, and that no distinction exists as to the right of recovery between cases of partial and of entire performance.

Notwithstanding the great respect which I entertain for the authority of the Commission of Appeals, I am constrained to differ from the conclusion thus reached, and must hold in the language adopted by Mr. Justice Bradley (*Thomas v. City of Richmond*, 12 Wall. 355): "A recovery can be had as for money had and received, where the illegality consists in the contract itself and that contract is not executed; in such case there is a *locus penitentiae*, the *delictum* is incomplete and the contract may be rescinded by either party." This statement of the law finds support in the early case of *Walker v. Chapman*, Loft. 342, where the plaintiff had paid money to procure a place in the customs, but which he did not get, and brought suit to recover back the payment, and Lord Mansfield decided in his favor; and upon the authority of this case, in the subsequent case of *Lovrey v. Bourdieu*, Doug. 468, which was an action to recover a premium paid upon an insurance which was merely a gaming contract, but was brought after the event had happened upon which the insurance was to be paid, Buller, J., said: "There is a sound distinction between contracts executed and executory," and the plaintiff was defeated because the agreement was not executory. In *Tappenden v. Randall*, 2 Bos. & P. 468, an action was maintained to recover a payment upon an illegal contract, Heath, J., after adverting to the distinction between executed and executory contracts, stated by Justice Buller, saying: "I think there ought to be a *locus penitentiae*, and that a party should not be compelled to adhere to his contract." In *Haselton v. Jackson*, 8 B. & C. 221, Littledale, J., says: "If two parties enter into an illegal contract and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterward," and a recovery was allowed on this ground. Other cases which proceeded upon this same rule are, *Aubert v. Walsh*, 4 Taunt. 277; *Bush v. Place*, id. 291; *Bone v. Eckless*, 1 Hurlst. & Norm. (Exch.) 925.

The same doctrine has been recognized in our own courts. *White v. Franklin Bank*, 22 Pick. 184; *Nellis v. Clark*, 4 Hill, 424; *Morgan v. Groff*, 4 Barb. 526. And in the latest English case, *Taylor v. Bowers*, 34 L. T. Rep. (N. S.) 988, decided in the Court of Appeal in 1876, the plaintiff was permitted to recover property transferred to defraud creditors where the scheme was not fully carried out, Mellish, L. J., saying: "If money is paid or goods delivered for an illegal purpose, and that purpose is afterward abandoned and repudiated, I think the person paying the money or delivering the goods may recover; but if he waits until the illegal transaction is carried out, or seeks to enforce it, he cannot maintain his action."

In opposition to these authorities there is not a single case, of which I am aware, sustaining the conclusion of the Commission of Appeals. The cases cited in support of that conclusion, in the opinion of Lott, Chief Commissioner, are: *Perkins v. Savage*, 15 Wend. 412; *Bell, ex parte*, 1 M. & S. 751; *Howson v. Hancock*, 8 Term, 575; *Bush v. Place*, 6 Cow. 431, and *Saratoga County Bank v. King*, 44 N. Y. 92. In none of these cases did the question arise whether the plaintiff could succeed in an action in disaffirmance of an unexecuted illegal contract.

In conclusion, I concur in the dissenting opinion of Dwight, Comm'r, "That the rule is well stated in 2 Comyn on Cont. 109; if the contract continues executory and the party paying the money be desirous of rescinding it, he may do so and recover back his deposit." A different rule would hold out an inducement to parties to an illegal transaction to persevere in their efforts to violate the law.

That the transaction in furtherance of which the payment was made has never been consummated is clear. Before any stock was issued the scheme to issue it was rescinded by the defendant. The real question is, was the *locus penitentiae* open to the plaintiff at the time he brought this suit. He had declined to respond to the second call when the defendant rescinded. Can there be any doubt that up to the time of the abandonment of the scheme by the defendant the plaintiff could have resorted to a court of equity and restrained further proceedings and vacated the proceedings already taken? The cases are numerous where courts of equity have interfered to prevent the consummation of a wrong upon the motion of a party who was instrumental in its inception. It is laid down by Judge Story (1 Eq. Jur., § 298), that "where the agreements or other transactions are repudiated on account of being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis* is not in equity material. The reason is that the public interest requires that relief should be given, and it is given to the public through the party. And in these cases relief will be granted not only by setting the agreement or transaction aside, but also in many cases by ordering a repayment of any money paid under it." See, also, *Nevill v. Wilkinson*, 1 Brown's Ch. 473, note "a." If the plaintiff had received the fruits of the illegal transaction, in equity as at law, he could not have recovered his payment, but until then not only could he have been heard, but restitution would have been made to him.

The *locus penitentiae* was open to the plaintiff so long as he was in a position to resort to a court of equity, and surely it was not closed to him by the action of the defendant in rescinding the illegal scheme.

After that action on the part of the defendant the plaintiff took the only steps he could take in repudiation of the transaction by demanding his money and bringing his suit. He is not to be denied relief upon the theory that the *delictum* was complete.

It is claimed that no payment was in fact made of the sum sought to be recovered by plaintiff. A dividend of four per cent had been declared by the defendant to its stockholders, among them to Sheehan, who transferred his interest to the plaintiff, and the dividend, instead of being paid in money, was credited, by an agreement, as a payment of the first call under the subscription. Stockholders who did not subscribe for the new stock were paid in money.

The evidence does not justify the inference that

the dividend was a fictitious or fraudulent one. The defendant has treated the dividend as though actually paid, not only in crediting it as a payment, but in its dealings with the other stockholders, and it is now too late to question its validity.

The plaintiff bought it of Sheehan and paid for it in full. His rights are the same as though he had borrowed the money of Sheehan to make the payment of the call.

Judgment is ordered for plaintiff for \$13,980, with interest from February 20, 1866.

LIABILITY OF MUNICIPAL CORPORATIONS FOR FLOODING, CAUSED BY STREET IMPROVEMENTS.

SUPREME COURT OF RHODE ISLAND, MARCH, 1877.

INMAN v. TRIPP.

Where a city, by the manner in which it grades a street, collects the water from a wide area and empties it charged with the street filth upon plaintiff's adjoining land, and into his cellar and well, it is liable for the damage done plaintiff thereby.

TRESPASS on the case brought by Willard F. Inman and another against Benjamin Tripp, Treasurer of the city of Providence, heard under the subjoined agreement:

"The plaintiff offers to prove the following facts: That, at the time of the grievances alleged in his declaration, he was the owner of an estate on the northerly side of Public street, in the city of Providence, with a dwelling-house, barn, and other buildings and improvements thereon. That said city, prior to said time, caused the grade of said Public street, which was a public highway, to be changed, and that the highway commissioners cut down a portion of a way, called Updike street, at its junction with Public street, whereby the surface water, which had collected in a pond at the corner of Greenwich and Daboll streets, was carried through Mawney street, a public street and highway, and into and through said Updike street upon Public street, and thence flowed upon the estate of the plaintiff, located at the lowest point on said Public street, and filled his cellars and well, and destroyed his property, and otherwise caused him great annoyance and injury. The plaintiff also offers to prove that, prior to said time, said city also changed the grade of Broad street, which crosses Public street, and thereby caused the surface water which came on said Broad street, which formerly had not flowed into Public street, to be turned into Public street, which water also flowed along said street, and into and upon the plaintiff's estate, doing him similar injury. That he presented his claim to the city counsel more than thirty days before this suit was commenced, and no compensation has been made to him for said injuries. If, upon these facts being proved, the plaintiff can maintain his action, the cause is to stand for hearing before the court upon the question of damages, otherwise judgment is to be entered for the defendant."

Charles H. Parkhurst, for plaintiff.

Nicholas Van Slyck, city solicitor, for defendants.

DURFEE, C. J. The city of Providence is a municipal corporation capable of suing and being sued like any other corporation. The question is, whether, being such a corporation, it is liable to be sued for the injury to prove which the testimony is offered. There can be no doubt that an action would lie against a

private corporation or individual for a similar injury; for the right to fight surface water certainly does not go so far as to justify a man's draining the puddles of his own land into the well and cellar of his neighbor. Why, then, will not the action lie against the city? The answer given is, that the water was not discharged upon the plaintiff's premises from land belonging to city, but from a public street, and was so discharged in consequence of a change of grade or surface in that and other streets, made by the city under the authority of the statutes of the State. And it is argued that a public corporation, acting for the public within the limits of its authority, is not liable, unless made liable, by statute, for the damages resulting to individuals from its acts.

It is perfectly well settled that a town or city is not liable, unless made so by statute, for damages resulting to an abutting owner from a mere change in the grade or surface of a highway made by such town or city, if the change does not extend beyond the limits of the highway. Such a change may occasion great inconvenience, and oblige the owner to incur great expense to adjust his houses or lands to the new grade or level; but, nevertheless, he must bear the inconvenience and expense, if they come, without compensation; for no right of his is invaded so long as the change does not create a nuisance, and is confined strictly within the limits of the highway. The loss which he suffers from such a change is *damnum absque injuria*. 2 Dillon on Mun. Corp., § 783. Many of the cases cited for the defendant are cases in which this doctrine is sustained. In the case at bar, the defendant asks us to go further: for in the case at bar the plaintiff complains not of what has been done in the streets, but of what has happened upon his own land, in consequence of what has been done in the streets. See *St. Peter v. Denison*, 58 N. Y. 416, 423. His property has been invaded, and the question is, whether he is entitled to any remedy against the city for the invasion. There are cases which hold, or seem to hold, that no action lies against a city even for such an injury. *Wilson v. Mayor, etc., of New York*, 1 Den. 595; *Clark v. City of Wilmington*, 5 Harr. (Del.) 243. The ground of these decisions is, that the city cannot be answerable at law for the consequences of an act which it is legally authorized or required to perform. But we think this doctrine, the abstract truth of which cannot well be gainsaid, is misapplied when it is held to sanction an invasion of private property, even though the invasion is only consequential. Let us consider the doctrine as it applies to the case at bar. The city of Providence is required to keep its streets in proper repair, and is authorized, in the discharge of this duty, to grade them and to alter their grades. Whatever, therefore, is done by the city in the discharge of this duty or in the exercise of this authority, must be deemed to be rightfully done, so long as there is no encroachment upon private property. But does it follow from this, that the city has the right to grade its streets so as to collect the water from a wide area, some of it from distant puddles or ponds, and bring it, charged with all the miscellaneous filth of the streets, to the margin of the plaintiff's land, and then empty it upon his land, and into his cellar and well? The statute should not be unnecessarily construed to sanction any such result. And so long as it is in the power of the city to make drains and culverts, as well as to alter grades, it is not necessary to give the statute such a construction. Or, if it is necessary, then the statute is so far unconstit-

tutional and void, and cannot protect the city from liability. Suppose the statute authorized the city in so many words to do what the plaintiff claims has been done, can there be any doubt that it would be unconstitutional, as authorizing the taking of private property for public use without just compensation? Certainly, property is taken, to some extent, when its beneficial use is destroyed or impaired in this way, as well as when its owner is directly and formally excluded from its enjoyment. *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Eaton v. Boston, C. & M. R. R. Co.*, 51 N. H. 504. And if a statute could not in so many words authorize the grievances complained of, it could not any better authorize them by the employment of general and indefinite terms.

The view which we have taken has the support of respectable authority. Indeed, it is proved by the general current of recent decisions. Thus, in Illinois, in *Nevins v. City of Peoria*, 41 Ill. 502, it was held that a city may elevate or depress its streets as it thinks proper, but if in so doing it turns a stream of mud and water upon the grounds and into the cellar of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household, it should not be excused from paying for the injuries it has directly brought. A city, say the court, has no more power over the streets than a private individual has over his own land; and it cannot, under the specious plea of public convenience, be permitted to exercise that dominion to the injury of another's property, in a mode that would render a private individual responsible in damages without being responsible itself. This decision has been reaffirmed in several subsequent cases. *City of Aurora v. Gillett et al.*, 56 Ill. 132; *City of Aurora v. Reed*, 57 id. 29; *City of Jacksonville v. Lambert*, 62 id. 519.

So, in Wisconsin, the same point has been similarly decided. *Pettigrew v. Village of Evansville*, 25 Wis. 223. And the court held that, if a city wishes to acquire the right to turn a stream of water upon the property of an individual to his injury, it must do so by an exercise of the power of eminent domain, and by the payment of full compensation, as the Constitution requires.

The Supreme Court of Michigan, in a careful decision recently delivered by Cooley, C. J., affirms the same doctrine. *Ashely v. The City of Port Huron*, 15 Alb. L. J. 81. The court there decides that a municipal corporation is no more exempt from liability than an individual, when that which it does results in the invasion of private property; that if a city constructs a sewer so as to discharge its waters upon private property, it is responsible for the injury, and that the flooding of private property is just as much an appropriation as would be the taking of an easement in it. And see *Clark v. Peckham*, 9 R. I. 455.

The counsel for the city contends that the city is not liable because the changing or refusing to change a grade, and the providing or refusing to provide sewers and culverts, is discretionary or judicial. We think, however, that this defense, though it might be good if the city were complained of for not doing such an act, or for doing it in an insufficient manner, is not a sufficient answer where private property is invaded and its beneficial use destroyed or seriously impaired without compensation.

Our statute (Gen. Stat., R. I., ch. 60, § 38) gives an abutting owner, who is injured by any change in the grade of a highway, a peculiar statutory remedy. The

defendant contends that, such a remedy being given, it is the only remedy. Where a statute creates a new right or liability, and at the same time gives the remedy, it has been held that the remedy given is the only remedy. The liability here incurred was not created by the statute. It would have existed, and a right of action on it would have existed, if the statutory provisions referred to had never been enacted. The remedy given, therefore, supposing it to be applicable, must be regarded in this respect as cumulative, not exclusive.

The defendant contends that the city is not liable for the acts complained of, or some of them, because they were done by the highway commissioners. We think, however, that the changes complained of, *prima facie* at least, must be regarded as the act of the city, which is answerable for the repair of the streets, and which, moreover, unlike towns in respect of surveyors, is specially authorized to prescribe the duties of the highway commissioners. See City Charter, § IX, clause 4; Public Laws, ch. 965, Act of January 26, 1872. The city has prescribed their duties by ordinance, specifying certain duties, and requiring them to perform generally the duties of a surveyor of highways, with a proviso, however, that they shall be "always subject to the orders of the city council." City Ordinances, ch. 36, § 17. Their official acts, therefore, however it might be in the case of a surveyor of highways, must be presumed to be, in legal effect, the acts of the city. And see *Conrad v. Trustees of the Village of Ithaca*, 16 N. Y. 158; *Eastman v. Meredith*, 36 N. H. 284, 293.

We think the testimony offered is admissible. The case, therefore, must stand under the agreement for an assessment of damages.

INVALIDITY OF PASSIVE TRUSTS.

NEW YORK COURT OF APPEALS — DECEMBER 4, 1877.

VERDIN V. SLOCUM.

A will, devising lands to executors in trust, contained this: "I direct my said trustees to permit and suffer my son, W. B. S., to have, receive and take the rents, issues and profits thereof, for the term of his natural life, and after his decease I give," etc. Held, that the son took a life estate in the lands upon which the lien of a judgment would attach, and a judgment creditor of the son was a necessary party to the foreclosure of a prior mortgage upon the lands.

APPEAL by Samuel A. Thompson, a purchaser at a mortgage sale, from an order of the General Term of the Supreme Court in the First Department, affirming an order of the Special Term, denying a motion to release him from his purchase. The facts sufficiently appear in the opinion. The case is reported below at 9 Hun, 150.

Erastus F. Brown, for appellant.

Andrew Fallon, for respondent.

EARL, J. The appellant, Thompson, the purchaser at a mortgage foreclosure sale, seeks to be released from his purchase upon the claim that the proceedings in the foreclosure action above entitled are so defective as not to give him a good title. He insists upon several defects, but one of which it will be necessary to consider, and that is that a judgment creditor of William B. Slocum should have been made a party to this action. Hiram Slocum died seized of the mortgaged premises subject to the mortgage. He left a will in which he devised his estate, including these premises, to his executors, in trust, that they should divide the same into three parts, and as to one-third part he

provided as follows: "I direct my said trustees to permit and suffer my son William B. Slocum to have, receive and take the rents, issues and profits thereof for the term of his natural life; and after his decease I give, devise and bequeath the same part or share to the heirs at law of my said son." It is claimed on the part of the plaintiff that these provisions created a valid, express trust, and hence that the legal title was vested in the trustees, and that the judgment did not become a lien upon the one-third thus devised; and hence that the judgment creditor was not a necessary party, and this was the view taken in the court below. On the part of Thompson it is claimed that the trust was invalid; and hence that William B. Slocum took a life estate in the land upon which the lien of the judgment attached; and hence that the judgment creditor should have been made a party, and this claim we believe to be well founded. The trust attempted to be created is a passive one, and condemned by the statute. The trustees had no active duties to discharge. They were not to receive the rents and profits of lands and apply them to the use of William B. Slocum, or to pay them over to him (1 R. S. 729, § 55), but they were directed "to permit and suffer" him "to have, receive and take the rents" and profits. They had no discretion to exercise. They could not refuse the permission, and they could in no way exercise any control over the rents and profits. That such a trust is condemned by the statute has never been doubted. *Parks v. Parks*, 9 Paige, 107; *Jarvis v. Babcock*, 5 Barb. 139; *Beekman v. Bonsor*, 23 N. Y. 298, 314, 316. William B. Slocum was entitled to the possession of the lands and to the rents and profits thereof during his life, and hence the statute vests the legal title in him for the same term. 1 R. S. 727, §§ 47, 49; *Craig v. Craig*, 3 Barb. Ch. 77. It follows, therefore, that the judgment was a lien, and that the life estate was affected thereby, and for this defect the motion should have been granted.

The order of the Special and General Terms should be reversed, with costs in the Supreme Court and this court to be paid by the plaintiff to Thompson. All concur.

CONSTITUTIONALITY OF STATE LEGISLATION AFFECTING STATUTES OF LIMITATION.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

TERRY, appellant, v. ANDERSON.

By a statute of limitations of the State of Georgia, actions against a stockholder of a bank to enforce his individual liability were not barred until twenty years from the time the action accrued. By an act of the legislature of Georgia, passed March 16, 1869, it was provided that such actions, accrued before June 1, 1865, should be barred if not commenced before January 1, 1871. *Held*, (1) that the legislature had a constitutional right to shorten the statute of limitations as to actions upon contracts already made, a reasonable time being left to enforce the contract; (2) and that the time given was reasonable.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia. Action to enforce the individual liability of stockholders of a bank. Sufficient facts appear in the opinion.

Mr. Chief Justice Waite delivered the opinion of the court.

In *Terry v. Tubman*, 92 U. S. 156, we decided that where the charter of a bank contained a provision binding the individual property of its stockholders for the ultimate redemption of its bills in proportion to the number of shares held by them respectively, the liability of the stockholder arose when the bank refused or ceased to redeem and was notoriously insolvent, and that when such insolvency occurred, prior to June 1, 1865, an action against a stockholder not commenced by January 1, 1870, was barred by the statute of limitations of Georgia of March 16, 1869. That act, as recited in its preamble, was passed on account of the confusion that had "grown out of the distracted condition of affairs during the late war," and substantially barred suits upon all actions which accrued before the close of the war, if not commenced by the first day of January, 1870.

This is a suit to enforce the liability of the stockholders of a bank under a provision of the charter similar to that considered in *Terry v. Tubman*, and it is expressly averred in the bill that the bank stopped payment on the 20th February, 1865, and never resumed. The affairs of the bank were closed up under an assignment made May 24, 1866, and which paid only a small percentage upon its liabilities. The case is thus brought directly within our former ruling, but it is insisted that the act of 1869 is unconstitutional, because it impairs the obligation under which the complainants claim, and as that question was not directly passed upon in the other case, we are asked to consider it now. The argument is that as the statute of limitations in force when the liability of the defendants was incurred did not bar an action until the expiration of twenty years from the time the action accrued, a statute passed subsequently, reducing the limitation, impaired the contract, and was consequently void.

This court has often decided that statutes of limitation affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action, before the bar takes effect. *Hackins v. Barney*, 5 Pet. 466; *Sohn v. Waterson*, 17 Wall. 599; *Christmas v. Russell*, 5 id. 300; *Jackson v. Lamphire*, 3 Pet. 290; *Sturgis v. Crowninshield*, 4 Wheat. 206. And it is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain. We have had occasion to consider this subject at the present term, in *Tennessee v. Sneed*, not yet reported.

In all such cases the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that we must place ourselves in the position of the legislators and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts.

Here nine months and seventeen days were given to sue upon a cause of action which had already been running nearly four years or more. The section of the statute affecting the present case is as follows:

"That all actions on bonds or other instruments under seal, and all suits for the enforcement of rights accruing to individuals or corporations under the statute or acts of incorporation, or in any way by operation of law which accrued prior to 1st June, 1865, not now barred, shall be brought by 1st January, 1870, or the right of the party, plaintiff or claimant, and all right of action for its enforcement shall be forever barred."

The liability to be enforced in this case is that of a stockholder, under an act of incorporation, for the ultimate redemption of the bills of a bank swept away by the disasters of a civil war, which had involved nearly all of the people of the State in heavy pecuniary misfortunes. Already the holders of such bills had had nearly four years within which to enforce their rights. Ever since the close of the war the bills had ceased to pass from hand to hand as money, and had become subjects of bargain and sale as merchandise. Both the original bill-holders and the stockholders had suffered from the same cause. The business interests of the entire people of the State had been overwhelmed by a calamity common to all. Society demanded that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things. This clearly presented a case for legislative interference within the just influence of constitutional limitations. For this purpose the obligations of old contracts could not be impaired, but their prompt enforcement could be insisted upon or an abandonment claimed. That, as we think, has been done here, and no more. At any rate, there has not been such an abuse of legislative power as to justify judicial interference. As was said in *Jackson v. Lamphire*, *supra*: "The time and manner of their operation [statutes of limitation], the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend upon the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment."

The Supreme Court of Georgia in *George v. Gardner*, 49 Ga. 450, held that the time prescribed in this act was not so short or unreasonable under the circumstances as to make it unconstitutional, and the Circuit Court of the United States for the southern district of Georgia held to the same effect in *Samples v. The Bank*, 1 Woods, 529. We are satisfied with these conclusions. The circumstances under which the statute was passed seems to justify the action of the legislature. The time, though short, was sufficient to enable creditors to elect whether to enforce their claims or abandon them.

This disposes of the question arising upon the individual liability of the stockholders under the charter. It still remains to consider the cases of the stockholders whose subscriptions were not paid in full at the time of the failure of the bank. For this purpose it is not necessary to decide whether this liability passed to the assignees under the assignment. If it did not, and the present complainants have the right to sue for it, their action is barred by the statute of 1869. It was a debt due the corporation, June 1, 1865, and by section 6 of that statute all actions upon any debt or liability

due a corporation, which accrued prior to that date and was not barred when the act was passed, must be brought by January 1, 1870. The case of *Cherry v. Lamar*, decided by the Supreme Court of Georgia, in January, 1877, is not, as we understand it, at all in conflict with this. There the charter of the bank made a call by the directors, and sixty days' notice of it to the stockholders, conditions precedent to the collection of unpaid stock subscriptions, and it was consequently held that the statute did not commence to run against such a liability until the requisite call had been made and notice given. Neither in this case nor in *Terry v. Tubman* does any such provision of the charter appear. For all that is shown in the record, the stockholders were liable to suit at any time for the recovery of the balance due from them.

These complainants are neither of them judgment creditors of the bank. In a suit instituted by the assignees to close up the assignment, they proved their claims, and the amount due them was found for the purposes of a dividend. The finding was sufficient for the purposes of distribution, but it has none of the characteristics of a judgment or decree, to be enforced as against any thing but the fund which the court was then administering.

We see nothing to take this case out of the operation of the decision in *Terry v. Tubman*, and the decree of the Circuit Court is, therefore, affirmed.

UNITED STATES SUPREME COURT ABSTRACT.

ASSIGNMENT.

Claims against United States not assignable.—Claims against the United States cannot be assigned so as to enable the assignee to bring suit in his own name in the Court of Claims. This is the rule of the common law, and the statute of February 23, 1853 (10 Stat. 170, § 10), also forbids such assignments. *Beecher v. Sweetser*, 15 Minn. 437; *Sim's Case*, 1 C. C. 12; *Cooper's Case*, id. 87; *Cote's Case*, 3 id. 65. And the act creating the Court of Claims did not work a repeal of the act of 1853, in this respect. Judgment of Court of Claims reversed. *United States, appellant, v. Gillis*. Opinion by Strong, J. Bradley and Field, JJ., dissent.

BAILMENT.

Bailee for custody not presumed to have authority to sell goods.—Plaintiff, the owner of certain whisky, put it in the custody of M. M. was not employed as a salesman, and while plaintiff remained in the neighborhood he made no sales, but made small sales in the absence of plaintiff. When plaintiff left the place he left the whisky in charge of M. Held, that none of these facts tended to show that M. was clothed by plaintiff with any authority to sell the whisky. A bailee for custody has not the indicia of an agent to sell. An agent's authority cannot be proved by his own acts alone, and sales only do not prove authority to sell. Judgment of Supreme Court of Colorado affirmed. *Thatcher, plaintiff in error, v. Kaucher*. Opinion by Strong, J.

FIRE INSURANCE.

Conditions in policy as to ownership.—In a fire insurance policy on buildings, issued to plaintiff below, it was provided that "if the interest of the insured in the property be any other than the entire unconditional and sole ownership of the property for the

use and benefit of the insured, or if the buildings insured stand on leased ground, it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy shall be void." The plaintiff owned the land upon which the buildings were erected in fee simple, and the premises were leased to another party for a term of years. Nothing was expressed in the policy to indicate that the interest of the insured was other than the entire unconditional and sole ownership of such property, or indicating that most of the buildings stood on leased ground. Held, that the condition of the policy was not violated, and plaintiff was entitled to recover on the policy in case of loss. Judgment of United States Circuit Court, N. D. Illinois, affirmed. *Lycoming Fire Ins. Co., plaintiff in error, v. Haven*. Opinion by Clifford, J.

LIFE INSURANCE.

1. *Reinstatement of policy: representations as to health: when representations not continuing.*—One whose life had been insured in a company at Newark, New Jersey, but who had failed to keep up the premiums, so that the policy lapsed, applied for a reinstatement of the policy to the agent at Washington, D. C., on the 1st of October. He paid the premium and gave his certificate of health to the agent on that day, and the physician of the company signed his certificate of examination, all of which was forwarded at once to the company. On the 12th of October the company returned its renewal receipt dated back to the time of the lapsing of the policy, and this receipt was, on the 14th, given to the insured, who made no statement as to his health then. In an action on the policy, it was claimed by the company that between the 1st and the 14th of October there was a change in the health of the insured that would have caused the rejection of the policy, and the court was, at trial, asked to charge that the representation, as to health, was a continuing one up to the 14th, which request was refused. Held, that such refusal was no error. The jury would have been warranted in finding that the contract was understood and intended by the parties to take effect by relator to the 1st of October, and the question was proper for submission to the jury. *Coll v. Phoenix Fire Ins. Co.*, 54 N. Y. 597; *Tipton v. Fetter*, 20 id. 423; *Lightbody v. N. A. Ins. Co.*, 23 Wend. 24; *Perkins v. Wash. Ins. Co.*, 4 Cow. 465; *Cooper v. Pacific M. L. Ins. Co.*, 3 Big. Ins. R. 656; 7 Nev. 616; *Carpenter v. M. S. Ins. Co.*, 4 Sandf. Ch. 408; *Am. Horse Ins. Co. v. Patterson*, 28 Ind. 17; *City of Davenport v. Peoria M. and F.*, 17 Iowa, 276; *Le Farom v. Insurance Co.*, 2 Big. Ins. R. 158. Judgment of Supreme Court of District of Columbia affirmed. *Mutual Benefit L. Ins. Co., plaintiff in error, v. Higginbotham, administrator*. Opinion by Hunt, J.

2. *Trial: ruling working no harm not error.*—Where the disposition of a subject by a judge can work no legal injury to the party objecting to it, there is no error. *Starbird v. Barrons*, 43 N. Y. 200; *Pepin v. Lachenmeyer*, 45 id. 27; *People v. Brandreth*, 36 id. 191; *Porter v. Ruckman*, 38 id. 211; *Corning v. Troy Iron and Nail Works*, 44 id. 577. Ib.

NEGLIGENCE.

1. *Rule as to, when both parties guilty of.*—One who by his negligence has brought an injury upon himself cannot recover damages for it. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The

question in such cases is, (1) whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case the plaintiff is entitled to recover. In the latter he is not. *Tuff v. Warman*, 5 Scott's C. B. (N. S.) 572; *Butterfield v. Foster*, 11 East, 60; *Bridge v. G. J. R. R. Co.*, 3 M. & W. 244; *Davis v. Mann*, 10 id. 546; *Clayards v. Dethic*, 12 Q. B. 439; *Van Lien v. Scoville Co.*, 14 Abbot's Pr. (N. S.) 91; *Insurance Co. v. East Boston Co.*, 106 Mass. 149. Judgment of Supreme Court of District of Columbia reversed. *Baltimore & Potomac R. R. Co., plaintiff in error, v. Jones*. Opinion by Swayne, J.

2. *Facts constituting contributory negligence.*—Plaintiff, a laborer in the employ of defendant, when about to leave the place where he was working on one of defendant's trains, was told by the person superintending him, who was also conductor of the train, to get on anywhere, as the train was in a hurry to leave. Plaintiff got on the pilot of the locomotive, which was a dangerous place to ride. While on the trip he was injured by a collision between the locomotive and some other cars of defendant, caused by defendant's negligence. The proper place for plaintiff to ride was in a box-car on the train provided for the employees; he had been told previously to always ride there and had been forbidden riding on the pilot of the locomotive. No one of those in the box-car were injured, and plaintiff would not have been if he had ridden there. Held, that plaintiff was guilty of contributory negligence and could not recover of the defendant for the injury. *Hickey v. R. R. Co.*, 14 Allen, 429; *Todd v. R. R. Co.*, 3 id. 18; S. C., 7 id. 207; *Gavett v. R. R. Co.*, 16 Gray, 501; *Lucas v. R. R. Co.*, 6 id. 64; *Ward v. R. R. Co.*, 2 Abbot's Pr. (N. S.) 411; *Galena R. R. v. Yarwood*, 15 Ill. 468; *Dogget v. R. R. Co.*, 34 Iowa, 285. Ib.

STATUTE OF FRAUDS.

Agreement not signed by party to be charged: performance by other party: admission of agreement in other writing: evidence: parties.—An agreement was made reading as follows: "This is to certify that the undersigned have taken two thousand two hundred and five head of cattle, valued at thirty-six thousand six hundred and eighty-one dollars and sixty cents on shares from George C. Beckwith; time to expire on the fifth day of December, one thousand eight hundred and seventy-two; then George C. Beckwith to sell the cattle and retain the amount the cattle are valued at above. Of the amount the cattle sell at over and above the said valuation, George C. Beckwith to retain one-half, and the other half to be equally divided between C. W. Talbot, and Elton T. Beckwith, and Edwin F. Beckwith." This agreement was signed by the plaintiff below, C. W. Talbot, and E. T. and E. F. Beckwith, but was not signed by the defendant below, George C. Beckwith. Defendant took possession of it and kept it, and wrote several letters in which he referred to "the agreement" as binding. Plaintiff and the two others signing it performed their part of it, but defendant refused to perform his part. In an action by plaintiff for damages for defendant's breach of the agreement, held, (1) that the letters were a recognition of the agreement, making it binding on de-

fendant (*Johnson v. Dodgson*, 2 Mees. & Welsb. 653; *Salmon Falls Co. v. Goddard*, 14 How. 456); (2) that parol proof was admissible to show that the agreement mentioned in the letters was the one in question, and (3) that plaintiff was entitled to maintain a separate action for his equal share of the profits. *Servante v. James*, 10 B. & C. 410. Judgment of Supreme Court of Colorado affirmed. *Beckwith, plaintiff in error, v. Talbot*. Opinion by Bradley, J.

NOTES OF RECENT DECISIONS.

Citizenship: Indians not connected with tribe and paying tax, citizens.—Indians not connected with any organized tribe, and who are taxed, are citizens of the United States and of the State where they reside, and such an Indian residing in New York State is entitled under the provisions of its Constitution to vote therein. (*Dredd Scott v. Sandford*, 19 How. 404; *Jackson v. Smith*, 20 Johns. 187.) U. S. Circ. Ct., N. D. New York, Dec., 1877. *United States v. Elm*.

Criminal law: constructive offense.—Obtaining an entrance to a banking-house by trick and fraud, an attempted robbery of the bank was frustrated by the firmness of the cashier. Held, that evidence of the fraudulent conspiracy by which entrance was obtained, coupled with the evident felonious intent, was sufficient to sustain the allegation of constructive "breaking and entering." Sup. Ct., Pennsylvania, Oct. 1, 1877. *Johnston v. Commonwealth* (Leg. Intell.).

Jurisdiction: of United States Circuit Court: what it depends upon.—The Circuit Court has not jurisdiction of a case irrespective of the citizenship of the parties unless it arises out of a law of the United States; nor is an averment that an action arises out of such law sufficient to confer jurisdiction, but it must appear from the facts stated that it does so arise. The original jurisdiction conferred upon the Circuit Courts by section 1 of the act of March 3, 1875 (18 Stat. 470), does not include an action arising out of the contracts or dealings of the parties, although upon its trial a question may arise involving the proper construction of a law of the United States. U. S. Circ. Ct., Oregon, Nov. 28, 1877. *Dowell v. Griswold* (Chic. Leg. News).

Nuisance: noise and vibration of machinery: injunction: increased noise and vibration: form of injunction: reasonable user of business premises.—The plaintiffs, a firm of solicitors, were the owners and occupiers of offices adjoining the defendants' steam printing works, which had been working from 1848 to May, 1875, without any complaint by the plaintiffs of nuisance occasioned by the noise and vibration of the machinery, though a slight noise and vibration could at times be heard and felt. In May, 1875, the defendants made some alteration in their machinery, which the plaintiffs contended increased the noise and vibration, and they accordingly commenced an action for an injunction to restrain the defendants from working their machinery so as to occasion a nuisance to the plaintiffs. Held, that the plaintiffs were entitled to an injunction restraining the defendants from working their machinery so as to occasion a nuisance or injury by vibration to any greater degree than had previously been occasioned up to May, 1875. *Semble*, the fact that noise and vibration from machinery has never been complained of for more than twenty years, does not deprive a neighbor of his right to prevent any increased noise, even though such increase be

slight. Eng. High Court of Justice, Ch. Div., Nov. 13, 1877. *Heather v. Pardon* (37 L. T. Rep. [N. S.] 393).

Proximate cause: when cause too remote.—Owing to a landslide, defendants' engine was thrown into Oil creek. Barrels of oil burst and took fire and destroyed plaintiff's property on a lot adjoining the railroad. Held, that the negligence of defendants' engineer in not seeing the obstruction, so as to avoid the accident, was not the proximate cause of plaintiff's loss; it was too remote. Sup. Ct., Pennsylvania, Nov. 19, 1877. *Hoag v. Lake Shore & Mich. So. R. R. Co.*

Streets and highways: occupation of, by corporation.—The occupancy of a public street or highway by a corporation, carries with it the obligation to keep it in good repair. Sup. Ct., Pennsylvania, Nov. 19, 1877. *Penna. R. R. Co. v. Borough of Irwin*.

Warranty: matter of description.—"Received from A the sum £60 for a black horse, rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon." Held, not to be a warranty that the horse was quiet to ride and drive. (*Budd v. Fairmanor*, 8 Bing. 48.) Eng. High Court of Justice, Com. Pleas Div., Nov. 23, 1877. *Anthony v. Halstead* (37 L. T. Rep. [N. S.] 433).

NEW BOOKS.

ABBOTT'S NEW CASES. VOL. II.

New Cases selected chiefly from Decisions of the Courts of the State of New York, with Notes, by Austin Abbott. With an Analytical Index to all points of law and practice contained in the standard reports of New York, issued during the period covered by this volume. Vol. II. New York: Ward & Peloubet, 1877.

THIS volume contains a number of valuable decisions, though not as many as we might expect from the wide field from which the cases are selected. Among those worthy of mention we notice these: *Grady v. Crook*, p. 53. Where one offers a reward for lost property, he is bound to pay it upon the return of the property, pursuant to the offer, and the fact that it is returned by a lawyer who refuses to give the name of the finder, his client, makes no difference. *Moore v. Jackson*, p. 211. Rafts of timber continuously moored along a navigable stream constitute a purpresture, and a public nuisance is thereby created. An agreement by one so mooring logs to pay the owner of the land adjoining the stream therefor is invalid, and cannot be enforced. *Grocers' Bank v. Pensfeld*, p. 305. A pre-existing debt is a sufficient consideration for the transfer of accommodation paper, and no new consideration need be shown. *Cassidy v. Lettch*, p. 315. The authority of an attorney named in the record of a foreign judgment as appearing therein must be presumed until disproved. *Shipman v. Beers*, p. 435. As between adjoining owners who are strangers to each other, one does not, by building on the line of his own ground, acquire a right to light from his neighbor's ground. *Hazard v. Wells*, p. 444. A creditor, who receives from his debtor the notes of third parties as security, is bound, in reference to presentation, demand and notice for the purpose of fixing liability, and to enforce the collection of the notes, to the same diligence as is required of a bailee for hire. Numerous notes are appended to cases throughout the volume, some of them, as, for example, that to *Brague v. Lord*, p. 8, upon the competency of witnesses under section 399 of the old Code, being of considerable length, and citing numerous authorities. The head-notes to the

cases are somewhat more full than necessary, and many of the statements of fact might be abridged without impairing the value of the report. The analytical index to the standard reports appended to the reported cases, which is excellently done, is a very valuable part of the volume, as it answers the purpose of a digest of the case law of the State during the period it covers. It omits, however, the contents of Howard's Reports, and is, therefore, incomplete. There is no sufficient excuse for such omission, for Howard's Reports are quite as "standard" as some of the others not excluded, and since lawyers seem to find them worth buying, neither digest makers nor authors can afford to ignore them.

CORRESPONDENCE.

THE GRAMMAR OF THE NEW CODE.

To the Editor of the Albany Law Journal:

SIR—The answer to "T. C." is not full enough. "An Enlightened Ignoramus" refers therein simply to the use by the legal profession of the indicative form of expression in lieu of the subjunctive. This is not conclusive, it being a well-known fact that lawyers sometimes sacrifice grammatical correctness for concise clearness.

About the year 1849, there was published in this country a work of some merit, inasmuch as it has since gone through several editions. I allude to Webster's Dictionary. This dictionary has an introduction which has been said to be good. Speaking of the "Progress and changes of the English Language," the author has undertaken the consideration of the question opened by T. C. He says: "The subjunctive form of the verb *if he be; though he fall; * * ** which was generally used by the writers of the sixteenth century, was, in a great measure, discarded before the time of Addison." And in support of his assertion, Mr. Webster gives examples from Locke, and even from Dr. Lowth, who advocated the use of the subjunctive in his grammar published in 1702. He then culls many instances of a like disregard for the subjunctive in its past and present tenses from Lord Chatham, Fox, Pitt, Burke, Johnson, Franklin, Washington and Chancellor Kent; however, "T. C." can read it all.

NEW YORK, Dec. 29, 1877.

H. F.

BIGELOW ON FRAUD.

To the Editor of the Albany Law Journal:

SIR—Will you be good enough to permit me to say to your readers that *Holbrook v. Connor* is twice cited in my book on Fraud (p. 17), and indirectly criticised. That is, indeed, an important case, and to have failed to refer to it would have been unpardonable. As to *Ellis v. Andrews*, four authorities are cited (p. 18), to the point decided in that case; three of them being strictly leading, and the fourth more recent even than *Ellis v. Andrews*. And inasmuch as the point decided in this case is laid down in a dozen other cases referred to in connection with the four, and would be readily inferred from the language of my book, even if there were no direct statement on the subject, it was deemed legitimate to omit the case decided in New York. The doctrine is fundamental.

MELVILLE M. BIGELOW.

BOSTON, Dec. 31, 1877.

[We made the statement as to the omission of a reference to *Holbrook v. Connor*, on the supposition

that Mr. Bigelow's "Table of Cases Cited" was what it purports to be. It seems, however, that it is not what it purports to be, as it does not contain *Holbrook v. Connor*, although it is twice cited in the book.

Mr. Bigelow's explanation of his reason for omitting *Ellis v. Andrews* is not satisfactory. The "four authorities" cited "to the point decided in that case" are *Harvey v. Young*, Yelv. 20; *Davis v. Meeker*, 5 Johns. 354; *Medbury v. Watson*, 6 Metc. 248, and "Noetting" (should be *Nælling*) v. *Wright*, 72 Ill. 390. Now, neither of these cases is an "authority" "to the point decided" in *Ellis v. Andrews*. The purport of *Harvey v. Young*—a case which occupies only a few lines in the report—was fairly stated by Buller, J., in *Pasley v. Freeman*, 3 T. R. 57, who said "the true ground of that determination was that the assertion was a mere matter of judgment and opinion; of a matter of which the defendant had no particular knowledge, but of which many men will be of many minds and which is often governed by whim and caprice. Judgment or opinion in such case implies no knowledge. And here this case differs materially from that in *Yelverton*. My brother Grose considers this assertion as mere matter of opinion only, but I differ from him in that respect. For it is stated on this record that the defendant knew that the fact was false. The case in *Yelverton* admits that if there had been fraud it would have been otherwise." *Medbury v. Watson* is not only not a "leading case" on this point, but it is not strictly an authority, since the point there was whether a third person was liable to a vendee for false and fraudulent representations made by him as to the value of property bought, and the court held that he was. *Davis v. Meeker*, held simply, that one purchasing a wagon, on sight, has no action for assertions that it was worth more than its real value. In *Nælling v. Wright*, the court held that the first three counts of the declaration did not present a cause of action, because, as expressly stated by the court, they could "only be regarded as expressions of opinion as to values, for which no action can be maintained"; while the other counts were disposed of solely on the ground of bad pleading.

The cases cited by Mr. Bigelow, then, are authorities only for the statement that an expression of an opinion is not a ground of action. But not so the case of *Ellis v. Andrew*. There the complaint alleged that the defendant fraudulently stated to plaintiff that the stock of the Congress and Empire Spring Company was worth at least eighty per cent upon the par value thereof, which statement said plaintiff believed to be true, and relying thereupon purchased from the said defendants \$25,000 of said stock, and paid therefor \$20,000 in cash, whereas, in truth, the said stock was not then worth over fifty per cent, and which fact was then well known to said defendant, whereby said plaintiff sustained damage, etc. On demurrer, it was held that the complaint did not show a cause of action. In delivering the opinion, Grover, J., said: "The assertion by the defendants that the stock was worth eighty per cent of its par value cannot, I think, be regarded as the expression of an opinion as to its value, for the reason that it is averred that it was fraudulently made, and that they (defendants) then knew that it was not worth more than forty per cent. I think it must be regarded as a false statement of the value made for the purpose of obtaining a higher price for the stock than they knew it was worth."

Now, Mr. Bigelow will, no doubt, concede that from

this standpoint the case is a very different one from those cited by him, and will also, we believe, agree with us that, if what the judge said is to be taken as the basis of the decision, the case is wrong in principle and sustained by no authority, ancient or modern. — ED. A. L. J.]

CONCERNING TWO NORTH CAROLINA DECISIONS.

To the Editor of the Albany Law Journal:

SIR—In your review of the 21st American Reports in the 22d number of your valuable JOURNAL, the decision of the court in the case of *The State v. Graham*, 74 N. C. 646, is severely criticised; and in the last number Mr. J. W. Judd has approved and repeated these strictures. May I not, without offense, respectfully suggest that both of you have either misapprehended the point there decided, or have mistaken the law?

The prisoner was indicted for larceny, and his conviction depended upon identifying him as the person who made certain foot-tracks which were admitted to be those of the thief, made when committing the felony. The officer having the prisoner in charge compelled him to place his foot in the tracks, and was then allowed to give in evidence the result of the comparison. Whether this evidence was competent was the precise question before the court. In delivering the opinion, the judge, speaking for the court, said: "We agree in the opinion that when the prisoner, upon being required by the officer to put his foot in the track, did so, the officer might properly testify as to the result of that comparison. It is unnecessary to say whether or not the officer might have compelled the prisoner to put his foot in the tracks if he had persisted in refusing to do so." The point thus decided was the main one, and the decision of which is assailed. Is the decision not correct and fully supported by the weight of authority? Let us see.

Starke on Evidence, Part IV, p. 50, says: "Where a fact has been ascertained in consequence of an admission improperly obtained, it may still be proved, for the fact cannot have been affected by the influence used; therefore, upon an indictment for receiving stolen goods, where, in consequence of the confession which had been unduly obtained, the stolen property had been found, concealed between the sackings of the prisoner's bed, it was held by the twelve judges, that the fact of the finding of the stolen property in the prisoner's custody was clearly evidence. But in such cases nothing is to be left to the jury but the fact of the prisoner's having directed the witness where to find the goods, and his finding them, but not the acknowledgment."

So Mr. Greenleaf, in his work on Evidence, Vol. I, § 231, says: "The object of all the care, which, as we have now seen, is taken to exclude confessions which were not voluntary, is to exclude testimony not probably true. But where, in consequence of the information obtained from the prisoner, the property stolen, or the instrument of the crime, or the bloody clothes of the person murdered, or any other material fact is discovered, it is competent to show that such discovery was made conformably to the information given by the prisoner. The statement as to his knowledge of the place where the property or other evidence was to be found, being thus confirmed by the fact, is proved to be true and not to have been fabricated in consequence of any inducement." See, also, to the same effect, 1

Phill. on Ev. 411; Archb. Cr. Pl. 131, and note by Waterman.

The same law of evidence is announced by Hawkins, East and Leach, and is based upon innumerable decisions.

Nobody denies the general rule that confessions improperly obtained are inadmissible against the prisoner, but the limitations of that rule, as expressed above, are as well established as the rule itself. The rule thus limited fully covers *The State v. Graham*.

The reason why extorted confessions are excluded is, that not being voluntary, they may not be true. Hence, if one thus influenced confesses his guilt, the evidence will be excluded because it may not be true; but if, in consequence of a confession improperly induced, a material fact is brought to light, that fact is competent evidence, because it is a fact, independent of the confession, and being natural evidence, extrinsic to the confession, the prisoner has no more right to complain than if a witness had testified to have seen him make the tracks. All that the court decided in *Graham's* case was, that the evidence was competent. It was for the jury to say what weight and effect it should have, in connection with the other testimony.

A pocketbook is stolen, and it is proposed to search the person accused, and, upon his objecting, his person is searched by force and the pocketbook is found upon him. No one will deny that the fact of so finding the stolen article is competent evidence against him. So if one, charged as the thief, is alleged to have made certain tracks admitted or proved to be those of the thief made in committing the felony, refuses to apply his foot to the track, and is then forced to do it, the result of the comparison is a fact and equally competent as evidence. The principle of the two cases is the same, whatever difference there may be in the conclusiveness of the two species of evidence. The weight and effect of the testimony is for the jury and not the court. I have not seen the Tennessee case, referred to by Mr. Judd, but I think it entirely safe to say, that the decision in *The State v. Graham* is supported by the weight of authority.

This sort of evidence, though treated under the head of "admissions," or "confessions," in the books, belongs to neither, but, as was said by the court, it is properly called by the civilians "real evidence." In placing his foot in the tracks, the accused neither "admits" nor "confesses" any thing. The foot may not fit the track, and that fact would be conclusive in his favor. It may fit, but that would be no admission or confession, for it may be shown that others had feet of the same size, which would weaken the force of the evidence; or that another actually made the track, or that he was elsewhere at the time of the theft, which would entirely destroy the weight of the evidence from "resemblance." In *State v. Garrett*, 74 N. C. 85 the prisoner was indicted for the murder of a child by burning. At the coroner's inquest, she alleged that the child's clothing caught fire, and that in trying to extinguish it, she, the prisoner, had her hand burnt, which she then had wrapped up. She was forced to strip the covering from her hand, when it appeared to a physician to exhibit no evidence of a burn. The testimony as to the appearance of the hand was held to be competent. It is true that the device of the accused was a fraud, but that could not be discovered until the force had been applied. The result was the evidence, no difference how brought about. If a witness

says he can identify the accused only by a scar on his body, which is concealed by his clothing, doubtless it would be competent for him to testify to having seen the scar on the prisoner, whether he made the inspection by consent, force or fraud. Whether the court, on the trial, could compel the prisoner to strip and thus establish or disprove the fact, as the court remarked in *State v. Graham*, "it is unnecessary to say." The most remarkable cases of modern times, if not of all times, upon the question of identity, were the recent *Tichborne trials*. Every species of evidence which human ingenuity could devise, to prove or disprove an identity, was there resorted to, and I think all that is claimed in *The State v. Graham* was fully admitted or adjudged, and more.

The rules of evidence applicable to questions of "identity," "legitimacy," etc., necessarily allow much latitude in their application. *The State v. Graham* is an example as to identity, illustrating the principles of evidence, as laid down by Starkie and Greenleaf, *supra*, and *Warlick v. White*, 76 N. C. 175, is an interesting case upon the question of "legitimacy."

A word as to *The State v. Neely*, 74 N. C., which is also severely commented on. That case was decided by a divided court, three to two, and while I do not concur in the correctness of the decision, we must not, in justice, lose sight of the single question decided, nor must we confound the decision with the somewhat heated *dicta* of the judge, *arguendo*. The prisoner was indicted for an assault with intent to commit rape, and the single question was whether there was any evidence of the intent. In North Carolina, any legal evidence, however slight, tending to support the charge in the indictment, cannot be withheld from the jury, the weight and effect of it being the independent province of the jury to pass upon. While I do not think there was any evidence of the intent charged, it yet must be admitted that the line between what is no evidence and what is slight evidence of a fact, is so dim and shadowy, that sometimes the coolest and most discriminating judgment of the judge fails to determine the question to the satisfaction of all minds; and accordingly the decisions are not uniform as to the line of demarkation between what is admissible and what is not admissible. Where the question is doubtful, the temperament of the court or its feeling, often, even imperceptibly, determines the question. It might have been so in this case, but the antecedents of the majority of the court making the decision preclude such a supposition.

December 26, 1877.

B.

NOTES.

THE necrology of the past year includes the names of an unusual number of lawyers and jurists. Among the more prominent are the names of Emory Washburn, the author and teacher; Chief-Justice Shipley, of Maine; David A. Smalley, for eighteen years United States District Judge of Vermont; Edward Kent, formerly a Justice of the Supreme Court of Maine; Enoch H. Rosekrans, once a Judge of the Supreme Court of New York; Chief-Justice Moses, of South Carolina; Isaac Ames, Judge of Probate of Suffolk county, Mass.; Joseph T. Platt, of the Philadelphia Court of Common Pleas; Chief-Justice Draper, of the Province of Ontario; Judge Rawson, of the Supreme Court of New York, and Professor Tyler. Among the names from England are those of Lord Justice Mellish and Mr. Samuel Warren.

Messrs. A. L. Bancroft & Co., of San Francisco, have initiated an enterprise which, if it shall prove successful, will make the library of the future literally "infinite riches in little room." They propose to publish in about 75 volumes all important cases decided by the various courts of this country prior to 1869, when the "American Reports" began. The editorial control of these reports—which are to be called the "American Decisions"—is to be in the hands of Mr. John Proffatt, who has achieved some reputation as a legal writer, and whose experience will doubtless enable him to discharge the difficult duties of the position with skill and judgment. We heartily wish the enterprise success.

The new judicature act, which changes the system of practice and the organization of the courts, went into effect in Ireland on the 1st inst.—The Oneida County Bar Association met on the 21st ult. to consider the new Code, but came to no conclusion as to whether it ought to be repealed or retained.—Judge Van Hoesen, of New York, thinks \$2,000 a year too much for the fees of a committee of a lunatic, whose services consist in spending an hour a month in visiting the lunatic, subscribing for a paper and ordering an occasional suit of ready-made clothes. He so held in *Matter of Brinkerhoff*, decided on the 26th ult.—A right to a seat in the New York Cotton Exchange was held to be property in the case of *Ritterband, receiver, etc., v. Boggett*, decided on the 26th ult. in the New York Superior Court, and an assignment of it to a proper person, desiring to purchase it from a receiver of the property of its owner, ordered.

The appointment of Halbert E. Paine, of Wisconsin, to be Judge of the Court of Claims in place of Judge V. Peck, resigned, is said to be fully determined upon. Mr. Paine was born in Ohio in 1828, and was graduated from the Western Reserve College. He was admitted to the bar in 1848. He served in the Union army during the war, and was breveted a major-general in 1865. He was a member of the Thirty-ninth, Fortieth and Forty-first Congresses.—The man who doesn't squander any money hiring lawyers has turned up in Sonoma county, Cal., where he recently recorded a deed to \$15,000 worth of land in which one of the boundaries is described as "being between the wheat and corn now growing on said land."

In the case of *Hancock v. Rand*, recently decided in New York by Horatio F. Averill, Esq., referee, an interesting question in relation to the law governing innkeepers was involved. General Hancock engaged rooms for himself and family at the St. Cloud Hotel, kept by defendants, at a specified price, which was less than that charged to transient guests. During his occupancy he and his family lost certain articles from their rooms, but there was no gross negligence shown on the part of defendants. The referee held that owing to the special agreement above mentioned General Hancock and his family were not the guests of the defendants, but only boarders, and therefore defendants were not liable for losses sustained. 2 Pars. on Cont. 151, 153; 1 id. 628; *Stewart v. McCready*, 21 How. Pr. 62; *Seward v. Seymour*, Anth. Law Stud. 51; *Mowers v. Feathers*, 6 Lans. 115; *Thompson v. Lacey*, 3 B. & A. 283; *Parkhurst v. Foster*, 1 Salk. 387; *Dansey v. Ritch*, 2 Ellis & Bl. 144; *King v. Ives*, 7 C. & P. 213; *Wintermute v. Clark*, 5 Sandf. 247; *Cromwell v. Stevens*, 3 Abb. (N. S.) 84; *Bennett v. Dutton*, 5 Term. 273; *Manning v. Wells*, 9 Thomp. 748.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, JANUARY 12, 1878.

CURRENT TOPICS.

A SOMEWHAT remarkable scene was witnessed in the New York Court of Oyer and Terminer last week. Dr. Lambert, president of the notorious American Popular Life Insurance Company, who had been convicted of swearing to a false report of the condition of the company, was called up for sentence and asked the ordinary question if he had any thing to say why sentence should not be pronounced. He thereupon unrolled a huge parcel of manuscript, and for two hours harangued the court and the people assembled upon various subjects relevant and irrelevant to the inquiry made. He eulogized his counsel, denounced those opposed to him, complimented the court, and of course asserted that he was innocent of the crime of which he had been convicted. How thoroughly he was imbued with the idea of his own rectitude is indicated by this language: "Instead of standing here condemned," said he, "I should be commended by the policy-holders and stockholders and the public, and to-day it should be the pleasant duty of your Honor to invite me to sit at your right hand instead of being called to pass an unpleasant sentence; nor do I doubt that such would be your Honor's own opinion." He, however, intimated that the sixty other insurance presidents with which New York city is blessed had enriched themselves dishonestly, which indicates that he does not believe that insurance business in general is conducted upon principles of integrity. The court, in reference to his remarks, said that it was impossible to determine therefrom whether the prisoner or his jury was on trial. The charges made were answered completely and in detail by the court, and a sentence of five years at hard labor in the State prison imposed. It is somewhat surprising that the prisoner should have been given such latitude, but the importance of the case, the previous high standing of the criminal and the present public feeling against the dishonesty of insurance officials induced Judge Brady to be as forbearing as possible in the matter. We trust, however, that his action will not be taken as a precedent. If it should be, the speech of the prisoner on sentence will become as important an event in the administration of penal justice as the speech at the gallows used to be in the days of public executions, and about as instructive and useful. When

Wainwright, the English murderer, who was convicted a couple of years ago, was about to eulogize his counsel in his remarks previous to receiving sentence, the court checked him, saying that it was neither time nor place for that, and bade him confine himself to the objections he might have to the passing of sentence. The convicted offender is treated with more consideration here than in England, and it is fortunate for the courts that a Dr. Lambert does not often appear before them.

The law of negligence, as developed by the courts, is full of remarkable rules and doctrines, and these rules and doctrines become still more remarkable when they are the blended product of the law of negligence and that of master and servant. The House of Lords has, in the recent decision of *Jackson v. Metropolitan Railway*, at least unsettled the popular confidence in the justice of some parts of this law. The plaintiff in this case was a passenger on defendant's line, which is the London underground railway. By a by-law of defendant, passengers are not allowed to enter any compartment of a train in which the seats are all occupied. At a station where the train upon which plaintiff was, stopped, an attempt was made by persons to get into the compartment where plaintiff was, which was full. Plaintiff put up his hand to prevent the intrusion. At the same time a porter in the employ of defendant, in preparing the train to start, violently shut to the door of the compartment, which caught and severely injured plaintiff's thumb. In this action for the injury the trial court held that there was evidence of negligence for the jury, who found a verdict for the plaintiff. A rule nisi was obtained, calling upon plaintiff to show cause why this verdict should not be set aside on the ground that there was no evidence of negligence. The Common Pleas Division discharged this rule, and this decision was allowed to stand by the Court of Appeal, which was divided. The House of Lords reversed the judgment of the courts below, holding that there was no negligence in shutting the door, saying that it was necessary that it should be shut by the porter; "and as the train was on the point of passing into a tunnel, he could not shut it otherwise than quickly, or in this sense violently." Lord Cairns, who delivered the judgment of the House of Lords, says that it is impossible to lay down any rule as to negligence in such cases, except "that, from any given state of facts, the judge must say whether negligence can legitimately be inferred, and the jury whether it ought to be inferred." The London papers are not satisfied with the decision of the House of Lords, though the *Law Times* thinks it sustainable upon the principle that plaintiff, in endeavoring to prevent the intrusion of passengers into his compartment, was a volunteer undertaking to perform the duty of one of defendant's servants, and he could not, as such, recover

for an injury resulting from the negligence of any of such servants. He, however, would not be a volunteer within *Wright v. London & N. W. Ry. Co.*, L. R., 10 Q. B. 352, and we think the decision, if not sustainable upon the ground put by the Lord Chancellor, is not so upon any ground.

The bill of Senator Davis for the establishment of a Federal Court of Appeals will remedy many of the evils now connected with the administration of justice in the United States courts. The new appellate court will be a very great improvement upon the one that now exists, and will serve for many years at least as an effectual check to the overcrowding of the calendar of the Supreme Court. We think, however, that in one or two respects the bill might be improved. Though an attempt is made to merge the District and Circuit Courts into one by providing that a Circuit Court shall be held at the same time and place as the District, the distinction between the two courts is retained, and there is to remain the present right of appeal in bankruptcy proceedings from the District to the Circuit. Why the courts are not merged for all purposes we cannot understand. There is no provision in the act against a judge sitting in review of his own decisions, an omission which we think is a mistake. The rule which prevails in this State has worked so satisfactorily that we cannot see why it is not worthy of a trial in the Federal courts. The ten-thousand-dollar limit upon appeal to the Supreme Court in ordinary cases is proper enough, as is the provision giving that court power only to review the questions of law arising in cases carried there. The additional judges provided for are needed. The present number of Circuit and District judges is insufficient for the work of the courts, as they now exist, and under the new system there would be a great increase of business in all Federal courts, except the Supreme. Senator Davis very properly does not attempt to make any change in the law governing procedure. This, indeed, sadly needs amendment, but the profession will be satisfied to wait for reform there if the organization of the courts can be satisfactorily improved during the present session of Congress.

The legislature resumed its sittings on Tuesday last. The introduction of bills has already commenced, the new Code, of course, not being forgotten by those desiring change in our statute law. In the Senate bills were presented designed to amend chapter 448 of the Laws of 1876, in relation to the exemption of trial jurors, and to amend chapter 449, explaining and regulating the action of the previous chapter; also a bill providing that whenever any mortgage of land duly recorded shall be assigned to a purchaser for a valuable consideration in good faith, and without notice of a prior unrecorded

mortgage, such recorded mortgage in the hands of such purchaser or of his assigns shall have priority over such unrecorded mortgage, notwithstanding the mortgagee in such recorded mortgage had, at the time of receiving the same, notice of the unrecorded mortgage. Bills to amend the excise law, the act in relation to the assignment of the estates of debtors for the benefit of creditors, and the laws in relation to savings banks, were also introduced. In the Assembly bills were brought forward to repeal the act creating a board of town auditors; to amend the act relating to the Court of Arbitration in New York; to amend section 1088 of the new Code; to repeal the act to establish specie payments in this State after January 1, 1879, and for the better protection of policy-holders of life insurance companies. The excise law was also under consideration in the Assembly, quite an extended debate having been had in relation to the propriety of amending it.

The bill in relation to the priority of mortgages in the hands of a *bona fide* assignee, above mentioned, is an attempt to provide a means for evading the operation of what seems to us a very just provision of the recording act. If, however, it is thought proper that priority of record should determine priority between mortgages, why not have the statute say so directly? In case the proposed bill should pass, the holders of such subsequent mortgages as are mentioned would one and all assign them to *bona fide* holders without notice, so that the provision as to notice, though still remaining in the law, would be a dead letter. It would be better to leave the law as it is, or to make no exception whatever in its operation against subsequent grantees or mortgagees with notice.

In the case of *Re Mitchell, ex parte Sherwin*, decided by the United States District Court of Massachusetts, appearing in our present issue, a novel question in bankruptcy law is presented. The decision of the court that property belonging to the estate of a bankrupt in the hands of assignees is liable to State taxation, and an assessment made upon the assignees therefor is proper, is so manifestly just, that it seems strange that the register who passed upon the question in the first instance should have thought otherwise.

NOTES OF CASES.

IN *Moore v. Jackson*, 2 Abb. New Cas. 211, it is held that the riparian owner cannot appropriate any part of a navigable stream which is a public highway by erections or obstructions of a continuous character. A raft of timber continuously moored was held to be a violation of this rule, and to constitute an illegal encroachment or purpresture.

It is somewhat difficult to determine when a floating object, such as a craft or boat, constitutes a nuisance in a stream. A canal boat permanently stationed in a basin was held to be so in *Hart v. Mayor of Albany*, 9 Wend. 571. In *Hecker v. N. Y. Balance Dock Co.*, 13 How. Pr. 549, a floating dock in the harbor of New York was held to be a nuisance. See, also, 2 Hawk Pl. Cr., ch. 75, § 11. But, in the same case, before another judge (24 Barb. 225), a floating dock is declared not to be a nuisance in navigable waters. In *Gold v. Carter*, 9 Humph. 369, the Supreme Court of Tennessee declare that every obstruction or erection in a stream declared navigable by law, which injures the navigation of such stream, is a nuisance. A mere temporary occupation of a part of a highway by persons engaged in building, or in receiving or delivering goods from stores or the like, is allowed from the necessity of the case, but a systematic and continued encroachment on a highway, though for the purpose of carrying on a lawful business, is unjustifiable. In *People v. Cunningham*, 1 Den. 524, distillers delivered their slops daily in the street to purchasers, and the street was obstructed by carts and teams resorting thither for the slops, and waiting to load. This was decided to be a nuisance. The general principle is settled that any obstruction of a public highway for an unreasonable length of time, however lawful is the business which is sought to be prosecuted, is indictable as a public nuisance, although room might still be left for the accommodation of the public. See *Davis v. Mayor of New York*, 14 N. Y. 525; *Fowler v. Saunders*, Cro. James, 446; *The King v. Russell*, 6 East, 427; *Rex v. Carlisle*, 6 Carr. & Payne, 636; *Rex v. Cross*, 3 Camp. 226; *Rex v. Jones*, id. 230; *The King v. Moore*, 3 Barn. & Adolph. 184; *Commonwealth v. Passmore*, 1 S. & R. 219; *The King v. Ward*, 4 Ad. & El. 384.

In *Myers v. Vanderbilt*, recently decided by the Supreme Court of Pennsylvania, it is held that under a statute requiring that "every will shall be in writing," a will, written and signed in lead pencil, is valid. The general rule undoubtedly is, that whenever a statute or usage requires a writing, it must be made on paper or parchment, but it is not essentially necessary that it be in ink. It may be in pencil. This view is sustained by numerous authorities as applied to contracts generally. *Chitty on Cont.* 72; 2 Pars. on Cont. 290; *Joefry v. Walton*, 2 Eng. C. L. 385; *Geary v. Physic*, 5 B. & C. 234; *Merritt v. Clasen*, 12 Johns. 102; *Draper v. Pattina*, 2 Speers, 292; *McDowell v. Chambers*, 1 Strobb. Eq. 347. The same rule applies to promissory notes. *Closson v. Stearns*, 4 Vt. 11; *Partridge v. Davis*, 20 id. 499; *Brown v. Butchers and Droo. Bk.*, 6 Hill, 443. So a book account made in pencil

was held admissible in evidence as a book of original entries. *Hill v. Scott*, 2 Jones, 169. And in England under a statute requiring a will of lands to be in writing, it has been held that a will written in pencil, instead of ink, would be good. 1 Redf. on Wills, § 17, pl. 2; *In re Dyer*, 1 Hag. Ecc. 219; *Rhymes v. Clarkson*, 1 Phil. 1. In *Patterson v. English*, 21 P. F. Smith, 459, the validity of a will signed with a lead pencil was not decided, but it was referred to, and a strong declaration made against the propriety of writing or signing in that manner. The reason given against it is the facility with which the writing may be altered or effaced. But when the statute is silent upon the subject, it would seem improper to say that the mere fact that a lead pencil was used, would make the will invalid. A writing with a lead pencil is acknowledged as a writing by the authorities, and fulfills the requirement of the statute. See, also, *Main v. Ryder*, 34 Leg. Int. 372.

The doctrine of ancient lights is generally understood not to be adopted in this country, and it certainly is not as between adjoining owners who are strangers to each other. It was, however, claimed in *Shipman v. Beers*, 2 Abb. New. Cas. 435, that if both proprietors obtain their title from a common source, the same grantor having conveyed the tenement with the windows to one, and the ground overlooked to another, the windows cannot be obstructed. The court held adversely to the claim, saying that while it had some support in the dicta of Selden, J., in *Lampman v. Milks*, 21 N. Y. 505, and was favored by Tyler and Washburn in their treatises, the weight of authority in this State is the other way. See *Myers v. Gemmel*, 10 Barb. 537, where it was held that a landlord might lawfully darken or stop the windows by any erection on the other lot; that such an act was not in derogation of his own grant, and that he could not be restrained by injunction from so doing. And in *Palmer v. Wetmore*, 2 Sandf. 316, it was held that a landlord who owns a lot adjoining demised premises, has a right to build thereon, although by so doing he obstructs and darkens the windows in the tenement devised, and that such an act is not an eviction. In *Doyle v. Lord*, 64 N. Y. 439, these cases were approved, and it was held that the grantee of a building and a portion of a lot upon which it stood would take no right to the light and air from the balance of the lot. And in *Keats v. Hugo*, 115 Mass. 204, it was held that the grant of an easement of light and air is not implied from the grant of a house having windows overlooking land retained by the grantor. See, however, 2 Washb. R. Est. 29, 63; *United States v. Appleton*, 1 Sumn. 501; *Cherry v. Stein*, 11 Md. 1. Also *Maynard v. Esher*, 17 Penn. St. 222; *Collier v. Pierce*, 7 Gray, 18.

HARVEY'S REMINISCENCES OF DANIEL WEBSTER.

THIS volume, by a life-long, trusted and familiar friend of Daniel Webster, presents the great man in some new lights and teems with anecdotes, most of which have now found their way into print for the first time. Despite some trivialities and some undue partialities, we think the result of the book will be to elevate Webster's character as a man. His reputation as a lawyer and statesman could scarcely be enhanced, and Mr. Harvey therefore wisely deals chiefly with the private side of his character. He gives us many conversations with Webster which bear on themselves the impress of faithful narration, and he presents him to us in his family and among his friends and contemporaries, in a microscopic way, which sheds vastly more light upon his real character than volumes of eulogy or generalization. Perhaps we cannot do better than to run through this amusing volume for our readers, and give them a general idea of its scope.

Some of the anecdotes about Daniel's boyhood and youth are quite new, and were derived from his own lips. His father was a poor man, as we have always known; but his account of the poverty of some of their New Hampshire neighbors seems almost incredible. Thus, one neighbor whom Daniel visited could offer him no better fare than a bundle of green grass fried in hog's lard; "but," said Mr. Webster emphatically, "it was not so bad after all. They fried up a great platter of it, and I made my supper and breakfast off it." This was the man who, on Daniel's graduating, advised him as to a choice of a profession. He said: "As for bein' a minister, I would never think of doin' that; they never get paid any thing. Doctorin' is a miserable profession; they live upon other people's ailin's, are up nights and have no peace. And as for bein' a lawyer, I would never propose that to anybody." The end of it was, he advised Daniel to study *conjuring*, so he could tell a man where his lost cow was, for people "would think nothin' of paying three or four dollars to a man like that, so as to find their property;" and as there was no conjurer within a hundred miles, he thought there was a good opening. Once, when Daniel was at home in the winter on a vacation, his mother gave him a new suit of clothes, spun, woven and dyed by her own hands. On his return to college in a sleigh, arrayed in his new suit, a bridge having been carried away, he was obliged to ford the stream, and in the transit he sank to his arm-pits in the freezing water. He managed with great ado to retain the breath of life till he reached a house, where he went to bed while his clothes thawed and dried; but the contents of his mother's dye-pot were left on his body instead of his clothes. Even this process probably could scarcely make him blacker than nature had

made him. Daniel helped his favorite brother Ezekiel through college with money which he earned in teaching, and probably the greatest trial of his life was to decline the lucrative office of clerk of Merrimac county, procured for him by his father, and the income of which would have made himself and his father's family comparatively affluent, because Governor Gore told him that his destiny was to make opinions for others to record.

The most striking description of Webster's personal appearance which we have ever met is contained in this volume, extracted from the New York *Tribune* newspaper, and representing him in one of his first causes. "He was a black, raven-haired fellow, with an eye as black as death and as heavy as a lion's—that same heavy look, not sleepy, but as if he didn't care about any thing that was going on about him, or any thing anywhere else. He didn't look as if he was thinking about any thing, but as if he *would* think like a hurricane if he once got waked up to it. They say the lion looks so when he is quiet. It wasn't an empty look this, of Webster's, but one that didn't seem to see any thing going on worth his while." In this connection we must not omit an anecdote of General Stark, of Bennington fame. Daniel was traveling on horseback from Portsmouth to court at Concord, and stopped over night at Hooksett, now Manchester. The old general was at the tavern, and, in Yankee fashion, questioned Daniel and elicited the confession that he was a son of Captain Ebenezer Webster, of Salisbury. Thereupon the husband of Molly Stark exclaimed: "Are you a son of old Captain Eb? Let me see you (turning him round). Why, I declare! Well, I am inclined to think you may be. In the war we could not tell whether Captain Webster's face was a natural color or blackened by powder. You must be his son, for you are a cursed sight blacker than he was!"

Among the anecdotes illustrating Webster's powers in court we were most struck by one relative to the case of *Brown v. Bramble*. The plaintiff held Bramble's annuity bond for one hundred dollars for life. Bramble was in the habit of indorsing his own payments on it, and having Brown subscribe his mark, for Brown could neither read nor write. Finally, on paying one year's due, Bramble indorsed one thousand dollars instead of one hundred dollars, and added "in full consideration of, and canceling this bond," which Brown unsuspectingly signed. Webster brought suit for Brown after the fraud was discovered. During the trial one of the plaintiff's friends whispered in Webster's ear that he had just seen Bramble's lawyer in the entry, talking with one Lovejoy and giving him a paper. Lovejoy was one of the omnipresent and convenient kind of witnesses who abounded before parties were witnesses in their own behalf. He was called on by Bramble and swore that Brown told him he had re-

ceived a thousand dollars from Bramble in full of the bond. When it came Webster's turn, he marched outside of the bar to the witness-stand. He tells the rest of the story himself: "'Sir,' I exclaimed, 'give me the paper from which you are testifying.' In an instant he pulled it out of his pocket; but before he had it quite out, he hesitated and attempted to put it back. I seized it in triumph. There was his testimony in Bramble's handwriting!" As may be imagined, that was the end of Bramble's case. As an offset to this, Mr. Harvey relates a story showing how a witness once was too acute for Webster. Webster was cross-examining Col. Winchester, who had sworn that, in his opinion, a certain signature was a forgery, and was pressing him for the reason for his opinion, to which the witness replied: "I can't give a reason, but if you will allow me to make an illustration, I will do so. Suppose some distinguished man at home or abroad should be seen walking on 'change; suppose you were there at high 'change. It would be very natural to point out Daniel Webster and say, 'There goes the defender of the constitution.' Everybody would mark him, and nobody could mistake his identity. They would always know him afterward. But if, in the afternoon, some man brought me a head, and two legs, and two arms on a platter, and asked me to identify them separately as belonging to Daniel Webster, I could not swear to them. In the same way there is something about this signature that does not look genuine, but I could not swear to the particulars."

A very curious anecdote was told by Webster in connection with the Dartmouth College case. Webster advised the president that, as the college was originally endowed to civilize and instruct the Indians, the point might be taken that its charter was forfeited, because no Indian had been attached to the college for a long period, and that it would be well to introduce a little of the aboriginal element. So the president went to Canada and coaxed three Indians as far as the west bank of the Connecticut river, opposite the college, and, after some delay, got them into a boat to cross the stream, when the Indians, espying the walls of the college buildings on the further shore, became alarmed and probably suspicious of imprisonment, and one of them, giving a whoop, plunged into the river, and the others followed. So far as Dartmouth College is concerned, the "poor Indian" continued ever afterward to have an "untutored mind."

Webster was a man of moral and physical courage. He never would fight a duel, and he never went armed. Without boasting he related to Harvey how he treated Pinkney, the great leader of the Federal bar, who put a marked and public slight upon him in the Supreme Court of the United States, designing at the outset to crush a dangerous rival. At the adjournment he asked Pinkney into an ante-room alone, and locking the door and knocking the key,

he told him that he had openly and purposely insulted him in court, and that he must in the same manner apologize the next morning, "or else," said he, "either you or I will go out of this room in a different condition from that in which we entered it." Pinkney trembled, parleyed and evaded, but it was useless; and finally admitting that he did intend to "bluff" him, asked his pardon and promised to make the *amende honorable* in open court. Webster let him out, and he kept his promise faithfully; and after that, said Webster, "there was no man who treated me with so much respect and deference as Mr. William Pinkney."

We have before remarked on Webster's unconscious imitation of Milton in his rhetoric, especially exemplified in the peroration of his reply to Hayne. Mr. Harvey reminds us of another instance. In his letter to the common council of Boston, when they had refused him Faneuil Hall, because they had recently denied it to Wendell Phillips, he says: "I shall defer my visit to Faneuil Hall, the cradle of American liberty, until its doors shall fly open on golden hinges to lovers of union as well as lovers of liberty." This is an unmistakable reminiscence of Milton's description of the opening of the gates of heaven, — "harmonious sound, on golden hinges moving," but we do not believe that Milton would have been guilty of talking about the *doors* of a *cradle*.

In connection with Webster's fondness for sports, Mr. Harvey tells a story which we have seen before, but which is now authenticated. Webster had been shooting in the marshes, at Marshfield, and employed a man to ferry him across a river. His Charon declined the proffered payment, but, after some hesitation, remarked: "'This is Daniel Webster, I believe.' 'That is my name,' replied the sportsman. 'Well, now,' said the farmer, 'I am told that you can make from three to five dollars a day, pleadin' cases up in Boston.' Mr. Webster replied that he was sometimes so fortunate as to receive that amount for his services. 'Well, now,' returned the rustic, 'it seems to me, I declare, if I could get as much in the city, pleadin' law cases, I would not be a-wadin' over these marshes this hot weather, shootin' little birds.'"

Mr. Harvey's attempts to make a wit of Webster are a failure. Webster liked and told good stories, and had a good sense of the humorous and the ridiculous, but he was not a wit. The examples given by his biographer remind us of the wit attributed to the English bench, most of which is decidedly elephantine. There is really none of them which seems to us worth quoting. But of Webster's playfulness, tenderness and good-fellowship Mr. Harvey gives us plenty of evidence. Of the vast depth of his affections he also gives us some most touching proofs. His nature on all sides — passions, affections and comprehension — was a colossal one

We now come to speak of two matters wherein Mr. Harvey gives us new light as to Webster's character. If any idea of Webster has been unanimously accepted, it is, that he was always careless about his debts, and very much addicted to indulgence in intoxicating drinks. On these two points his biographer surprises us. In regard to the first he convinces us that Webster has been misunderstood. It must be remembered that, for the sake of the public, Webster consented to comparative poverty. Being a poor man, he gave up a law practice which would have produced him \$25,000 annually, for a senator's or secretary's meagre salary, and incurred the heavy outlay inseparable from such positions. It has been popularly believed that State street came to his relief on several occasions of necessity, but Mr. Harvey shows that, on one occasion at least, he indignantly spurned the proffer of such assistance. In his last years, and while in feeble health, he consented to argue the Goodyear case for a fee of \$15,000, solely for the sake of paying some debts, and in his last days he wished he could get two more such fees, so that he could die out of debt. On the other point we are not so clear. Mr. Harvey says Webster was a temperate man, and that his intellect was never obscured by alcoholic stimulants. It will be difficult to make any one, who saw Webster much for the last twenty-five years of his life, believe this. His appearance was much against this theory, his contemporaneous reputation was opposed to it, and it was commonly believed and asserted that, on minor public occasions, he was not infrequently a sufferer from over-indulgence. We think it is a mistake to try to make a saint of Webster. Great, grand, glorious man that he was, he had some of the failings of commoner clay. Otherwise he would truly have been super-human.

Another aspect of the man in which Mr. Harvey presents him is that of peace-maker. That certainly is a novel role for Daniel Webster, according to popular traditions, but Mr. Harvey proves his case most indubitably. It would be easy to believe that Webster was magnanimous; indeed, such was his reputation; but that he was so forgiving of injuries to himself, and so anxious to promote peace among others, we were not hitherto prepared to credit. In all his life there are no passages that will do him greater credit than his successful attempt to heal the breach between Benton and John Wilson, and his unavailing endeavors to reconcile Benton with Calhoun. As narrated by Mr. Harvey, these are among the most touching incidents in biography. They disclose a far-down sweetness, goodness and simplicity that a thousand times atone for unruly passions of the flesh, and bring forcibly to mind the Saviour's declaration, "Blessed are the peace-makers, for they shall be called the children of God."

This brings us, in closing, to say that Mr. Harvey's book abounds in proofs of Webster's unassum-

ing, simple and complete acceptance of the truths of the Christian religion. Webster was too great a man not to have an intellectual assurance of these great facts. He was cheerful, liberal and tolerant in his religious opinions, but he clung to them fervently to the last. An intimate friend once asked him, in the presence of a score of others, what was the most important thought that ever occupied his mind? After scanning the group a moment to make sure that no strange or unfriendly auditor was present, he responded, "my individual responsibility to God;" and then he spoke to them on this subject, as only he could speak, for some moments. We know it is not unfrequently the case that lawyers become so wise in their own conceit as to deny the higher allegiance and the evidence on which the Christian religion rests, but we are not among them. If any lawyer thinks himself wiser on these points than Daniel Webster, we cannot sympathize with him. If there are any who believe that Christ was an impostor, that God is blind chance, or a law without a legislator, and that man, instead of being created in the image of God and a little lower than the angels, is nothing but an ape with modern improvements, let him read Daniel Webster on theology. Perhaps these matters are a little *obiter*, but really we think a little theology now and then will not hurt our readers.

We must now reluctantly leave this great man, and we cannot better do it than in the closing words of this biographer: "The spot where Daniel Webster reposes is upon elevated land, and overlooks the sea, his mammoth farm, the First Parish Church, and most of the town of Marshfield, — wide-spreading marshes, forests remote and near, the tranquil river and glistening brooks. On a pleasant day the sands of Cape Cod can be descried from it, thirty miles directly to the east, where the Pilgrims first moored their ship. The spot is perfectly retired and quiet, nothing being usually heard but the solemn dirge of the ocean, and the answering sighs of the winds. It is the spot of all others for his resting-place."

TAXATION OF ASSIGNEES IN BANKRUPTCY.

UNITED STATES DISTRICT COURT OF MASSACHUSETTS, JANUARY 5, 1873.

Re MITCHELL, ex parte SHERWIN.

Property in the hands of assignees in bankruptcy is liable to taxation under State laws.

THE city of Boston assessed a tax of \$1,553.21 upon the assignees of Mitchell, Green & Stevens for the personal estate of the bankrupts in their possession, or under their control, on the 1st of May, 1872, the beginning of the fiscal year. The assignees denied the right of the city to assess them, and the case was submitted to the court upon agreed facts, under a petition by the collector of the city, to order the assignees to draw their warrant for the amount of the tax. (The assignees had made return of the property to the assess-

ors under protest, so that there was no dispute about the quality or amount. It consisted in part of money, and, in a larger part, of a stock of goods. The stock was sold by the assignees on the 3d of May, in pursuance of an arrangement made before the first day of the month, and the proceeds were divided among the creditors at once, long before the assessment was actually made, or notice given that it would be made; but there was enough money of the estate remaining to pay the tax, if it is properly and legally assessed upon them.

E. P. Nettleton, for the petitioner.

J. Wilder May, for the assignees.

LOWELL, J. The first ground taken by the assignees is, that they are officers of the court; that the funds in their hands are in the custody of the law, and, therefore, not to be disturbed or interfered with by any action on behalf of the State. An able opinion to this purport has been given by one of the registers. *Re Booth*, 14 N. B. R. 232. I cannot subscribe to that opinion. I can see no interference or obstruction of the court, or of the law in taxing to the owner thereof, any fund that may happen to be in whole or partly in the registry of the court, or under its direction, as was the case with the money here, provided there is no attempt to affix upon it a lien, or in some way to disturb the actual custody of the fund. Such an assessment is merely an official declaration that the owner of the fund should pay his share of the public burdens. I do not know why a ship in the hands of the marshal should escape taxation to the owner, though, undoubtedly, it will be free from levy or seizure as long as it remains in his official possession. If the State undertook to tax an assignee in bankruptcy as such, that is, to tax his office and franchise, his right to exercise a function under the laws of the United States, or in any mode to discriminate against an assignee, or against the estate of a bankrupt, very different considerations might arise.

It is said the assignee is an officer of the court; and so he is, in a certain sense, and so is every attorney who practices in the court; and this will protect them from taxation as such officers, but not necessarily in respect to funds which they are to administer for private persons, though their administration should be under the control of the court. The law of Massachusetts for levying taxes does not undertake to act upon personal property *in rem*, but merely upon the owner. An assignee is an officer of court, and much more, as I shall have occasion to show.

2. I have examined with great care the law of taxation. (Gen. Stats., ch. 2, *passim*.) I should be glad to find there an exemption of assignees who had so promptly and faithfully executed their trust that, while they were appointed in April, they had realized and distributed a great part of the assets long before any assessment was actually made upon them; but I have searched in vain. Section two provides that all property, real and personal, of the inhabitants of the State, shall be taxed unless expressly exempted. Section five provides what property shall be exempted, and does not mention bankrupts or insolvents, or their estates or assignees.

Section ten provides that all personal estate shall be assessed to the owner in the city or town of which he shall be an inhabitant on the first day of May, with numerous exceptions as to the place, and some as to the person — such as that, under some circumstances, the legal owners shall be assessed, and, under others,

the equitable owner — but none which makes any exemptions not included in section five, and none which affect this case in any direct way, though the section clearly shows that all trustees are intended to be included in the word "owner," unless otherwise provided for.

The remaining question is, whether the assignees were the owners of this property. This closely resembles the question already answered, and the remarks I am about to make are to be taken as applicable to both points. If assignees are mere agents of the court, and the fund is one in court, there might be reason to say that it was without a definite owner who could be ascertained and assessed, but there is no doubt that assignees are trustees with great powers and large discretion. They have the legal title and control of the property as fully as the bankrupt had, and it has been repeatedly decided that statutes, or rules having the binding power of statutes, which regulate the administration of their trust, such, for example, as require them not to sell by private contract, or not to bring action or suit without an order of court or a consent of creditors, are merely directory, so that a neglect of them will form no valid objection to a title and no defense to an action or suit. I am of opinion, therefore, that the assignees were the owners of this property on the first of May, and that the assessment was properly made before then, and that they should pay the tax.

Order accordingly.

WHEN REGULARITY OF CORPORATE ORGANIZATION MAY NOT BE QUESTIONED.

SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1877.

CHUBB, plaintiff in error, v. UPTON.

There was an attempted alteration of an Illinois corporation under the forms of law approved by the attorney-general of the State, with an increase in capital. Defendant took part in the proceedings, subscribed for the increased stock, paid a percentage thereon, and acted as an officer of the new company. *Held*, that he could not, in an action by the assignee in bankruptcy of such company to compel the fulfillment of his contract of subscription, deny the regularity of the organization of the new company.

IN error to the Circuit Court of the United States for the Western District of Michigan. The action was brought by Clark W. Upton, assignee of the Great Western Insurance Company, a bankrupt, against A. Lamont Chubb, to enforce a contract of subscription for stock of the bankrupt. Sufficient facts appear in the opinion.

Mr. Justice HUNT delivered the opinion of the court.

The numerous questions raised upon the trial of this action depend upon a few general principles which are not difficult of application.

It is settled by the decisions of the courts of the United States and by the decision of many of the State courts that one who contracts with an acting corporation cannot defend himself against a claim on such contract, in a suit by the corporation, by alleging the irregularity of its organization. This was settled more than half a century since in the courts of the State of New York, and has recently been affirmed in this court. *Dutchess Collar Mfg. Co. v. Davis*, 14 Johns. 238; *Sanger v. Upton*, 91 U. S. 56; *Upton v. Trebilcock*, 45; *B. & A. R. R. Co. v. Cary*, 26 N. Y. 75; *Bissell v. M. S. R. R. Co.*, 22 id. 259.

It is also settled that the same principle applies to

the case of a subscription to the capital stock in an organization which has attempted irregularly to create itself into a corporation and has acted as such. Same auth.: *Meth. Ch. v. Pickell*, 19 N. Y. 485; *Upton v. Hamborn*, 3 Bissell, 417.

The rule applies to increasing the stock of a corporation when the question arises upon paying a subscription for stock forming a part of such increase. The duty and the necessity of performing the contract of subscription are the same as in the case of an original stockholder.

An assignee appointed under the bankrupt laws of the United States represents both the corporation and its creditors, and the defense of irregular organization cannot be urged against him. Auth. *supra*.

It has been several times adjudged in this court that in an action by such assignee to recover unpaid subscriptions upon stock in such an organization, the defense of false and fraudulent representations inducing such subscription cannot be set up, especially when the subscriber has not been vigilant in discovering such fraud and in repudiating his contract. *Upton v. Trebilcock*, 91 U. S. 45; *Webster v. Upton*, id. 65; *Carver v. Upton*, id. 64; *Ogilvie v. Knox Ins. Co.*, 22 How. 387.

The same authorities hold that one who receives a certificate of stock for a certain number of shares at a given sum per share thereby becomes liable to pay the amount thereof when called upon by the corporation or its assignee. Nor is it necessary to sustain the action that there should have been a subscription for the whole amount named on the articles. *R. & W. Plank R. Co. v. Westel*, 21 Barb. 56.

The statute of Illinois of 1869 authorized an increase of the capital of the Great Western Insurance Company. Papers were filed under the law for that purpose, which were examined by the attorney-general and certified to be in due form, and the company proceeded to issue its stock upon that theory.

The defendant became a subscriber for fifty shares of this increased stock, the shares being \$100 each. He paid a portion, to wit, thirty per cent of this subscription. He attended meetings of the stockholders and of the directors, acting himself as such. He gave a proxy to Mr. Atwater to attend a meeting of the stockholders at Chicago and to vote for him, and he was elected and acted as the president of a branch of the said company.

It is idle to deny that this was the case of an organization which claimed to have taken and apparently supposed that it had taken the measures required by law to complete its increase of capital. It acted as such, and the defendant by receiving his certificate of stock entered into engagements with it as such. If it be conceded that its increased stock was but *de facto*, and that it could have been annulled or suppressed by the action of the attorney-general as acting under an irregular organization, the defendant derives no aid from the admission. The cases cited are clear to the point that he cannot make the objection but must perform the engagements he has made.

The last offer of the defendant was intended to present this question in its most formidable shape. It was to show that the original capital of \$100,000 was fully subscribed; that the holders of the stock never increased the capital nor authorized its increase; that this company ceased to do business prior to 1868; that the \$100,000 was not transferred to the company claiming to have organized on the increased capital, and

that there was no valid transfer of the original stock or charter.

All this does not alter the fact, that there was an attempted alteration of the company under the forms of law, approved by the attorney-general, with an increased capital, in the organization and management of which the defendant took part; that he paid his money, received his certificate of stock, attended meetings, voted, acted as an officer, and, so far as the record shows, never repudiated his position at any time, even to the time of the trial. If successful, he would have shared in its profits. He may have been the dupe and victim of the action of others. He may have been an accomplice. At all events he was so far an actor in the affair that he cannot escape the consequences of his position.

Another series of objections is to the admission of various pieces of evidence introduced to show that the defendant was a stockholder. The original stock-ledger had been destroyed by fire, and the plaintiff supplied its place by the introduction of sundry other kinds of evidence tending to prove who were the stockholders, and that the defendant was one of them. The importance of this evidence was at an end when the certificate of shares was afterward given in proof and when it was expressly admitted by the defendant that he held the same; that he made payments thereon and acted as a holder of shares in the company. It is not necessary, therefore, to inquire whether or not the evidence was properly admitted.

At the time this writ of error was taken, the decisions of this court in the several cases of *Upton v. Trebilcock*, *Sanger v. Upton*, and *Carver v. Upton* (91 U. S.), had not been made. They contain a clear statement of the views of the court upon all of the material points here to be considered, and we suppose that this writ of error would not have been brought had they then been before the party and his counsel. The careful examination given in those cases to the several questions here involved render unnecessary a detailed review of the cases.

We think there is nothing in the record before us that would justify us in disturbing the verdict and judgment rendered in the Circuit Court. The judgment is, therefore, affirmed.

CONTRACT FOR USE OF WHARF A MARITIME ONE.

SUPREME COURT OF THE UNITED STATES—OCT. TERM, 1877.

EX PARTE EASTON ET AL., Petitioners.

A contract for the use of a wharf by the master or owner of a ship or a vessel is a maritime contract, and as such is cognizable in admiralty, and being one made exclusively for the benefit of a ship or vessel, a maritime lien arises in favor of the owner of the wharf against the vessel for payment of reasonable and customary charges for such use, and the same may be enforced by a proceeding *in rem* or a suit *in personam*. A barge though not propelled by wind or steam, or any motive power of its own, may be held liable for wharfage dues.

PETITION for a writ of prohibition. Sufficient facts appear in the opinion.

Mr. Justice CLIFFORD delivered the opinion of the court.

Judicial power, under the Federal Constitution extends to all cases of admiralty and maritime jurisdiction, and it was doubtless the intention of Congress,

by the ninth section of the judiciary act, to confer upon the District Court the exclusive original cognizance of all admiralty and maritime causes, the words of the act being in terms exactly co-extensive with the power conferred by the Constitution. In order, therefore, to determine the limits of the admiralty jurisdiction, it becomes necessary to ascertain the true interpretation of the constitutional grant. On that subject three propositions may be assumed as settled by authority, and to those it will be sufficient to refer on the present occasion, without much discussion of the principles on which the adjudications rest: (1) That the jurisdiction of the District Courts is not limited to the particular subjects over which the admiralty courts of the parent country exercised jurisdiction when our Constitution was adopted. (2) That the jurisdiction of those courts does not extend to all cases which would fall within such jurisdiction according to the civil law and the practice and usages of continental Europe. (3) That the nature and extent of the admiralty jurisdiction conferred by the Constitution must be determined by the laws of Congress and the decisions of this court, and by the usages prevailing in the courts of the States at the time the Federal Constitution was adopted. No other rules are known which it is reasonable to suppose could have been in the minds of the framers of the Constitution than those which were then in force in the respective States, and which they were accustomed to see in daily and familiar practice in the State courts.

Authority is conferred upon the libelants as the proprietors of the wharf and slip in question by the law of the State to charge and collect wharfage and dockage of vessels lying at said wharf and within the slip adjoining the wharf of the libelants.

Sufficient appears to show that the respondents are the owners of the barge named in the libel; that on the tenth of October, 1876, she completed a trip from the port of Baltimore for the port of New York, and that she took wharfage at the wharf or pier of the libelants, where she remained for eleven days. For the use of the berth occupied by the barge, the libelants charged thirty-four dollars and twenty cents as wharfage and dockage. Due demand was made and payment being refused, the libelants instituted the present suit, which is a libel *in rem* against the barge to recover the amount of that charge. Process was served, and the respondents appeared and excepted to the libel, and set up that process of condemnation should not issue against the barge for the following reasons: (1) Because no maritime lien arises in the case for the matters set forth in the libel. (2) Because no lien in such a case is given for wharfage against boats or vessels by the laws of the State. (3) Because the law of the State referred to in the libel as giving a lien for wharfage is unconstitutional and void, for the following reasons: (1) Because it imposes a restriction on commerce. (2) Because it imposes a duty of tonnage on all vessels of the character and description of that of the respondents. (3) Because it discriminates against the boats or barges of persons who are not citizens of the State where the proprietors of the wharf reside.

Pending the proceedings in the District Court, the respondents presented a petition here, asking leave to move this court for a prohibition to the court below, forbidding the District Court to proceed further in the case.

Pursuant to said petition this court entered an order permitting argument upon the merits of the petition and directing that due notice be given to the libelants and the clerk of the District Court. Hearing was had in conformity to that order, and the case was held under advisement.

Power is certainly vested in the Supreme Court to issue the writ of prohibition to the District Court when that court is proceeding in a case of admiralty and maritime cognizance of which the District Court has no jurisdiction. 1 Stat. at Large, 81; *U. S. v. Peters*, 8 Dall. 129.

Where the District Court is proceeding in a cause not of admiralty and maritime jurisdiction, the Supreme Court cannot issue the writ, nor can the writ be used except to prevent the doing of something about to be done, nor will it ever be issued for acts already completed. *Ex parte Christy*, 8 How. 292; *U. S. v. Hoffman*, 4 Wall. 158.

Admiralty and maritime jurisdiction is conferred by the Constitution, and Judge Story says it embraces two great classes of cases—one dependent upon locality, and the other upon the nature of the contract.

Damage claims arising from acts and injuries done within the ebb and flow of the tide have always been considered as cognizable in the admiralty, and, since the decision in the case of *The Genesee Chief*, it is considered to be equally well settled that remedies for acts and injuries done on public navigable waters, not within the ebb and flow of the tide, may be enforced in the admiralty as well as for those upon the high seas and upon the coast of the sea.

Speaking of the second great class of cases cognizable in the admiralty, Judge Story says, in effect, that it embraces all contracts, claims and services which are purely maritime, and which respect rights and duties appertaining to commerce and navigation. 2 Story on Const., § 1666.

Public navigable waters, where inter-state or foreign commerce may be carried on, of course, include the high seas, which comprehend, in the commercial sense, all tide-waters to high-water mark.

Maritime jurisdiction of the admiralty courts in cases of contracts depends chiefly upon the nature of the service or engagement, and is limited to such subjects as are purely maritime, and have respect to commerce and navigation within the meaning of the Constitution.

Wide differences of opinion have existed as to the extent of the admiralty jurisdiction, but it may now be said, without fear of contradiction, that it extends to all contracts, claims and services essentially maritime, among which are bottomry bonds, contracts of affreightment, and contracts for the conveyance of passengers, pilotage on the high seas, wharfage, agreements of consortship, surveys of vessels damaged by the perils of the seas, the claims of material men and others for the repair and outfit of ships belonging to foreign nations or to other States, and the wages of mariners, and also to civil marine torts and injuries, among which are assaults or other personal injuries, collision, spoliation and damage, illegal seizures or other depredations on property, illegal dispossession or withholding of possession from the owners of ships, controversies between the part owners as to the employment of ships, municipal seizures of ships, and cases of salvage and marine insurance. Conkl. Treatise (5th ed.), 254.

Wharf accommodation is a necessity of navigation, and such accommodations are indispensable for ships and vessels and water-craft of every name and description, whether employed in carrying freight or passengers, or engaged in the fisheries. Erections of the kind are constructed to enable ships, vessels and all sorts of water-craft to lie in port in safety, and to facilitate their operation in loading and unloading cargo, and in receiving and landing passengers.

Piers or wharves are a necessary incident to every well-regulated port, without which commerce and navigation would be subjected to great inconvenience, and be exposed to vexatious delay and constant peril.

Conveniences of the kind are wanted both at the port of departure and at the place of destination, and the expenses paid at both are everywhere regarded as properly chargeable as expenses of the voyage. Commercial privileges of the kind cannot be enjoyed where neither wharves nor piers exist, and it is not reasonable to suppose that such erections will be constructed for general convenience unless the proprietors are allowed to make reasonable charges for their use.

Compensation for wharfage may be claimed upon an express or an implied contract, according to the circumstances. Where a price is agreed upon for the use of the wharf, the contract furnishes the measure of compensation, and when the wharf is used without any such agreement, the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred.

Such erections are indispensably necessary for the safety and convenience of commerce and navigation, and those who take berth alongside them to secure those objects derive great benefit from their use. All experience supports that proposition, and shows to a demonstration that the contract of the wharfinger appertains to the pursuit of commerce and navigation.

Instances may, doubtless, be referred to where wharves are erected as sites for stores and storehouses, but the great and usual object of such erections is to advance commerce and navigation by furnishing resting-places for ships, vessels, and all kinds of water-craft, and to facilitate their operation in loading and unloading cargo and in receiving and landing passengers.

Nor is the nature of the service or the character of the contract changed by the circumstance that the water-craft which derived the benefit in the case before the court was without masts or sails or other motive power of her own. Sail ships, and even steamships and vessels, are frequently propelled by tugs, and yet, if they secure a berth at a wharf or in a slip at the place of landing or at the port of destination, and actually occupy the berth as a resting-place or for the purpose of loading or unloading, no one, it is supposed, will deny that the ship or vessel is just as much liable to the wharfinger as if she had been propelled by her own motive power.

Neither canal boats nor barges ordinarily have sails or steam power, but they usually have tow-lines, and it clearly cannot make any difference, as to their liability for wharfage, whether they are propelled by steam or sails of their own, or by tugs or horse or mule power, if it appears that the boat or barge actually occupied a berth at the wharf or slip at the commencement or close of the trip as a resting-place, or for the purpose of loading or unloading cargo, or for receiving or landing passengers.

Goods, to a vast amount, are transported by such means of conveyance, and all experience shows that boats of the kind require wharf privileges as well as ships and vessels or any other water-craft engaged in navigation. *The Northern Belle*, 9 Wall. 328.

Access to the ship or vessel rightfully occupying a berth at a wharf, for the purpose of loading and unloading, is the undoubted right of the owner or charterer of such ship or vessel for which such right has been secured. *Wendell v. Baxter*, 12 Gray, 496.

Privileges of the kind are essential to the carrier by water, whether he is engaged in carrying goods or passengers.

Repairs to a limited extent are sometimes made at the wharf, but contracts of the kind usually have respect to the voyage and are made to secure a resting-place for the vessel during the time she is being loaded or unloaded. Such contracts, beyond all doubt, are maritime, as they have respect to commerce and navigation, and are for the benefit of the ship or vessel when afloat.

Carrying vessels would be of little or no value unless they could be loaded, and they are usually loaded from the wharf, except in a limited class of cases where lighters are employed, the vessel being unable to come up to the wharf in consequence of the shoalness of the water.

Accommodations at the port of destination are equally indispensable for the voyage as those at the port of departure. Consignments of goods and passengers must be landed, else the carrier is not entitled to freight or fare. Where the contract is to carry from port to port, an actual delivery of the goods into the possession of the owner or consignee or at his warehouse is not required in order to discharge the carrier from his liability. He may deliver them on the wharf, but to constitute a valid delivery there the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods or to put them under proper care and custody. Delivery on the wharf, under such circumstances, is valid if the different consignments be properly separated, so as to be open to inspection and conveniently accessible to their respective owners. *The Eddy*, 5 Wall. 495.

These remarks are sufficient to show that wharves, piers, or landing-places are well nigh as essential to commerce as ships and vessels, and are abundantly sufficient to demonstrate that the contract for wharfage is a maritime contract for which, if the vessel or water-craft is a foreign one or belongs to the port of a State other than the one where the wharf is situated, a maritime lien arises against the ship or vessel in favor of the proprietor of the wharf.

Standard authorities, as well as reason, principle, and the necessities of commerce, support the theory that the contract for wharfage is a maritime contract, which in the case supposed gives to the proprietor of the wharf a maritime lien on the ship or vessel for his security.

From an early period wharf-owners have been allowed to exact from ships and vessels using a berth at their wharves a reasonable compensation for the use of the same, and the ship or vessel enjoying such a privilege has always been accustomed to pay to the proprietor of the wharf a reasonable compensation for the use of the berth. *The Kate Tremaine*, 5 Ben. R. 611.

Ancient codes and treatises, such as are frequently

recognized as the source from which the rules of the maritime law are drawn, usually treat such contracts as maritime contracts, for which the ship or vessel is liable. *The Maggie Hammond*, 9 Wall. 452; *DeLovio v. Boit*, 2 Gall. 472.

Charges for wharfage were adjudged to be lien claims in the District Court of the Third Circuit more than seventy years ago, and in speaking of that case, Judge Story says that it seems to him that the decision was fully supported in principle by the doctrines as well of the common law as of the civil law, and by the analogous cases of materials furnished and repairs made upon the ship (*Ship New Jersey*, 1 Pet. Adm. R. 228; *Ex parte Lewis*, 2 Gall. 484), where it was expressly adjudged that the contract was necessarily maritime, giving as the reason for the conclusion that the use of the wharf is indispensable for the preservation of the vessel. *Johnson v. McDonough*, Gil. 108.

Other eminent admiralty judges have decided in the same way, and among the number the late Judge Ware, whose opinion in cases involving the question of admiralty jurisdiction is entitled to the highest respect. *The Phoebe*, Ware, 341; 2 Conkl. Adm. (2d ed.) 515; *Bark Alaska*, 8 Ben. 392; *Hobart v. Dragon*, 10 Pet. 120; *The Mercer*, 1 Sprague, 284; *The Ann Ryan*, 7 Ben. R. 21; *Dunlap's Adm.* 75; *Abb. on Ship.* (5th ed.) 423.

Water-craft of all kinds necessarily lie at a wharf when loading and unloading, and Mr. Benedict says that the pecuniary charge for the use of the dock or wharf is called wharfage or dockage, and that it is the subject of admiralty jurisdiction; that the master and owner of the ship and the ship herself may be proceeded against in admiralty to enforce the payment of wharfage, when the vessel lies alongside the wharf or at a distance and only uses the wharf temporarily for boats or cargo. Ben. Adm. (2d ed.), § 283.

Application for the writ of prohibition is properly made in such a case upon the ground that the District Court has transcended its jurisdiction in entertaining the described proceeding, and whether it has or not must depend not upon facts stated dehors the record, but upon those stated in the record upon which the District Court is called to act and by which alone it can regulate its judgment. Mere matters of defense, whether going to oust the jurisdiction of the court or to establish the want of merits in the libelants' case, cannot be admitted under such a petition here to displace the right of the District Court to entertain suits, the rule being that every such matter should be propounded by suitable pleadings as a defense for the consideration of the court, and to be supported by competent proofs, provided the case is one within the jurisdiction of the District Court. *Ex parte Christy*, 8 How. 308.

Congress has empowered the Supreme Court to issue writs of prohibition to the District Courts "when proceeding as courts of admiralty and maritime jurisdiction," by which it is understood that the power is limited to a proceeding in admiralty. Conkl. Treatise (5th ed.), 56. Such a writ is issued to forbid a subordinate court to proceed in a cause there, depending on suggestion that the cognizance thereof belongeth not to the court. *F. N. B.* 39; 3 Bl. Com. 112; 2 Pars. on Ship. 198; 8 Bac. Abr. 206.

Viewed in the light of these considerations it is clear that a contract for the use of a wharf by the master or owner of a ship or vessel is a maritime contract, and, as such, that it is cognizable in the admiralty; that such a contract being one made exclusively for

the benefit of the ship or vessel, a maritime lien in the case supposed arises in favor of the proprietor of the wharf against the vessel for payment of reasonable and customary charges in that behalf for the use of the wharf, and that the same may be enforced by a proceeding *in rem* against the vessel or by a suit *in personam* against the owner.

Many other questions were discussed at the bar which will not be decided at the present time, as they are not properly involved in the application before the court.

Petition for prohibition denied.

PRESUMPTION OF GOOD FAITH IN THE TRANSFER OF NEGOTIABLE PAPER.

SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1877.

BROWN et al., plaintiffs in Error, v. *SPOFFORD et al.*

Promissory notes payable to order may be transferred by indorsements, or when indorsed in blank or made payable to bearer they are transferable by mere delivery and the possession of such an instrument indorsed in blank, or made payable to bearer, is *prima facie* evidence that the holder is the proper owner and lawful possessor of the same; and nothing short of fraud, not even gross negligence, if unattended with *mala fides*, is sufficient to overcome the effect of that evidence or to invalidate the title of the holder, supported by that evidence.

Accordingly held that an agreement made at the time of the making or indorsement of a negotiable instrument was not admissible in an action upon such instrument by a *bona fide* purchaser for value before maturity.

In such an action the settled commercial rule is that nothing less than prior knowledge of such facts and circumstances as impeach the title is available as a defense, unless it be shown that the instrument was fraudulent in its inception. To impeach the title of a holder for value, it must first be shown that he had knowledge of the circumstances at the time the transfer was made.

Agreements unperformed cannot be pleaded in accord and satisfaction.

ERROR to the Supreme Court of the District of Columbia. The facts appear in the opinion.

Mr. Justice CLIFFORD delivered the opinion of the court.

Sufficient appears to show that the plaintiffs claim to recover of the defendants the amount of five promissory notes, set forth in the record, each dated January 8, 1872, payable to the order of Austin P. Brown, in one, two, three, four and five months from date, amounting in the aggregate to the sum of eleven thousand three hundred and thirty-six dollars and sixty-four cents. Due indorsement of the notes was made by the payee, and the plaintiffs also claim to recover the costs and fees of protest and notice to the makers for non-payment.

Service was made and the defendants appeared and pleaded the general issue, and two special pleas, which are fully set forth in the record.

Issue was joined by the plaintiffs upon the first plea of the defendants, and to the second plea the plaintiffs replied and denied the same in fact and in substance, and all and singular the matters therein set forth, and alleged in further reply that they became the holders of the notes in the regular course of mercantile dealings, for a full, fair, and valuable consideration, before the maturity of the notes and without any notice or knowledge of the matters set forth and alleged in the defendants' second plea. They also deny and traverse all the allegations and averments contained in the defendants' third plea.

Special pleas in such a case are unnecessary, as every such defense, where the action is assumpsit upon promissory notes, is admissible under the general issue.

Delay ensued, and at a subsequent term the parties went to trial and the verdict and judgment were in favor of the plaintiffs, in the sum of eleven thousand three hundred dollars and forty-seven cents, with costs and interest. Exceptions were taken by the defendants, as appears by the record.

Six notes, it seems, were given by the defendants, all of the same date, one of which was not due when the suit was instituted to recover the amount of the first five. On the second of August, 1872, the plaintiffs sued the other note, which was signed and indorsed like the other five, and was for the sum of twenty-two hundred and sixty-seven dollars and thirty-two cents for value received. Service was made and the defendants appeared and filed three pleas, of the same legal effect as those filed in the preceding case. Replications were also filed by the plaintiffs, of the same legal import as those which they filed in the suit to enforce payment of the first five notes. Proper issues being joined, the parties went to trial and the verdict and judgment were for the plaintiffs, in the sum of two thousand two hundred sixty-nine dollars and eighty-five cents, with costs and interest, as therein provided.

Separate judgments were rendered in the two cases, but the defendants were allowed to file eight bills of exceptions to the rulings of the court in each of the cases, which were subsequently signed and sealed by the presiding judge, each of the bills of exceptions having respect to the trial in the respective suits as if the same had been previously consolidated and the verdicts had been rendered at the same time by the same jury. Both judgments were removed into this court by one writ of error.

Certain errors are assigned here as applicable to the judgment in each of the respective cases, in substance and effect as follows: (1) Evidence was offered by the defendants to prove the alleged agreement between them and the company, which was excluded by the court, and they assign for error that the court erred in excluding that evidence. (2) That the court erred in holding that the agreement between the company and the defendants offered in evidence would not affect the right of the plaintiffs to recover in the suits. (3) That the court erred in holding that if the plaintiffs received the notes before maturity, without notice of the alleged agreement, the defendants were liable in the action, even though the plaintiffs paid their own notes with money borrowed from the company, whose agents they were in the transaction. (4) That the court erred in instructing the jury that if they find from the evidence that the plaintiffs did not have notice of the alleged agreement between the company and the defendants, still they may recover in the actions if the jury further find that the defendants neglected and failed to comply with the terms of the agreement. (5) That the court erred in instructing the jury that the agreement to receive as a compromise in discharge of the notes a sum less than the amount of the same could only be made available as a defense by proving that the sum agreed was paid or tendered by the defendants as therein stipulated.

Exceptions not assigned for error will not be separately examined. Two of the errors assigned, to wit, the first and the second, are so nearly alike that they may be examined together.

Negotiable notes are written instruments, and as such they cannot be contradicted, nor can their terms be varied by parol evidence, and that proposition is universally true where the promissory note is in the hands of an innocent holder. Where a bill of exchange was drawn in the usual form and was protested for non-payment, the court held twenty years ago that parol evidence of an understanding between the drawer and the party in whose favor the bill was drawn, was inadmissible to vary the terms of the instrument. *Brown v. Wiley*, 20 How. 447.

In that case the defendant offered to prove to the jury, pursuant to the defense set up in a special plea, a parol agreement between him and the plaintiffs, that the bill should not be presented for acceptance until funds were furnished and placed in the hands of the drawees, to provide for a certain other draft, who had agreed to accept the second bill when funds were received to meet their liability for accepting the first bill, but the court below excluded the evidence and the defendant excepted, and this court decided that the ruling was correct and affirmed the judgment, holding that the evidence offered that the bill should not be presented until a distant, uncertain, or undefined period, tended in a very material degree to alter and vary the operation and effect of the instrument. *Shunkland v. Washington*, 5 Pet. 394; 1 Greenl. Ev. (12th ed.), 318; *Stackpole v. Arnold*, 11 Mass. 30; *Hunt v. Adams*, 7 id. 521; *Myrick v. Dame*, 9 Cush. 254; *Thompson v. Ketchum*, 8 Johns. 192.

Certain fixed principles govern the liability of parties to a bill of exchange or promissory note which are essential to the credit and circulation of such paper, of which the most important is that whatever may have occurred between other parties to the instrument, if not fraudulent in its inception, the holder of the same, if he acquired it for value in the usual course of business before maturity, cannot be affected by any such transactions, unless it be first shown that he had knowledge of such transactions at the time the transfer was made. Nothing less than knowledge of such transactions can meet the exigencies of such a defense, the rule being that the *bona fide* holder of a negotiable instrument for value, if acquired before maturity and without notice of any facts which impeach its validity between the antecedent parties, has a good title to the instrument, unaffected by any such prior transaction, and may recover the amount even though the instrument, as between the antecedent parties, is without any legal validity. *Goodman v. Simonds*, 20 How. 364; *Swift v. Tyson*, 16 Pet. 15; *Murray v. Gardner*, 3 Walls. 119.

Attempt was made in a leading case to prove that the payee agreed with the indorser that if he would indorse the note he should incur no responsibility, as the payment was secured by collaterals, and when offered in the Circuit Court the evidence was admitted, but the court, when the case was brought here on writ of error, reversed the judgment, holding that the evidence should have been excluded. *Banks v. Dunn*, 6 Pet. 53.

Decided cases of the most authoritative character have determined that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsement of a bill or note, cannot be admitted to vary, qualify, contradict, add to, or subtract from, the absolute terms of a written contract. *Specht v. Howard*, 16 Wall. 566.

In the absence of fraud, accident, or mistake, the rule is the same in equity as at law, that parol evidence of an oral agreement, alleged to have been made at the time of drawing, making, or indorsing a bill or note, cannot be permitted to vary, qualify, or contradict, or to add to, or subtract from, the absolute terms of the written contract. *Forsyth v. Kimball*, 1 Otto, 294.

Parol evidence of an agreement made contemporaneously with a promissory note which contains an absolute promise to pay at a specified time is not admissible in order to extend the time for payment or to provide for the payment out of any particular fund, or in any other way than that specified in the instrument, or to make the payment depend upon condition. *Chitty on Cont.* (10th ed.) 39; *Abrey v. Cruz*, Law Rep., 5 C. P. 41; *Allan v. Furbish*, 4 Gray, 506; 2 Pars. on Bills and Notes, 501.

Apply these rules to the case before the court and it is clear that the first and second assignments of error must be overruled, as it is clear that the evidence offered was inadmissible and that the ruling of the court was correct.

Due execution of the notes is admitted, nor is it questioned that they were indorsed in blank, as set up by the plaintiffs. Beyond all doubt the plaintiffs became the holders of the notes before maturity and for value, but the defendants insist that the plaintiffs did not become the holders of the same in good faith, nor in the regular course of business, and they requested the court to instruct the jury that if they believed that the plaintiffs came into the possession of the notes without paying value, or under circumstances which would have put a prudent man upon inquiry concerning the alleged agreement, then the jury must consider the plaintiffs bound by the agreement, and that their verdict should be for the defendants.

Three objections arise to that prayer for instruction, any one of which is sufficient to show that it was properly rejected: (1) Because the uncontradicted evidence showed that the plaintiffs did pay value for the notes. (2) Because the settled rule of law is that the plaintiffs, as the holders of the notes for value, and having acquired the same before maturity and in the usual course of business, or without notice of any prior equities, have a good title to the same irrespective of what may have transpired between the defendants and prior holders of the notes. (3) Because there is no evidence in the case that the plaintiffs had knowledge of any equities between the defendants and such prior parties, the settled commercial rule being that nothing less than prior knowledge of such facts and circumstances as impeach the title can meet the exigencies of such a defense, unless it be shown that the instrument or instruments were fraudulent in their inception.

Where the supposed defect or infirmity in the title of the instrument appears on the face at the time of the transfer, the question whether the party who took it had notice or not is in general a question of construction, and must be determined by the court as matter of law, as has been held by this court in several cases. (*Andrews v. Pond*, 13 Pet. 65; *Fowler v. Brantley*, 14 Pet. 318.) But it is a very different thing when it is proposed to impeach the title of a holder for value by proof of any facts and circumstances outside of the instrument itself. He is then to be affected, if at all, by what has occurred between other parties, and he may well claim an exemption from any consequences

flowing from their acts, unless it be first shown that he had knowledge of such facts and circumstances at the time the transfer was made. *Goodman v. Stonds*, 20 How. 366; *Collins v. Gilbert*, 4 Otto, 758.

Tested by these authorities it follows that the third assignment of error must be overruled.

Both the fourth and the fifth assignments of error have respect to the supposed compromise which it is alleged was proposed and adopted, and inasmuch as they relate to the same state of facts they will be examined together.

Parties may doubtless adjust their controversies, and where they do so in good faith and understanding, courts of justice will uphold the adjustment, unless it violates the rules of law applicable to the transaction. Suppose that is so, still it is clear the alleged compromise was never carried into effect. What was proposed is that the notes were to be delivered up upon the payment of a prescribed amount at the time and in the manner set forth in the agreement, but nothing was ever paid or tendered, nor was any thing ever done in fulfillment of the agreement. Instead of that the evidence shows that the defendants never made any attempt to make the payments, and the court instructed the jury that if they found that the agreement of compromise was never carried out by the defendants that it constitutes no defense to the action; that such a compromise can only be made available to the defendants as a defense by proving that the sums agreed to be paid in discharge were paid or tendered as stipulated. Formal exceptions were taken to those instructions, and they are the basis of the errors alleged in the fourth and fifth assignments.

Sufficient appears to show that the indebtedness of the defendants amounted to the sum of thirteen thousand six hundred and three dollars and ninety-six cents, and that the plaintiffs agreed to accept ten thousand dollars as a compromise, "upon the payments being made at the times stated," from which it is evident that nothing short of the fulfillment of that agreement would discharge the original demand, and that such a compromise, to be available, must be performed. 2 Pars. on Cont. (6th ed.) 635; 2 Story on Cont. (5th ed.) 537; *Chitty on Cont.* (10th ed.) 693.

Agreements unperformed cannot be pleaded as accord and satisfaction. *U. S. v. Clark*, Hemp. R. 317.

Where a creditor agreed to satisfy a judgment for a less sum than the amount recovered, if paid by a day certain, and the debtor failed to make the payment, it was held that the creditor might enforce the judgment for the full amount. *Early v. Rogers*, 16 How. 608.

Performance of the agreement by the judgment debtor, it was held in that case, was a condition precedent to the proposed reduction of the judgment, and the court said: "We think the district judge interpreted the agreement of the parties and the judgment correctly, as the parties made the reduction dependent on a condition which has not been fulfilled."

Where an arrangement was made for the discharge of certain notes, but the arrangement failed because one of the debtors disagreed to the terms of the composition, the court decided that the debt stood revived, and that judgment was properly rendered for the whole amount. *Clark v. Brown*, 22 Wall. 273; *Addison on Cont.* (6th ed.) 996.

Two other exceptions were taken at the trial, in respect to which it is only necessary to say that they

have not been assigned for error; and if they had been, it would not have benefited the defendant, as the questions presented fall within the rules already sufficiently explained.

Nothing remains for remark except to advert very briefly to certain irregularities which appear in the proceedings. Judgment was rendered in the first suit before the parties went to trial in the second, and yet the defendants were allowed to file eight bills of exceptions, which purport to be applicable to each of the two cases; and the judgment in each case is removed here by one writ of error, though the transcript does not show that the two cases were ever consolidated. Such proceedings are palpably irregular; but inasmuch as they are not the subject of objection by either party, the court has decided to exercise jurisdiction and dispose of the controversy. Separate judgments having been entered in the court of original jurisdiction, the judgment rendered here must be separately applied in the court below.

Judgment affirmed.

UNITED STATES SUPREME COURT ABSTRACT.

CONSTITUTIONAL LAW.

When Constitution does not affect previous statutes. — The Constitution of Missouri, taking effect July 4, 1865, provided that "the general assembly shall not authorize," etc., * * * "unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." *Held*, to apply only to future acts, and not to past ones. (*State v. Macon County Court*, 41 Mo. 453; *State v. Greene County*, 54 id. 540; *Henry County v. Nicolay*, U. S. Sup. Ct. Mes.) Judgment of Circuit Court, W. D. Missouri, affirmed. *County of Macon, plaintiff in error, v. Shores*. Opinion by Swayne, J.

CONTRACT.

1. *Contract made with government: provisions of act authorizing, must be followed: alteration of, without authority.* — By an act of Congress, provision was made for the erection of a public building under the direction of the Secretary of the Treasury. Plaintiff contracted to furnish material for such building of a certain kind, the contract providing that no departure from its condition should be made without "the written consent of the Secretary of the Treasury." Plaintiff furnished under a subsequent oral agreement with the assistant superintendent having charge of the erection of the building, material better than that called for by the original contract. *Held*, that the assistant superintendent had no authority to enlarge the terms of the original contract, and plaintiff could not claim compensation for the value of the material furnished, but only the contract price for the material he was required by the contract to furnish. Decree of Court of Claims affirmed. *Hawkins, appellant, v. United States*. Opinion by Clifford, J.

2. *Verbal agreements altering written contract: effect of.* — Verbal agreements between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to vary its terms or to affect its construction, the rule being that all such verbal agreements are to be considered as merged in the written instrument. But oral agreements subsequently made on a new and valuable consideration, and before the breach of the contract, in cases not falling within the statute of frauds,

stand upon a different footing, as such agreements may, if not within the statute of frauds, have the effect to enlarge the time of performance, or may vary any other of its terms, or may waive and discharge it altogether. (*Emerson v. Staler*, 22 How. 41; *Goss v. Nugent*, 5 Barn. & Ad. 65; *Nelson v. Boynton*, 3 Metc. 402; *Harvey v. Grabbam*, 5 Ad. & El. 61; *Leonard v. Vredenburg*, 8 Johns. 39; Chit. on Con. [10th ed.] 105.) 1b

3. *Express stipulations and implied promises.* — Express stipulations cannot in general be set aside or varied by implied promises, or, in other words, a promise is not implied where there is an express written contract, unless the express contract has been rescinded or abandoned or has been varied by the consent of the parties. Hence the rule is that if there be an express written contract between the parties, the plaintiff, in an action to recover for work and labor done, or for money paid, must declare upon the written agreement so long as the special agreement remains in force and unrescinded, as he cannot recover, under such circumstances, upon a *quantum meruit*. (1 Story on Con. [5th ed.], § 18; *Selwzy v. Foy*, 5 Mees. & Wels. 83; *Creighton v. Toledo*, 18 Ohio St. 451; *Weston v. Davis*, 24 Me. 375; *Whiting v. Sullivan*, 7 Mass. 109; *Merrill v. Railroad*, 18 Wend. 588; *Glacius v. Black*, 50 N. Y. 150; *Bain v. Miller*, 4 Taunt. 743; *Inchbald v. Railway*, 17 C. B. [N. S.] 733; *Bartholomew v. Markwick*, 15 id. 711; *Toussaint v. Martinant*, 2 Term, 105; *Culler v. Powell*, 6 id. 324; *Ferguson v. Carrington*, 9 B. & C. 59; *Dennett v. Atherton*, L. R., 7 Q. B. 327; *Mayor v. Eschbach*, 17 Md. 283.) 1b.

4. *Authority conferred by law upon officials must be taken notice of.* — Individuals as well as courts must take notice of the extent of the authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act. (*State v. Hayes*, 52 Mo. 580; *Delafield v. State*, 26 Wend. 22; *People v. Bank*, 24 id. 423; *Mayor v. Reynolds*, 20 Md. 11; *Whitside v. U. S.*, 3 Otto, 257.) 1b.

EVIDENCE.

Internal revenue tax: secondary: when testimony of witnesses not admissible. — In an action to recover, from a collector of internal revenue, the amount paid upon a tax for "1,350 barrels of beer sold and removed from plaintiff's brewery without proper stamps," plaintiffs offered to prove by witnesses on the stand that, from the date at which the internal revenue act of 1866 went into effect, until the assessment complained of was made, "no beer was sold or removed from their brewery for consumption or sale except in barrels or parts of barrels which were all duly stamped with an internal revenue stamp * * * as required by the act of Congress;" that they "had made their monthly returns to the collector regularly until and including the month of December, 1873; that there was no under-statement or under-valuation in either of said returns of the quantity of beer brewed, or of beer sold or removed from their brewery for consumption or sale, and that neither of the returns was false or fraudulent." The books required by the revenue law to be kept by a brewer were not produced, and no attempt to account for their absence, nor any claim of defective entries in plaintiff's returns was made. *Held*, that the evidence was not admissible. Judgment of Circuit Court, E. D., Pennsylvania, affirmed. *Bergdoh, plaintiff in error, v. Pollock*. Opinion by Waite, C. J.

LIFE INSURANCE.

Construction of contract: premium notes: paid-up policy.—In a policy of life insurance, and in the agreement for the same (the premiums upon which were payable partly in money, and partly by note), it was provided that the amount of the note given for the designated part of the annual premium, was to be "a permanent loan from the company, bearing interest at the rate of seven per cent until paid by dividends." The part of the premium for which the note was given, was described as "the amount of premium loaned this year," and the policy provided that the amount of the note unpaid, if any, when the sum secured by the policy became payable, was to be deducted from the amount of the insurance money to be paid. The policy declared that in case of a paid-up policy being taken, the amount thereof should be determined by the sum of the premiums paid in cash. *Held*, that when a paid-up policy was taken, the amount of the notes could not be deducted from the sum to which the old policy showed the policy-holder to be entitled, but the debt of the notes would be a lien against the new policy, payable, with interest, when that should become due. Decree of Circuit Court, E. D. Missouri, affirmed. *Brooklyn Life Ins. Co., appellant, v. Dutcher.* Opinion by Swayne, J.

MUNICIPAL BONDS.

1. **Evidence of good faith of holder, when admissible.**—In an action upon a negotiable coupon belonging to a municipal bond, the petition averred that plaintiff was the *bona fide* holder of the coupon; this was denied by the answer. *Held*, that plaintiff was entitled to show by affirmative proof that he was a *bona fide* holder. Judgment of Circuit Court, W. D. Missouri, affirmed. *County of Macon, plaintiff in error, v. Shores.* Opinion by Swayne, J.

2. **Nul tiel corporation, when plea of, not allowed.**—It was objected by defendant that the corporation for whose benefit the bond was issued was not organized within the time limited by the charter. *Held*, unavailing. It cannot be shown in defense to a suit of a corporation, that the charter was obtained by fraud; neither can it be shown that the charter has been forfeited by misuser or nonuser. Advantage can only be taken of such forfeiture by process on behalf of the State, instituted directly against the corporation for the purpose of avoiding its charter, and individuals cannot avail themselves of it in collateral suits until it be judicially declared. (*Kaiser v. Trustees of Bremen*, 16 Mo. 90; *Smith v. County of Clarke*, 54 id. 58; *Oleott v. Bynum*, 17 Wall. 58.) *Id.*

3. **Presumption of authority to issue bonds.**—Where a corporation has power under any circumstances to sue negotiable securities, the *bona fide* taker has a right to presume they were issued under circumstances which gave the requisite authority, and that they are no more liable to be impeached for any infirmity, in the hands of the holder, than any other commercial paper. (*Supervisors v. Schenck*, 5 Wall. 784; *Herne v. Nichols*, 1 Salk. 289; *Merchants' Bank v. State Bank*, 10 Wall. 646; *Steamboat Company v. McCutchen and Collins*, 13 Penn. St. 13.) *Id.*

NEGLIGENCE.

1. **Evidence of experts: where admissible.**—In an action to recover for the loss of plaintiff's barge, which defendants undertook to tow through Long Island Sound, a witness who had testified that for many years

he had been captain of a tug-boat, and was familiar with the making up of tows; that he was a pilot and had towed vessels on Long Island Sound, and was familiar with the waters of Chesapeake Bay, was asked: "With your experience, would it be safe or prudent for a tug-boat on Chesapeake Bay, or any other wide water, to tug three boats abreast, with a high wind?" *Held*, a proper question. *Clark v. Baird*, 9 N. Y. 183; *Bears v. Copely*, 10 id. 93; *Harris v. Panama R. R. Co.*, 4 Jones & Spencer, 373; *Jackson v. N. Y. C. R. R. Co.*, 2 T. & C. 653; *Moore v. Westcott*, 9 Bosw. 558; *Price v. Hartshorn*, 44 N. Y. 94; *Walsh v. Washington Marine Ins. Co.*, 32 id. 427. Judgment of Circuit Court, E. D., Pennsylvania, affirmed. *Eastern Transportation Line, plaintiff in error, v. Hope.* Opinion by Hunt, J.

2. **Tug-boat towing barge: what care required of tug owner.**—In reply to a request by defendant to charge, the court answered: "By the contract between the parties the defendants undertook to tow the plaintiff's barge from Jersey City to New Haven. As a necessary incident of this engagement the defendants were entitled and were bound to assume supreme control and direction of the plaintiff's boat, and of the persons in charge of her, so far as was necessary to enable them to fulfill their engagement, and they were bound to exercise such degree of diligence and care as a prudent and skillful performance of the service for which they stipulated would require." *Held*, no error. (*Alexander v. Greene*, 3 Hill, 9.) *Id.*

3. **Error in request to charge.**—If a request to charge contains one unsound proposition, it is not error to refuse to make the charge, although it contains many sound propositions. (*Bearer v. Taylor*, 93 U. S. 46.) *Id.*

4. **Neglecting endangered property to save life not negligence contributing to loss of property.**—At the time of the accident the boat of the plaintiff was in danger of sinking; he believed the danger to be imminent, and to save his own life jumped from his boat to the tug, leaving his boat without the care or control of any one on board of his boat. *Held*, that plaintiff was not guilty of contributory negligence so as to defeat a recovery. *Id.*

COURT OF APPEALS ABSTRACT.

ADVERSE POSSESSION.

1. **What is to render void conveyance of lands held adversely.**—A., having a life estate in lands, conveyed them in fee to defendant who took possession and asserted title to the fee. After the death of A., the remainderman conveyed the lands to plaintiff. *Held*, that the conveyance was void, under 1 R. S. 739, § 147, which declares every grant of lands to be absolutely void if, at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor. Judgment below affirmed. *Christie v. Gage.* Opinion by Andrews, J.

2. **Rule of title as to landlord and tenant: when not applicable.**—The rule that a tenant and those claiming under him cannot dispute the title of the landlord has no application to the relation existing between the grantee in fee of a tenant for life and the remainderman or reversioner. (*Jackson v. Harsen*, 3 Cow. 323.) *Id.*

3. **Church corporation conveying lands held adversely.**—The remainderman in this case was a church cor-

poration, and the conveyance was made under the direction of the court. *Held*, not to prevent the transaction coming within the statute. *Ib*.
[Decided Nov. 13, 1877.]

APPEALABLE ORDER.

Order refusing preference in claim against insolvent insurance company.—The petitioner made application to the Supreme Court to have her claim against an insurance company, which was in the hands of a receiver, paid before a distribution of the assets among all the creditors of the corporation. The plaintiff had no statutory right to ask preference for her claim. *Held*, that an order refusing plaintiff's application did not affect a substantial right and was not appealable. Appeal dismissed. *Application of Müller v. Wickham, Receiver.* Opinion by Allen J.

DIVORCE.

1. *Review by Court of Appeals of order allowing alimony.*—While the exercise of the discretion of the court below, in reference to alimony in divorce actions, will not be reviewed in this court, where the facts are such that on general principles of equity a plaintiff is not entitled to demand alimony, the question becomes one of law reviewable in this court. Order below reversed. *Collins v. Collins.* Opinion by Rapallo, J.

2. *Alimony pendente lite: not allowed unless marriage proved or admitted.*—Temporary alimony and expenses are not allowable unless the existence of the marital relation is admitted or proved to the satisfaction of the court. *Brinkley v. Brinkley*, 50 N. Y. 184. Accordingly, where the defendant in answer to the complaint of his wife for divorce set up that they were not married, because at the time the marriage ceremony was performed plaintiff had another husband living, and also that plaintiff had been guilty of adultery, which allegations were not controverted by plaintiff. *Held*, that alimony *pendente lite* and expenses should not be allowed. *Ib*.
[Decided Nov. 20, 1877.]

EMINENT DOMAIN.

Facts necessary to authorize proceedings to acquire land.—Under the statute providing for the acquirement of land for the construction of a ditch or channel necessary for the purpose of drainage (Laws 1869, chap. 888, § 9), it is provided that application may be made to the court for a commission, etc., when the commissioners cannot agree with the owner of the land upon the compensation and damages to which he is entitled. *Held*, that the inability to agree and the reasons for such inability are essential to be stated in the petition, and if the reasons be not stated the court acquires no jurisdiction and the proceedings fail. Order below reversed. *Matter of application of Marsh v. Appleton.* Opinion by Allen, J.
[Decided Nov. 27, 1877.]

LIFE INSURANCE.

Issue of new policies in place of lapsed ones: to whom benefit of, inures.—B, having no title to or interest in certain policies upon the life of plaintiff's husband in his possession, which were for plaintiff's benefit, for the purpose of getting title, arranged with the husband without plaintiff's knowledge, to permit the policies to lapse and to take out new policies to B as creditor of the husband. This was done. The old policies were the consideration and inducement of the new policies, which could not have been obtained without the sur-

render of the old, and the premiums on the new policies were paid in part by a cash dividend on one of the old ones. *Held*, that the new policies in equity simply took the place of the old, and the money payable thereon belonged to the party entitled under the old policies. (Story's Eq. Jur., § 1254, etc.; Bunyon's L. Ins. 302; *Nesbitt v. Beveridge*, 10 Jur. (N. S.) 53; *Norwood v. Guerdon*, 60 Ill. 253; *Chapin v. Fellows*, 36 Conn. 132; *Lenon v. Phantx L. Ins. Co.*, 38 id. 294; *Dutton v. Wilner*, 52 N. Y. 313; *Mitchell v. Reed*, 61 id. 123.) Judgment below affirmed. *Barry v. Brune.* Opinion by Earl, J.

[Decided Nov. 20, 1877. Reported below, 8 Hun, 396.]

LEASE.

Assignment of, as security not required to be filed as chattel mortgage.—Leases for years are chattels real and not mere chattels, and the assignment of a lease is not subject to the same rules as are applicable to a bill of sale or a mortgage upon personal property. Accordingly, where an instrument in writing conveying the interest of M. in the stock and fixtures in certain stores, and also the lease of such stores, was given as a mortgage in security for a debt, was not filed as required by the statute (4 Edm. Stat. at L. 435, 436), *held*, that while it was invalid against the creditors of M., as to the stock and fixtures, it was not so as to the lease, but operated to transfer it. Judgment below reversed. *Booth v. Kehoe.* Opinion by Miller, J.
[Decided Dec. 4, 1877.]

NEGLIGENCE.

1. *Railroad crossing in city: acts of flagman: absence of flagman.*—Irrespective of a city ordinance negligence cannot be predicated of an omission to keep a flagman at a street railroad crossing; but when a flagman has been uniformly stationed at a crossing, the negligence of the flagman to give warning and properly discharge his duty, or in absenting himself from his post, is imputable to the railroad company. Judgment below affirmed. *Dolan v. President, etc., Delaware & Hudson Canal Co.* Opinion by Church, C. J.

2. *How far negligence question of law: how far of fact.*—In reference to the degree of care required in crossing a railroad track at a street crossing it is a general rule that care commensurate with the danger must be exercised, and it is also a general rule that it is the province of the jury and not of the court to determine whether such care has been used. *Ib*.
[Decided Nov. 27, 1877.]

NOTES OF RECENT DECISIONS.

Contributory negligence: burden of proof.—Negligence of a plaintiff, contributing to an injury complained of, is matter of defense, and ordinarily the burden of proving it is on the defendant. Sup. Ct., Pennsylvania, Nov. 5, 1877. *Mallory v. Griffey* (W. Not. Cas.).

Criminal evidence: admissions: failure of arrested person to contradict assertion of accomplice.—The defendants, Malone and McDermott, were indicted for larceny from the person, of a watch. After their arrest they were searched in the station-house. The watch was found upon McDermott. The officer then in the presence and hearing of Malone asked McDermott how he came by the watch, and McDermott replied that Malone gave it to him. Malone said nothing. The counsel for Malone asked the court to rule that this evidence should have no bearing against

Malone. This the court declined to do, and instructed the jury that it was a question whether the conduct and silence of Malone was an admission of the truth of the answer of McDermott, and if so it was evidence for them to consider, giving it such weight as they thought it deserved, otherwise it was to be rejected in considering the case of Malone. The defendant Malone excepted, and the Supreme Court sustained the exceptions, the rescript being as follows: "No inference against the defendant Malone was warranted by his failure to contradict statements made in his presence while he was in custody." Sup. Jud. Ct., Massachusetts, Jan. 2, 1878. *Commonwealth v. Malone*.

Criminal law: assault on officer making arrest without a warrant.—The defendant was indicted for an assault on an officer. He had been taken into custody without a warrant, on a charge of drunkenness, and on a trial therefor was acquitted. The assault was committed while he was under arrest for drunkenness, and counsel contended that as he was acquitted of drunkenness, he could not be found guilty of the assault, because at the time the arrest was made the officer was a trespasser, not having a warrant. In overruling the exceptions the Supreme Court said, "The mere fact that defendant had been acquitted of the 'crime of drunkenness,' which is drunkenness by the voluntary use of intoxicating liquor, was not conclusive evidence that he was not drunk when arrested, nor that the officer was not in the discharge of his duty when he made the arrest." Sup. Jud. Ct., Massachusetts, Jan. 2, 1878. *Commonwealth v. Coughlin*.

Evidence: admissibility of parol, to vary written contract.—Parol evidence is admissible in an action on a writing, to show that at the execution of the writing a stipulation had been entered into, a condition annexed, or a promise made by word of mouth, upon the faith of which the writing was executed, although such evidence may vary and materially change the terms of the contract. Sup. Ct., Pennsylvania, Nov. 12, 1877. *Greenowall v. Kohne* (W. Not. Cas.).

Highway: right of the owner of adjoining land to temporary use of.—The owner of land adjoining a highway may temporarily occupy the highway by placing building materials thereon, and will only be held liable for injuries resulting from a negligent or unreasonable use of his privilege. Sup. Ct., Pennsylvania, Nov. 5, 1877. *Mallory v. Griffey* (W. Not. Cas.).

Sale of personal property: cargo to arrive: misrepresentation: scienter.—Defendants, corn merchants in London, received a telegram from their agents at Gibraltar to the effect that a cargo of rye, shipped for defendants at Sulina, had arrived at Gibraltar in good condition. Defendants advertised the cargo for sale, and, on plaintiffs' agent negotiating with them for the purchase of it, showed him the telegram. Plaintiffs thereupon purchased the cargo, which turned out to be rotten, and was sold by plaintiffs at a loss. Defendants did not know whether or not the cargo had been examined by their agents at Gibraltar; but they knew it was not usual to examine cargoes at a British port of call unless an order was sent to the agent there from the owner; and they had sent no such order in this instance. Held (reversing the decision of the Common Pleas Division), that these facts would not support a count in a declaration before the Judicature Acts for false representation, and that the plaintiffs were not entitled to any equitable relief, not claimed in the pleadings, as having suffered loss through a false representation innocently made by the defendants.

English Ct. Appeal, Nov. 16, 1877. *Schroeder v. Mendl*. (37 L. T. Rep. [N. S.] 452).

Statute of frauds: subsequent part delivery of personal property agreed to be sold.—The subsequent delivery of a part of the personal property agreed to be sold under an agreement within the statute of frauds takes the agreement out of the operation of the statute. Sup. Ct., Minnesota, Dec. 13, 1877. *Gaslin v. Pinney* (N. W. Rep.).

RECENT BANKRUPTCY DECISIONS.

ASSIGNMENT FOR CREDITORS.

Superseded by bankruptcy: validity of judgment.—A general assignment for creditors, without giving priority, is superseded by proceedings in bankruptcy. Where, after a general assignment for creditors has been made, a judgment is recovered in the ordinary course of practice, and without collusion between the debtor and creditor, for the purpose of giving priority, such judgment and the levy under it are good, even as against an assignee in bankruptcy subsequently appointed. New York Sup. Ct. *Dolson v. Kerr, sheriff*, 16 Nat. Bankr. Reg. 405.

BANKRUPT.

Is trustee of his estate until assignee is appointed: may waive demand and notice on bills; beginning suits.—Until an assignee is appointed, the bankrupt is the trustee of his estate for the benefit of his creditors. If he is indorser upon notes or bills which mature before the appointment of an assignee, he may waive demand and notice. *Semble*, that he may, even without leave of court, begin any suits which are necessary to save the statute of limitations, or are otherwise of immediate urgency, although he cannot, without suit, receive payment. U. S. Dist. Ct., Massachusetts. *Ex parte Tremont National Bank; In re Battery*, 16 Nat. Bankr. Reg. 397.

FALSE PRETENSES.

Indictment under § 5132, R. S. U. S.: when it will lie, and what it must charge.—An indictment under section 5132, R. S. U. S., will lie before an order of adjudication in bankruptcy. An indictment for obtaining goods under false pretenses, founded upon the ninth clause of section 5132, need not charge an intent to defraud creditors generally. Such an indictment need not contain the negative averment that the accused was in fact not carrying on business and dealing in the regular course of trade when he obtained credit for goods on false pretenses. U. S. Dist. Ct., E. D. Virginia. *United States v. Myers*, 16 Nat. Bankr. Reg. 387.

JURISDICTION.

By State court: assignee cannot be interfered with by State court.—A State court has no jurisdiction of an action brought against a trustee (or assignee) in bankruptcy to enjoin the collection of the assets of the bankrupt. The assignee holds the assets as an officer of the court which appointed him, and his possession and management thereof cannot be interfered with by the State courts. Although the assignee may prosecute or defend a suit pending at the time of adjudication, he is not compelled to resort to the State court before which it was pending, but may apply directly to the Federal courts. Sup. Ct., South Carolina. *Southern v. Fisher*, 16 Nat. Bankr. Reg. 414.

PREFERRED CLAIM.

Fund already drawn on.—The bankrupt, nearly a year before the petition was filed, left for collection

with his attorney a note signed by a third person, and subsequently drew several orders upon him payable out of the proceeds thereof. *Held*, that the holders of the orders were entitled to payment out of such proceeds, in preference to the assignee. U. S. Dist. Ct., Massachusetts. *In re Smith*, 16 Nat. Bankr. Reg. 399.

SET-OFF.

Deposits in bank by debtor to bank: composition: liquidated and unliquidated debts.—Upon the bankruptcy of a depositor his deposit becomes a security for the payment of his indebtedness to the bank. Such deposit should be set off against the aggregate debt to the bank, not including any notes upon which the bankrupt is surety, unless the principals are insolvent. A bankrupt in a composition case in which no assignee has been appointed stands in the position of an assignee in respect to set-off. *Seemle*, that if the bank holds mere contingent debts or liabilities, or a claim for unliquidated damages arising upon contract, it may retain the deposit until the amount of its provable debt can be ascertained, and may then use it as a set-off. U. S. Dist. Ct., Mass. *Ex parte How. Nat. Bank; In re North*, 16 Nat. Bankr. Reg. 420.

TITLE.

To property of bankrupt: assignee takes subject to legal claims.—The assignee takes the property of the bankrupt as an attaching creditor would take it, subject to all legal claims upon it. The bankrupt made a contract with S. & Co. to manufacture hides into leather for them, the hides to be purchased with the proceeds of drafts upon S. & Co.; the drafts were discounted at a bank, and the proceeds thereof placed to the credit of the bankrupt in his general account; the hides purchased were paid for by checks upon such account. *Held*, that the hides were purchased for S. & Co. and became their property; that it is not necessary that the agent should pay out the identical bank notes he receives from his principal. Where some of the hides were purchased with the proceeds of drafts which S. & Co. refused to accept, their title to such hides is not affected by such fact, but they become debtors to the estate or to the bank advancing the money. The title to the leather, when completed, passes under the arrangement for the purchase of the hides. U. S. Circ. Ct., Vermont. *Safford v. Burgess*, 16 Nat. Bankr. Reg. 402.

RECENT AMERICAN DECISIONS.

SUPREME COURT OF WISCONSIN — DECEMBER 6, 1877.*

BAILMENT.

Possession essential to a pledge.—Possession by the pledgee is essential to a pledge; actual possession when practicable; constructive possession when actual possession is impracticable. *Seymour v. Colburn*. Opinion by Ryan, C. J.

NEGLIGENCE.

1. *Liability of master for acts of servant.*—A principal is liable in compensatory damages for injuries done by his servant acting within the scope of his employment; and, if the act is such that the servant would be liable in punitive damages, if the action were against him, the principal is liable in damages of that character in case he authorized the act or subsequently ratified it, but not otherwise. (*M. & M. R. R. Co. v.*

Finney, 10 Wis. 388; *Craker v. Railway Co.*, 36 id. 657; *Bass v. Railway Co.*, 39 id. 636.) *Bass v. C. & N. W. Railway Co.* Opinion by Lyon, J.

2. *Retention of servant in employ after notice of tortious acts: punitive damages.*—Where a railroad company retained a brakeman in its service, and even promoted him to a position of greater responsibility, after notice of tortious acts committed by him against a passenger, for which he would be liable in punitive damages, there was no error in submitting to the jury, in an action against the company, the question whether it had ratified such acts. *Ib.*

3. *Violent expulsion of passenger from railroad car.*—Plaintiff was a passenger upon a train of the defendant company, and, there being no vacant seat in any passenger car, except the smoking car and the rear or ladies' car, he entered the latter peaceably, without being forbidden or barred from entering it by any officer or agent of the company; while he was there, and while the train was in motion, a brakeman seized him, and, without requesting him to leave the car, or offering him a seat elsewhere, forcibly ejected him from the car, upon the platform thereof, in a rude and violent manner, though without any intent to inflict bodily injury upon him, and using no more force than was necessary to get him out of the car. *Held*, that the injury was one which, in an action against the brakeman, would sustain a verdict for punitive damages. *Ib.*

4. *When notice to conductor of train notice to the railway company.*—In case of the misconduct of a brakeman toward a passenger on a railroad train, immediate notice to the conductor of the train (by whomsoever given) is notice to the company; and if the conductor or other officer of the company, after such notice, disbelieves the charge made against the brakeman, still the retention of the latter in its service by the company will be at its peril of the fact. *Ib.*

5. *Service of complaint notice of facts stated therein.*—A verified complaint, duly served, in an action against the company for the misconduct of its servant, is notice of such misconduct; and where, after such service, the servant is retained and promoted, these facts may be put in evidence to show ratification of his act. *Ib.*

PERSONAL PROPERTY.

Rights of action ex delicto, not.—"Things in action," in the statutory definition of personal property (subd. 14, § 1, ch. 5, R. S.), comprise only such rights of action as may be the subject of sale and transfer, and not mere rights of action *ex delicto*, for personal wrongs; and the latter are not included in the personal property owned by a woman at the time of her marriage, which (by § 2, ch. 95, R. S.) continues to be her sole and separate property after marriage. *Gibson v. Gibson*. Opinion by Ryan, C. J.

RAILROAD.

1. *Railroad company seizing land without having acquired title liable in trespass: waiver.*—Where a railroad company, without the consent of the owner, and without having acquired a right to the land in the manner provided by statute, takes possession of land for which it is liable to make compensation (in this case land forming part of a public street, but the fee of which was in the plaintiff), it is liable in an action of trespass; and the neglect of the owner to proceed by injunction to restrain the company from constructing its road on such land is not a waiver of his

* From O. M. Conover, State Reporter, and to appear in 42 Wisconsin Reports.

right of action for the trespass. (*Sherman v. The M., L. S. & W. Railway Co.*, 40 Wis. 645, and earlier cases in this court.) *Blesch v. C. & N. W. Railway Co.* Opinion by Cole, J.

2. *Damages recoverable in such action.*—In this action for such a trespass it was error to give instructions implying that the plaintiff was entitled to recover the difference between the value of the use of the premises with the railroad constructed and used as it was, with all its inconveniences, and the value of such use as it would have been with the railroad where it was, but without such inconveniences. The damages recoverable in this case could not exceed the difference between what would have been the rental value of the premises (during the continuance of the trespass, down to the commencement of the action), in case there had been no railroad on the street, and its actual rental value with the railroad constructed and operated as it was. The fact that only a part of the width of defendant's track was upon plaintiff's land will not affect the rule of damages. *Ib.*

SURETYSHIP.

Official bond given by constable.—The liability of a surety cannot be extended by construction or doubtful implication. By the conditions of a bond duly given by P. as a constable, he and his sureties jointly and severally agreed to pay to the persons entitled thereto, "all such sums of money as the said constable (might) be liable to pay by reason of or on account of any summons, execution or other process or proceeding which (should) be delivered to him for collection, and for all moneys which (should) come into his hands as such constable." *Held*, that no action will lie upon the bond for the amount of a judgment recovered by plaintiff against P. for the value of plaintiff's property seized by P., under an attachment against the goods of a third person. *It seems* that the bond would cover a breach of duty by the constable not only in omitting to serve a *fi. fa.*, but also in omitting to serve a summons or other process. *Taylor v. Parker.* Opinion by Cole, J.

NEW BOOKS AND NEW EDITIONS.

SMITH ON CONTRACTS—SIXTH EDITION.

The Law of Contracts. By John William Smith, Esq., late of the Inner Temple, Barrister at Law, author of "Leading Cases," "A Treatise on Mercantile Law," etc. Sixth American, from the sixth London edition, by Vincent T. Thompson, Esq., M. A., of Lincoln's Inn, and of the Midland Circuit, Barrister at Law. With notes and references to both English and American decisions by William Henry Rawle. And with additional notes and references to recent American cases by George Sharswood, LL. D. Philadelphia: T. & J. W. Johnson & Co., 1878.

THE reputation of John William Smith for extensive legal knowledge and ability of the first order is such that every work with which his name is associated is accepted, without question, as being as excellent an exposition of the subject-matter contained therein as could be produced. We are not surprised, therefore, that since the publication of the work before us, in 1846, the unusual (for a law book) number of six editions should have been required to meet the demand of the profession. The treatise is too well known in every country where the common law prevails to require any recommendation from us. Like several other elementary works familiar to all, it is made up of lectures prepared for delivery to law students. It was not printed until after the death of Mr.

Smith. For the student it is undoubtedly the best text-book upon the law of contracts. The additions and annotations made by the American editors are uniformly excellent, and have fitted the work for use on this side of the water. The citations of authority in this edition appear to embrace all the important late cases, and are as full as is to be expected in an elementary work of this character. The details, indeed, of the law of contracts are not as thoroughly considered as in the treatise of Professor Parsons, but the general principles are stated clearly and logically, and the annotations of the editors render the book sufficiently comprehensive to answer the purpose of almost any reader or student. The work is well indexed and excellently printed and bound.

THE AMERICAN LAW REVIEW.

The American Law Review, January, 1878. Editors Moorfield Story, Samuel Hoar. Vol. XII, No. 2. Boston: Little, Brown & Co.

The January number of this excellent periodical contains several articles of importance and value. "The amendment of the Patent Law," by Chauncey Smith, is an elaborate review of the history and present condition of the American law regulating patents, with suggestions for improvement. "Jeremiah Mason and the Bar," by C. H. Hill, is an interesting collection of reminiscences of the distinguished lawyer whose name is mentioned, and of those, from time to time, associated with him in one way or another. "The Parliaments of France," by James Beck Perkins, is an instructive and entertaining description of a tribunal long since passed away. "Liquidated Damages," by John Profatt, is the concluding article. The case law in relation to the subject is considered at length, but the points intended to be presented are not stated with sufficient clearness to render the article of great importance or value. The digests of English, State and Bankruptcy decisions, as usual, constitute a valuable feature of the Review. The book notices are well written, and conscientiously critical, and the summary of events is very readable and presents in a brief form the leading legal events of the past three months in various parts of the world.

CORRESPONDENCE.

THE NEW GRAMMAR OF THE CODE.

To the Editor of the Albany Law Journal:

SIR—I did not intend, after my "extraordinary attack on the grammar of the New Code," to trespass further on your space. But, as the mild sarcasm of "An Enlightened Ignoramus" has been followed by the gentle raillery of "H. F.," and as the subject has aroused considerable discussion among lawyers, I think in justice to myself I should write a few last lines in reply. Putting aside the temptation to indulge in a little pleasantry at the expense of my adversary's first Dogberry-like *nom de plume*, I pass on to his assertion that I am not "familiar with the new grammars" (names of authors not given). I did not know that there was a new grammar any more than a new multiplication-table; but I have read the last editions of most of the standard grammars, including Brown, Kerl, Clark, and, last of all, Swinton, and find that they all retain the poor "old fashioned statutory subjunctive." That any reputable grammar can sanction such a phrase as (sec. 450 New Code) "A married woman appears * * * as if she was single," we can

scarcely believe. The statement that Mr. Field only arrived at "mature judgment" in 1865 seems to me in rather doubtful taste. But "Ignoramus" entirely misapprehends the point of my letter. I did not say that the best writers never made a confusion between the indicative and the subjunctive, or that overworked judges could spend time in polishing their sentences, but I *did* say that a *statute*, on account of its great importance, should be perfect in form, and I do now further say that a code in conversational style is a disagreeable novelty. And now a few words to "H. F." who playfully hurls at my head an old edition of Webster's dictionary. The introduction he so much admires is now a thing of the past, having been omitted in the last edition of the great dictionary. The brief statement about the subjunctive in the new edition (page xxvii) covers but a small portion of the ground. All the examples cited in the old introduction prove simply that there has been in the minds of many good writers great doubt as to the employment of the subjunctive, some even, in the same sentence, using both the correct and incorrect form. But what did the introduction propose? Merely to use the indicative form when the *present* or the *past* is referred to. But in regard to a future contingent event, when the old form of the subjunctive properly applies, Webster proposed, "If it *shall*," "If it *should*," etc. Even Swinton, the newest of "the new grammars," does not follow Webster in this. I now close this discussion, so far as I am concerned, hoping that when I next meet "An Enlightened Ignoramus," and his ally, they can find more formidable weapons than a phantom grammar and an old dictionary. T. C.

NEW YORK, January 7, 1878.

NOTES.

WE have received the first number of a new Canadian law periodical, entitled *The Legal News*. It is published weekly at Montreal by Messrs. T. & R. White. It contains sixteen pages royal octavo, and is excellently printed upon good paper. Its contents comprise leading articles upon legal topics, notes and comments upon legal news, condensed reports of interesting and important decisions rendered by the courts of the various British American provinces, and notes of the leading decisions of the courts of the United States, England and France. It is well and carefully edited, and is, we should judge, just what the profession in Canada need, and we trust it will be heartily sustained by them.

The following is a list of the first fifty causes on the Court of Appeals calendar made for January 15, 1878: CLASS 1—*Criminal Actions*.—No. 1, Phelps v. People; 2, People v. Brown; 3, Polinsky v. People; 4, People v. Casey; 5, People v. New York C. and C. Railroad Company. CLASS 2—*Probate Cases*.—No. 6, Jones v. Smith; 7, Horn v. Pullman; 8, Auburn City National Bank v. Hunsiker; 9, Sutton v. Ray. CLASS 3—*Executors and Administrators*.—No. 10, Erie Railroad Company v. Vanderbilt; 11, Kraushaar v. Meyer; 12, Field v. Field; 13, Ellwell v. Van Liew; 14, Davis v. Van Buren; 15, Kohler v. Matilage; 16, Scholey v. Halsey; 17, Craighead v. Peterson; 18, Sherwood v. Agricultural Insurance Company; 19, Brewer v. Penman; 20, Law v. Harnomy; 21, Holden v. New York and Erie Railroad; 22, Mehan v. Syracuse and C. Railroad Company; 23, Jordan v. Valkening; 24, Boran v. Cooper; 25, Wallace v. Freeland; 26, Schofield v.

Doscher; 27, McNulty v. Hurd; 28, Townsend v. O'Connor; 29, Dorrity v. Rapp; 30, The People v. Starkweather; 31, Moore v. Hegeman; 32, Adair v. Brimmer; 33, Kettletas v. Kettletas; 34, Cook v. Sanderson; 35, Evans v. Cleveland; 36, Shakespeare v. Markham; 37, New v. Nicholl; 38, Read v. City of Buffalo; 39, First National Bank of Chittanooga v. Morgan; 40, Samuels v. Northern Central Railroad Company; 41, McMurray v. Noyes; 42, Fordham v. Hendrickson; 43, Beers v. Shannon; 44, Hastings v. Westchester Fire Insurance Company; 45, Munson v. Lutell; 46, Garvey v. McDevitt; 47, Sturgis v. Vanderbilt. CLASS 4—No. 48, The People ex rel. Thompson v. The Board of Supervisors of Hamilton county. GENERAL CALENDAR.—No. 49, Young v. Hunt; 50, Booth v. Farmers and Mechanics' National Bank.

A false alibi was recently successful in a trial in London. Two men were indicted for housebreaking at Wood Green, on the night of Sunday, October 21. They were positively identified by three persons, who saw them under very favorable circumstances going to and coming from the house with a cart drawn by a brown pony. A fourth man, who knew one of the prisoners well, swore that he saw him in his cart four miles from his house, and that he read the name on the cart. The three who saw them near the spot had no previous knowledge of them, but at once gave a full description to the police, who recognized the prisoners as answering that description; and then it was found that they were brothers-in-law, living near together, and had a cart and a brown pony exactly like that seen by the witnesses. This appeared to be conclusive proof; but it was met, as usual where the criminals are not caught at the time, by an *alibi*. Twelve witnesses, chiefly relatives and friends, were called to prove that two hours before the robbery the prisoners were at home and there remained for the night. They were unshaken as to any of the incidents of the evening and it was clear that, if the *alibi* was not a true one, it had been contrived by transferring to the Sunday in question the history of some previous Sunday. As most of the witnesses had been out of doors on that night, it occurred to one of the magistrates on the bench to question them as to the state of the weather, when, being unprepared on this point, all agreed in describing it as a rough, wet, and dark night. An almanac was sent for and it was found that the moon was then at full; but no person present could remember what was the weather and the prisoners were acquitted. The next morning the deputy assistant judge received a letter from a gentleman who had heard the trial, stating that he kept a diary of the weather, and that on his return he had referred to it, and that on the 21st (the day in question) the moon was at full, and the night fine and light; but on the previous Sunday was gusty and rainy, as described by the witnesses. The judge said that he also kept a similar diary, and that he would examine it and inform the jury of the result. When the court next met he said that his diary showed the 21st to have been fine and bright; but the 14th was the night of the great hurricane. His residence was only five miles from the scene of the robbery, and, therefore, the state of the sky must have been the same. This left no doubt that the incidents described for the *alibi* occurred on Sunday, the 14th, and not on Sunday, the 21st, as sworn, and that there had been a miscarriage of justice. The case is interesting, as showing how difficult it is to meet an *alibi* based upon a mere change of time. It is also instructive as giving a useful hint for one method of defeating it.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, JANUARY 19, 1878.

CURRENT TOPICS.

WE should judge from what is said in the *Solicitors' Journal*, that the English bench and bar are, after a two years' trial, fully satisfied with the working of the judicature reforms. The intermediate appellate court has been found fully equal to keeping up with the business sent to it, and possesses in a high degree the confidence of the profession. The final Court of Appeals (the House of Lords) is declared to have but one defect—it keeps the highest judicial talent comparatively unemployed. The result of increased experience of the new system of pleading and procedure is equally favorable. That system not only strangles at an early stage undefended actions, and compels parties to show their hands, but it has recently achieved the triumph of pushing a chancery action through the several stages of writ, pleading, notice of trial and hearing, in less than two months, a result which the English editor declares "approaches as near to a legal millennium as could be expected." We are glad to know that the experience of the profession in England in this matter has been so satisfactory, as it affords overwhelming evidence in favor of the superiority of a system of practice under a code. We have in this State long appreciated the advantages possessed by the system in force here over that prevailing in the New England and some other States but we could not persuade those living where the common law still has sway of the truth known to us. The testimony of the profession in England will, we trust, prove more persuasive than ours.

The lower house of the Pennsylvania legislature is engaged in a controversy somewhat similar to that between the Assembly in this State and Judge Potter occurring some years ago. Representative Bullard, of Delaware county, who was arrested upon a charge of embezzlement, claimed exemption on the ground of privilege, alleging that he was at the time of arrest on his way to the State capital to attend to his official duties. Judge Clayton, of Delaware county, refused to discharge him, notwithstanding the request of the judicial committee of the House, and the sergeant-at-arms has been directed to bring the imprisoned member before the House to argue the question of privilege.

The judges of Philadelphia have asked the legislature of their State to abridge the powers conferred upon them. Under the law, as it exists at present, they are charged with the appointment of a number of local officials. They say that a just regard for the independence of the judicial office and for the preservation of public confidence in the administration of justice and of respect for the constitutional and legitimate authority of the judiciary requires that they be relieved from the duty mentioned.

We supposed that in the matter of dishonest lawyers America was in advance of the old world, but a solicitor in London, named Dinsdale, has eclipsed all of our rascals. He is charged with manufacturing and disposing of fictitious leases to the amount of over \$1,500,000. Numerous parties have parted with money on the faith of these leases which were ingeniously forged. There being no recording act in force in London, the fraud was not immediately discovered, which accounts for the extent of the transactions.

Section 1244 of the new Code, requiring that "a conveyance of property sold by virtue of an execution or sold pursuant to a judgment, must distinctly state in the granting clause thereof whose right, title or interest was sold, and is conveyed without naming in that clause any of the other parties to the action," has given so much trouble to those foreclosing mortgages that compliance therewith in all cases has been thought by many impracticable. The General Term of the Supreme Court in the First Department, in the case of *Randell v. Von Ellert*, decided on the 11th inst., has given an exposition of the meaning of the section which will render its practical application easy hereafter. The purpose of the statute will ordinarily be effected, says the court, "by stating that the interest sold is that which the mortgagor had at the time when the mortgage was recorded."

The report of the Commissioner in Lunacy to the legislature makes some very valuable suggestions in respect to the laws relating to insane persons, which we trust will be carefully considered by our law-makers. We refer more especially to the recommendation to create the office of Master in Lunacy, as it exists in England, and the remarks made on the relations of insanity to crime. He recommends, in substance, that power be conferred upon the Supreme Court in each Judicial Department to appoint a certain number of Masters in Lunacy, who shall be experts, and to whom all issues involving questions of insanity shall be referred. The subtlety, delicacy and difficulty of such questions render it necessary that their examination be intrusted to

men specially trained, and in no other way can they be so conveniently had as by the method suggested by the Commissioner. The duty of the State to those unfortunate beings, who are criminal because they came into the world mentally deformed, is strongly urged. The Commissioner presses the idea that punishment will not reform these persons, because there is no basis upon which to perform work. A prison is not, therefore, the place for them, and it would be a step in the way of prison reform to periodically weed out from the inmates of penal institutions all persons of doubtful mental capacity, and transfer them to the State asylum for insane criminals. The Commissioner in Lunacy, Dr. Ordronaux, has shown himself thoroughly well fitted for the position he occupies, and we trust he will long remain there.

Dr. Spear's second article on Extradition gives a general view of the Extradition treaties of the United States and the laws enacted by Congress for carrying them into effect. Following this, the learned writer will discuss the specific question that was the matter of dispute between Mr. Secretary Fish and Lord Derby, in several articles treating of "The Extradition Remedy"; "Extradition Cases;" "The Cases of Caldwell and Lawrence" and "The Cases of Lagrave and Hawes." Dr. Spear is a thorough student of Constitutional and International law, and his contributions to the literature of those subjects place him in the ranks of the foremost thinkers and writers of the age. The subject to which his attention is now devoted is one not alone of interest to jurists, but of immediate practical importance to every lawyer who has a client or who hopes to have one; and the treatment which it will receive at his hand will, we are confident, satisfy the expectations of both the theorists and the lawyers.

The excise law still occupies the attention of the legislature, several bills for the amendment or repeal of the existing statutes now being before that body. Comparatively few bills of general interest relating to other subjects were brought forward during the past week. We only notice these as worthy of mention: One to organize a bureau of statistics; one to prevent frauds in the sale of fertilizers, and one for the punishment of tramps. The latter bill provides for the establishment of two State workhouses, and the commitment of vagrants thereto by police magistrates.

The bill in relation to vagrants introduced in the legislature is stringent enough in its provisions to suppress the tramp nuisance, that is, if severe penalties, with a possibility of the prompt enforcement

thereof, will have that effect. By it police magistrates and justices of the peace are required to commit those convicted of vagrancy to the work-house for not less than ninety days; for a second offense not less than six months, and for the third offense an indefinite time, it being provided that no term shall be stated in the commitment. Vagrant laws of a stringent character, passed in Maine and Illinois, have been declared unconstitutional. We trust that any enactment of our legislature upon the subject may not be open to the same objection.

The Court of Appeals resumed its sitting on the 15th inst. On that day it handed down a large number of decisions, among which were those in the cases of *People v. Lord* and *People v. Stephens*, known as the canal contract cases. By these decisions the judgments of the court below, nonsuiting plaintiff, were affirmed.

It seems that there is some legal limit to the authority of revenue officials to intrude upon private premises in search of evidence of violations of the revenue law. In *United States v. Mann*, just decided by the Supreme Court of the United States, an abstract of which appears in our present number, it is decided that a bank officer who refused to permit a collector to come into the bank and look over the checks which had been paid in, to see if he could find any which had no stamps on, did perfectly right, and was liable to no penalty for his action. The case will be given in full in our columns at an early date.

In Congress nothing is being done of interest to the profession, the attention of that body apparently being absorbed in the measures before it, having reference to financial questions. This is to be regretted, as the proposed reforms in the organization of the federal judiciary and the legislation amending or repealing the bankruptcy law, are liable to be postponed until another session. The practicing lawyers in Congress should see that this is not done. That the financial laws of the nation are in need of amendment is possible, though there is a great conflict of opinion both as to the fact of this need, and if it exists, what changes should be made, but in respect to the pressing necessity for a radical change in the national judicial organization there is no dispute whatever. As to the bankruptcy law there is no disagreement in regard to the propositions that it is in many features not what it ought to be, and that its operation is not productive of as much good as could be wished, but as to the remedy for these things there is a want of harmony. We believe, however, that outside of a small body of interested persons, there are very few either lawyers or

business men who would mourn over the absolute repeal of the law. In some other matters of interest to the profession legislation is wanted, but if the present Congress will enact Senator Davis' bill for the reorganization of the courts and repeal of the bankruptcy law, it will be entitled to the thanks of all.

NOTES OF CASES.

IN the case of *Loy v. Home Ins. Co. of Columbus*, 2 N. W. Rep. 83, decided on the 18th ult. by the Supreme Court of Minnesota, plaintiff held a policy of insurance given by defendant upon her dwelling-house containing the following clause: "If the property be sold or transferred or any change take place in title or possession whether by legal process or judicial decree or voluntary transfer or conveyance this policy shall be void." The court held (1) that the policy was not avoided by a mortgage upon the property, given after it was issued, and (2) that the foreclosure of such mortgage by advertisement and a sale of the premises on such foreclosure, the period of redemption not having expired and no change having taken place in the possession, did not operate as a sale, transfer or change in title within the meaning of the clause so as to defeat a recovery for a loss accruing after the foreclosure sale and before the expiration of the time of redemption. The grounds of the decision were these: First the clause being inserted by the defendant for its benefit and in language of its choice must be construed strictly against it and liberally in favor of the assured. See *Hoffman v. Utica Ins. Co.*, 32 N. Y. 405; *Westfall v. Hudson Riv. Ins. Co.*, 2 Duer, 495; *Ins. Co. v. Wright*, 1 Wall. 456; *Western Ins. Co. v. Cropper*, 32 Pa. St. 351. Second, the clause prohibits only a complete transfer of the title and not a lien or incumbrance, and the foreclosure by advertisement was not a legal process or a judicial decree, nor did it operate to transfer title until the time for redemption has expired. See as sustaining the view taken as to the effect of the mortgage, *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; 4 Am. Rep. 582, where it is held that a mortgage upon property insured is not in violation of a clause forbidding sale, conveyance, alienation, transfer or change. Also, *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164; 5 Am. Rep. 115; *Smith v. Mut. Fire Ins. Co.*, 50 Me. 96; *Masters v. Madison Ins. Co.*, 11 Barb. 624; *Rollins v. Columbian Ins. Co.*, 5 Post. 204; *Ayers v. Hartford Fire Ins. Co.*, 17 Iowa, 180. In *Kane v. Hibernia Mut. Ins. Co.*, 20 Am. 409, it was declared in a policy conditioned to be void in case of alienation of the insured property, that "a judgment of foreclosure" should be deemed an alienation. It was held, however, that a decree in a foreclosure suit without further proceedings was not

an alienation. See *McIntire v. Norwich Ins. Co.*, 102 Mass. 280; 8 Am. Rep. 458.

In the case of *Ex parte Dement*, 6 Cent. L. J. 11, recently decided by the Supreme Court of Alabama, it is held that a physician, like any other person, may be called to testify as an expert in a judicial investigation, whether it be of a civil or criminal nature, without being paid for his testimony as for a professional opinion, and upon refusal to testify is punishable as for a contempt. This conclusion is supported by authority. In *Collins v. Godefroy*, 1 B. & Ad. 950, plaintiff, an attorney, who had attended six days on subpoena as a witness for defendant, to testify in respect to the negligence and unskillfulness of another attorney, sued for a fee of six guineas, which there was evidence that defendant had agreed to pay him. The court of King's Bench said: "If it be a duty imposed by law upon a party regularly subpoenaed to attend from time to time and give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance, is a promise without consideration. We think such a duty is imposed by law, and that a party cannot maintain an action for compensation for loss of time in attending trial as a witness." But see *Webb v. Page*, 1 Carr. & Kirw. 23, where it is said: "There is a distinction between the case of a man who sees a fact and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion about a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound as a matter of public duty to speak to a fact which happens to fall within his knowledge. Without much testimony the course of justice must be stopped. The latter is under no such obligation. There is no necessity for his evidence, and the party who selects him must pay him. And in *Matter of Roelker*, Sprague's Decis. 276, the court says: "When a person has knowledge of any fact pertinent to an issue to be tried, he may be compelled to attend as a witness. In this all stand upon equal ground. But to compel a person to attend merely because he is accomplished in a particular science, art or profession, would subject the same individual to be called upon in every cause in which any question in his department of knowledge is to be solved." See, also, *Lonergon v. Royal Exch. Ins. Co.*, 7 Bing. 731; *Elwell Med. Juris.* 592; *Ordranax Juris. of Med.*, § 118; *Lyon v. Wilkes*, 1 Cow. 591. In a paper on the "Testimony of Experts," read before the Academy of Arts and Sciences, the late Prof. Washburn said: "Nor do I understand that a party has a right to call upon a man of skill or science to exercise these in the trial of an ordinary question involving the right to property, or damages of a personal character, by simply summoning him, and tendering him the ordinary fees of a witness in court."

EXTRADITION TREATIES AND LAWS.

BY SAMUEL T. SPEAR, D. D.

THE President of the United States, subject to the advice and consent of the Senate given by at least two-thirds of the Senators present, is authorized to make treaties with foreign nations. To Congress is delegated the power of making "all laws which shall be necessary and proper for carrying" these treaties into execution. These two grants of power are the constitutional sources of all the treaties and all the laws of the United States relating to the international extradition of fugitive criminals.

The volume of Public Treaties, published under the authority of Congress in 1875, contains the treaties of the United States in force on the 1st of December, 1873; and of these, twenty-four make provision for international extradition. Stated in the order of their respective dates, and designated by the foreign nations with which they were made, they are the following:—Great Britain, August 9th, 1842; France, November, 9th, 1843, with a supplementary article, February 24th, 1845, and another article, February 10th, 1858; Hawaiian Islands, December 20th, 1849; Swiss Confederation, November 25th, 1850; Prussia and other States, June 16th, 1852; Bremen, September 6th, 1853; Bavaria, September 12th, 1853; Wurtemberg, Oct. 13th, 1853; Mecklenburg-Schwerin, November 26th, 1853; Oldenburg, December 30, 1853; Schaumburg Lippe, June 7th, 1854; Two Sicilies, October 1st, 1855; Hanover, January 18th, 1855; Austria, July 3d, 1856; Baden, January 30th, 1857; Sweden and Norway, March 21st, 1860; Venezuela, August 27th, 1860; Mexico, December 11th, 1861; Hayti, November 3d, 1864; Dominican Republic, February 8th, 1867; Italy, March 23d, 1868, with an additional article, January 21st, 1869; Nicaragua, June 20th, 1870; Orange Free State, December 22d, 1871; and Ecuador, June 28th, 1872.

To these are to be added the extradition stipulation of May 23d, 1870, with San Salvador; that of September 12th, 1870, with Peru; that of March 19th, 1874, with Belgium, and that of August 11th, 1874, with the Ottoman Empire.

The one common purpose of all these stipulations is to establish, as between the contracting parties, the reciprocal right, upon the terms specified, to demand and impose a corresponding obligation to deliver fugitive criminals who, having committed offenses within the territorial jurisdiction of the one, have fled from justice and sought refuge within that of the other. How far a political sovereignty shall concede the right and assume the obligation is always a question for its own determination. The modern practice of nations is to settle the point by treaties beforehand, in which they pledge their faith to each other, and define the

cases in which, and the conditions upon which, extradition will be granted. This is the only basis of such extradition acknowledged by the United States.

The crimes specified in the twenty-four extradition stipulations contained in the volume of Public Treaties, are the following:—1. Arson. 2. Assassination. 3. Assault with intent to commit murder. 4. Burglary. 5. Circulation or fabrication of counterfeit money. 6. Counterfeiting public bonds, bank bills, securities, stamps, dies, seals, and marks of state and administrative authority, etc. 7. Embezzlement of the public money. 8. Embezzlement by public officers. 9. Embezzlement by persons hired or salaried. 10. The utterance of forged paper. 11. Forgery. 12. Infanticide. 13. Kidnapping. 14. Larceny of cattle or other goods and chattels of the value of twenty-five dollars or more, found only in the treaty with Mexico. 15. Mutiny. 16. Murder. 17. Mutilation, 18. Parricide. 19. Piracy. 20. Poisoning. 21. Rape. 22. Robbery.

These crimes are designated by titles known and acknowledged, as between the contracting parties to mean the same offenses, or they are made the subjects of special description. When the designation is simply by titles, and these titles are furnished by different languages, titles that are equivalents in meaning are used. These names mean things; and neither of the contracting parties can, by local legislation, change the nature and character of the crimes that are the subjects of the stipulation, and thus in effect create new ones, and then claim extradition for these new crimes on the mere basis of names. Sometimes, for the purpose of greater certainty, extradition crimes are specifically defined. Thus, in the supplemental article of February 24th, 1845, added to the treaty of 1843 with France, burglary is placed in the extradition list, defined to be "breaking and entering by night into the mansion-house of another with intent to commit felony." Should either government, for its own purposes, see fit to establish a different grade of burglary, the offense would not be the one defined in the treaty, and, hence, would not, under the treaty, be an extradition crime. It was on this ground that Judge Fancher, in *Lagrange's Case*, 14 Abb. Pr. R. N. S. 383, said that the crime of burglary, in the sense meant in the treaty with France, "refers to the common law offense of burglary," and that the treaty does not "provide for the demand and extradition of a fugitive for our statutory offense of burglary in the third degree." The proceedings in this case he held to be "unauthorized and illegal," because the crime charged was not the one specified in the treaty.

The general rule of evidence adopted in the extradition treaties of the United States is, that the charge of criminality on which the demand for delivery is based, must be supported by such evidence

as would justify the apprehension and commitment for trial of the person accused, if the alleged offense had been committed in the country on which the demand is made. The laws of that country, and not those of the one making the demand, furnish this rule; and in this respect each government administers its own laws without reference to those of the other. The obligation of delivery is qualified by this rule, since it is a part of the contract. Many of the treaties of the United States, for the purpose of applying the rule, expressly authorize "the judges and other magistrates" of the contracting governments to issue their warrants for the apprehension of accused persons, to examine into the question of their alleged criminality, and, if satisfied that the evidence is sufficient to detain them for trial, to certify this fact to "the proper executive authority." Other treaties give the rule of evidence, but contain no such provision for its application, and hence leave the matter to be determined by legislation in each country.

The actual delivery of fugitive criminals is, in all these treaties, to be preceded by a demand of one government upon the other, made by ministers or officers duly authorized. The stipulation is to deliver such fugitives, "upon mutual requisitions," in the cases and upon the evidence specified. Who shall make this delivery? Ten of these treaties expressly assign this duty to the executive authority of the respective governments; twelve of them do so, not expressly, but by obvious implication; and in two of them there is no mention of the authority by which the delivery shall be made.

There are also special qualifications, found in some of these treaties, which limit their application as to crimes and persons. Fourteen of them expressly exclude political offenses from the list of extradition crimes, with the exception that, in the treaty with the Two Sicilies, it is provided that such offenses shall be excluded "unless the political offender shall also have been guilty of some one of the crimes enumerated in article twenty-two." Eight of them declare that the stipulation shall not apply to offenses committed before the date of the treaties. One of them provides that no surrendered person shall be tried for any offense committed previously to that for which extradition was demanded; and two of them apply the same principle in respect to "any ordinary crime" committed before the one stated in the requisition. Fourteen of them exclude from extradition the citizens or subjects of the country on which the demand is made; and sixteen provide that, in cases in which the persons demanded have committed crimes within the jurisdiction of the country whose asylum they have sought, extradition may be deferred until after their acquittal or punishment. Four of them declare that the extradition stipulations shall not be affected by subsequent treaties respecting naturalization. All these

treaties, with the exception of five, relate simply to fugitives charged with crime and demanded for trial; and in these five express provision is made that extradition shall extend also to fugitives convicted of crime, with the requirement that, in such cases, an authenticated copy of the sentence of the court shall be the evidence of the fact.

This outline sketch presents the general features and characteristics of the extradition treaties of the United States. Some things are common to them all, and others are the peculiarities of particular treaties.

The first of these stipulations is the one found in the twenty-seventh article of the treaty of 1794 with Great Britain, which, by the next article, was limited to the period of twelve years, and hence ceased to be operative after 1806. The article reads as follows:

"It is further agreed that His Majesty and the United States, on mutual requisitions, by them respectively, or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offense had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the fugitive."

This contract specified murder and forgery as the crimes for which extradition might be demanded. It designated the agency through which the demand might be made, and gave the rule of evidence as to the criminality of the accused person, and, hence, as to the obligation of compliance with the demand. It pledged the good faith of each government to conform its policy to the terms of the stipulation. It was upon its face a contract that contemplated action *in futuro*, and, hence, was an *executory* contract, and not one executed by the mere ratification of the treaty. It, however, omitted to provide, in express terms, any agency or authority for making the delivery of a fugitive criminal, or for applying the rule of evidence as to criminality; and Congress never passed any law for carrying it into execution.

The only case which occurred under this treaty was that of Jonathan Robbins in 1799, a report of which is given in Wharton's State Trials, pp. 392—457. Robbins, on suspicion of having been concerned in the mutiny on board the British frigate *Hermione* in 1791, was arrested in 1799 in Charleston, South Carolina, and committed to prison, before any demand for delivery was made by the British Government. After he had been imprisoned for about six months, Judge Bee, United States District Judge for that State, was informed by the

Secretary of State that a demand had been made upon the President for his delivery as a fugitive criminal, and also notified that the President, if the evidence was sufficient to sustain the charge, advised and requested him to deliver the prisoner to "the Consul or other agent of Great Britain who shall appear to receive him." Robbins was soon after brought before the District Court on *habeas corpus*, and Judge Bee, after hearing the case, ordered him to be surrendered "to the British Consul, or such person or persons as he shall appoint to receive him." He subsequently addressed a letter to the Secretary of State, informing him of his "compliance with the request of the President of the United States," and saying that he judged the evidence against Robbins sufficient to sustain the charge on which he had been demanded.

This case produced an intense excitement among the people, and led to a warm discussion in the House of Representatives. It was claimed by some that the court had no jurisdiction to make the delivery, and by others that the President could not execute the stipulation until authorized to do so by an act of Congress. Mr. John Marshall, subsequently Chief Justice of the Supreme Court of the United States, was then a member of the House of Representatives; and, in the speech which he made on the subject, he defended the action of the President, taking the ground that, while the courts have no power "to seize any individual and determine that he shall be adjudged by a foreign tribunal," the President, being charged with the duty of executing the laws, and a treaty being declared by the Constitution to be a law, had power to make the delivery in the absence of any legislation by Congress. The fact in the case was that Judge Bee issued the order for delivery; and, according to the argument of Mr. Marshall, he had no authority, as a judge, to do so. The authority was with the President; and, as a matter of fact, he did not exercise it. What he did was to advise and request the judge to make the delivery if the evidence was sufficient. In his letter of May 21st, 1799, to the Secretary of State, he said: "How far the President of the United States would be justifiable in directing the judge to deliver up the offender is not clear. I have no objection to advise and request him to do it."

This advice and request plainly conferred no authority upon Judge Bee, when hearing a case upon *habeas corpus*, and determining whether the prisoner was lawfully restrained of his liberty. The argument of Mr. Marshall, while it logically condemns the action of Judge Bee, does not fit that of the President. It claims for him a power which he did not exercise, but which he advised and requested Judge Bee to exercise. The delivery was a judicial one, and was not officially the act of the President at all. The judge of a court did what, as Mr. Marshall asserted, the President only had the authority

to do, and not the less so because he was requested by the latter to do it. The advice of the President given to a judge in hearing a *habeas corpus* case is no basis for the exercise of power.

Chief-Justice Marshall, in delivering the opinion of the Supreme Court of the United States in *Foster v. Neilson*, 2 Pet. 253, said, "Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of Congress, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court." The same court reaffirmed this doctrine in *The United States v. Arredondo* 6 Pet. 691.

The twenty-seventh article of the treaty of 1794 with Great Britain was a contract in which the parties mutually pledged their faith with respect to action *in futuro*, but in which they made no provision as to the agency for the delivery of fugitive criminals. They simply agreed that the delivery should be made in the cases and circumstances stated. The contract did not by its own terms execute itself, and, hence, needed legislation to make it operative, and, hence, was not, in the absence of the requisite legislation, "the law of the land" for courts. Courts, according to the principle laid down in *Foster v. Neilson*, could exercise no power under it until Congress should legislate for its execution.

Was the article "the law of the land" for the President? It certainly was not so in express terms. The President has power to make treaties. These treaties, if self-executing without the aid of legislation, are laws of the land; yet it is not a constitutional prerogative of his office to execute treaties, any more than it is to execute the Constitution, except as he is authorized to do so. Attorney-General Wirt, in *Sullivan's case*, 1 Op. At. Gen. 509 said: "The Constitution and the treaties and acts of Congress made under its authority, comprise the whole of the President's powers." In this case there was no law of Congress, authorizing the President to deliver fugitive criminals, and no provision in the treaty giving the authority; and, according to the doctrine stated in *Foster v. Neilson*, the extradition stipulation was not "a law of the land" because it was a contract which did not and could not execute itself without legislation. It may have been the duty of Congress to supply the appropriate legislation; but its failure to do so certainly did not add to the powers of the President. Legislative omissions are not a source of positive powers to any department of the Government.

Our conclusion is, that the surrender of Robbins

was without legal authority. The treaty gave Judge Bee no authority to make the surrender, and the President could give him none. The President himself had no such authority; and if he had, he did not directly exercise it. It was stated, in the debate in the House of Representatives, that President Washington had expressed strong doubts whether this part of the treaty of 1794 could be carried into effect without the action of Congress.

The next extradition stipulation of the United States is contained in the tenth article of the treaty of August 9th, 1842, with Great Britain, which provides as follows:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: Provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive."

This differs from the treaty of 1794, in increasing the number of extradition crimes to seven, and in providing that the judges and other magistrates of the respective Governments shall have power to arrest and examine alleged fugitives, and, if the evidence of criminality be sufficient, to certify the fact to "the proper executive authority," that a warrant for surrender may be issued.

In *The Matter of the British Prisoners*, 1 Woodb. & Minot, 66, Judge Woodbury interpreted the words "the proper executive authority" to mean, in their application to the United States, the President acting in such matters through the State Department, whose acts are to be regarded as his and by his authority. He also said that, "where the aid of no such act of Congress seems necessary in respect to a ministerial duty devolved on the Executive by the supreme law of a treaty, the Executive need not wait and does not wait for acts of Congress to direct such duties to be done." This case occur-

red in 1845, before Congress had passed any extradition law; and the view of Judge Woodbury was, that the treaty of 1842, in its terms and without any legislation for its execution, by clear implication, gave the President authority to make the delivery of fugitive criminals. Attorney-General Nelson, in *The Case of Christiana Cochrane*, 4 Op. Att.-Gen. 201, adopted this construction, and advised the President to make the surrender of the alleged criminal. These two cases are the only ones that occurred under the treaty prior to the act of Congress providing for the execution of extradition treaties; and in both no legislation was thought necessary to give effect to the treaty.

An attempted extradition under the treaty of November 9th, 1843, with France, brought this question distinctly before Congress; and the result was the enactment of a law in 1848 for carrying into execution all such treaties. The treaty with France expressly provided that the surrender, on the part of the United States, "shall be made only by authority of the executive thereof." It, however did not provide for any preliminary arrest and examination by the magistrates of either country.

In 1847 a demand was made for the surrender of Nicholas Lucien Metzger by the French Minister, on the charge of forgery in France; and the executive authority at Washington, declining to act in the first instance, referred him to the courts. Metzger was afterward arrested in the city of New York, on a warrant issued by a police magistrate; and the magistrate, after examining the case, deemed the evidence sufficient, and committed him to prison to await the order for extradition from the President. He was, on *habeas corpus*, released from prison by a circuit judge of the State of New York, who held that the magistrate had no jurisdiction over the matter. He was subsequently arrested on a warrant issued by Judge Betts, of the United States District Court, who, after hearing the case, held that it came within the terms of the treaty with France; that the evidence was sufficient to detain the accused, and that, the treaty being a part of the supreme law of the land, no act of Congress was needed to carry it into execution. The judge committed him to prison, to await the action of the President. 1 Edmond's Select Cases, 399. An application was then made to the Supreme Court of the United States for a writ of *habeas corpus*, to review the action of Judge Betts; and the court, upon hearing the case, refused to grant the writ, on the ground that, the district judge having exercised a special authority at chambers, and there being no provision of law for a revision of his judgment, the court had no jurisdiction in the matter. 5 How. 176.

The President of the United States then issued his order, commanding the marshal of New York to deliver the prisoner to the diplomatic agents of the French Government. Before this order was

executed, Judge Edmonds, a circuit judge of New York, granted a writ of *habeas corpus* which brought the accused before him; and after the case was twice argued, he discharged him, giving an elaborate opinion directly the reverse of that of Judge Betts. "This case," said the Judge, "involves the question whether the President of the United States has authority, by virtue of mere treaty stipulation, and without an express enactment of the national legislature, to deliver up to a foreign power, and virtually to banish from the country, an inhabitant of one of the sovereign States of our confederacy." The conclusions to which he came, after considering the question at large, are the following:—1. That "a treaty containing provisions to be executed *in futuro* is in the nature of a contract, and does not become a rule for the courts until legislative action shall be had on the subject." 2. That "the treaty with France of 1843, providing for the surrender of fugitives from justice, cannot be executed by the President of the United States without an act of Congress." See *the Matter of Meteger*, 1 Barb. 248.

This simply applies the principle stated in *Foster v. Neilson*, *supra*, and also in *Turner v. The American Baptist Missionary Union*, 5 McLean's C. C. R., 344. If the treaty-making power can pledge the faith of the United States in respect to future acts, and independently of and without the legislation of Congress, commit the execution of treaties to the President, thus in effect constituting him the sole judge of their meaning and the occasions and manner of their fulfillment, then it is theoretically a very dangerous power, because capable of the most enormous abuses. The President acts independently of Congress when exercising the treaty power; and if he be equally independent in respect to the execution of treaties, then he may, with the consent of the Senate, place the whole matter in his own hands, without the restraints or guidance of law, except as thus made. The fact that a treaty, whether for extradition or any other purpose, is a part of "the supreme law of the land," no more makes it self-acting and self-executing without legislation, than does the fact that the Constitution is such a law make it self-acting and self-executing. Nearly all the powers granted in the latter are brought into operation by legislative action. Why should not the same rule apply to the contracts made in treaties, especially when their stipulations do not upon their face act *in presenti*, but provide for things to be done only *in futuro*? Such treaties address themselves to the legislative discretion of Congress, and are to be executed by its aid and co-operation.

The act of Congress, of August 12th, 1848, entitled "An Act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivering up of certain offenders," not only followed soon after the deci-

sion of Judge Edmonds, but, by its title, seems to recognize the correctness of his view. The law, as then enacted, as subsequently supplemented by the acts of June 22d, 1860, and of March 3d, 1869, and as reproduced in the Revised Statutes of the United States, is contained in sections 5270-5277. The first of these sections reads as follows:—

"Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

This provides the judicial agency for arresting any person charged with crime under any extradition treaty, and also examining the evidence of his criminality, and certifying the same to the Secretary of State if the evidence be deemed sufficient to sustain the charge.

Section 5271, as amended by the act of June 19th, 1876, relates to the evidence upon the judicial hearing of any complaint, and reads as follows :

"In every case of complaint and of a hearing upon the return of a warrant of arrest, any depositions, warrants or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be legally and properly authenticated, so as to entitle them to be received as evidence of the criminality of the person so apprehended by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants or other papers shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required in this section."

This does not change the rule that the evidence of criminality must be such as would justify the commitment of the accused for trial, if the alleged offense had been committed in the country on which

the demand is made. It simply provides that certain documentary evidence shall be received and considered, if properly authenticated.

Section 5272 relates to the surrender of fugitives, and reads as follows:

"It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person, accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape."

Of the five remaining sections, four relate respectively to the time allowed for the actual extradition of an accused person after his commitment, to the protection of accused persons delivered up to the United States by any foreign government, to the powers of the agents duly appointed by the United States to receive such persons, and to the penalty for unlawfully interfering with them in the discharge of their duties. The other section declares that all these provisions "shall continue in force during the existence of any treaty of extradition with any foreign government, and no longer." The effect of this declaration is to confine the operation of the law strictly to the execution of extradition treaties, and, of necessity, to limit the powers which it grants exclusively to that function. The obvious implication is that, in the absence of such treaties, there is no authority for any extradition at all. The only law relating to the subject expressly limits its own application to the execution of these treaties.

These provisions of law, designed to give effect to extradition treaties, and deriving their constitutional authority from this fact, not only imply their own necessity, but also empower and direct the requisite judicial and executive agency for this purpose, and, that too, without any interference with the terms of these treaties. The Government of the United States has made treaties with other governments relating to the arrest and restoration of deserting seamen from foreign vessels; and section 5,280 of the Revised Statutes of the United States provides for the execution of these treaties so far as they are operative in this country, assuming the necessity of legislation to carry them into effect. Precisely the same assumption is made in the legislation that relates to treaties for the extradition of fugitive criminals. Both classes of treaties pledge the faith of the United States; and it is difficult to see

how the President can, by virtue of the powers vested in him, in the absence of legislation, constitutionally supply the necessary judicial and executive machinery, with the appropriate rules and regulations, for carrying these treaties into effect. There is not a single extradition treaty of the United States that does not leave undetermined a variety of important questions that can be settled only by legislation, and hence, not one that does not need law as an auxiliary to its execution. That law neither the President nor the judiciary can supply. Congress has supplied it, and thus put an end to a question that was once the subject of conflicting opinions.

EFFECT OF THE WAR ON LIFE INSURANCE CONTRACTS.

SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1877.

NEW YORK LIFE INSURANCE CO., Plaintiff in Error,
v. DAVIS.

S., residing at Petersburg, Virginia, before the war, procured a policy of insurance upon his life in The N. Y. Insurance Company, located in New York. The policy was conditioned to be void if the premiums were not paid when due. The premiums were, up to the commencement of the war, paid to an agent of the company who resided at Petersburg, who was authorized to receive them, and who was furnished receipts for such a purpose. After the war commenced, S. tendered the premiums to the agent, who refused to receive them, and tender was also made after the close of the war to him with like result. *Held*, that the war suspended the contract of agency between the company and its agent in the absence of an agreement to the contrary and the agent had no authority to receive the premiums, and a tender to them did not avail to save the rights of S. under the policy.

IN error to the Circuit Court of the United States for the eastern district of Virginia. The facts appear in the opinion.

Mr. Justice BRADLEY delivered the opinion of the court.

This was an action on a policy of life insurance issued by the plaintiff in error, a New York corporation, before the war, upon the life of Solomon Davis, a citizen and resident of the State of Virginia. The policy contained the usual condition, to be void if the renewal premiums were not promptly paid. They were regularly paid until the beginning of the war. The last payment was made December 28, 1860. The company, previous to the war, had an agent, A. B. Garland, residing in Petersburg, Virginia, where the assured also resided, and premiums on this policy were paid to him in the usual way, he giving receipts therefor, signed by the president and actuary, as provided on the margin of the policy, which were usually sent to the agent about thirty days in advance of the maturity of the premium. About a year after the war broke out, the agent entered the Confederate service as a major, and remained in that service until the close of the war.

Offer of payment of the premium next due was made to the agent in December, 1861, which he declined to receive, alleging that he had received no receipts from the company, and that the money would be confiscated by the Confederate government if he did receive it. A similar offer was made to him after the close of the war, and was also declined. The agent testified that

he refused to receive any premiums and had no communication with the company during the war, and did not resume his agency after it terminated.

Sloman Davis died in September, 1867.

The plaintiff below was assignee of the policy, and claimed to recover the amount thereof, \$10,000, upon the ground that he was guilty of no laches, and that at the close of the war the policy revived.

It is unnecessary to state, in detail, the proceedings at the trial. The plaintiff contended, and the judge instructed the jury, in substance, that they might infer from the evidence that the place of payment intended by the parties was at the residence of the plaintiff, and that if the company did not furnish receipts to its agent, so that the premiums could be paid according to the terms of the policy, it was not the fault of the plaintiff; and if he was ready and offered to pay his premium to the agent, there could be no forfeiture of the policy, if within reasonable time after the war he endeavored to pay his premiums, and the company refused to receive them. On the other hand the defendant contended that the war put an end to the agency of Garland, and the offer to pay the premium to him was of no validity, and the failure to pay rendered the policy void. This view was rejected by the court, and a verdict was rendered for the amount of the policy, less the amount of certain premium notes which had been given by the insured.

It is obvious that this case is nearly on all fours with that of *The New York Life Insurance Company v. Stratham*, 93 U. S. 24, decided by this court at the last term. As we still adhere to the views there expressed, we do not deem it necessary to reiterate them. But the questions which received special discussion on that occasion were, whether a failure to pay the stipulated premiums involved a forfeiture of the policy, although such failure was caused by the existence of the war; and what were the mutual rights of the parties consequent upon forfeiture under such circumstances. The point which is now most strenuously relied on, namely, the supposed power of the agent of a northern company to receive premiums in a southern State in insurrection after the war broke out, and the supposed right of a policy-holder to tender them to such agent,—although involved in the case,—was not specially adverted to in the opinion of the court. We propose to add some observations on this branch of the subject.

First, however, a few words with regard to the position that there was competent evidence for the jury to infer that the place of payment intended by the parties was the place of residence of the assured. This we think is entirely untenable. The legal effect of the policy itself was that payment should be made to the company at its domicile. The indorsement on the margin, which is much relied on by the plaintiff's counsel, has no such effect as he attributes to it. It is in these words: "All receipts for premiums paid at agencies are to be signed by the president or actuary." This is simply a notice to the assured that if he shall pay his annual premium to an agent, or at an agency, he must not do so without getting a receipt signed by the president or actuary of the company. How this caution can possibly be construed into an agreement on the part of the company to make any particular agency the legal place of payment of premium it is difficult to see. The circumstances show nothing but the common case of the establishment of an agency for the mutual convenience of the parties; and do not present the slightest ground for varying the legal effect

of their written contract. We think, therefore, that the charge was erroneous on this point. Of course, we do not mean to be understood as holding that, as long as an agency is continued, a tender to the agent would not be valid and binding on the company.

But we deem it proper to consider more particularly the question of agency and the alleged right of tendering premiums to an agent during the war.

That war suspends all commercial intercourse between the citizens of two belligerent countries or States, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years, that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition, it must follow that no active business can be maintained, either personally, or by correspondence, or through an agent, by the citizens of one belligerent with the citizens of the other. The only exception to the rule recognized in the books (if we lay out of view contracts for ransom and other matters of absolute necessity) is that of allowing the payment of debts to an agent of an alien enemy, where such agent resides in the same State with the debtor. But this indulgence is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war; though if so transmitted without the debtor's connivance, he will not be responsible for it. *Washington, J., in Conn. v. Penn., Peter's C. C. Rep. 525; Buchanan v. Curry, 19 Johns. 141.* In the next place, in order to the subsistence of the agency during the war, it must have the assent of the parties thereto—the principal and the agent. As war suspends all intercourse between them, preventing any instructions, supervision, or knowledge of what takes place, on the one part; and any report, or application for advice, on the other, this relation necessarily ceases on the breaking out of hostilities, even for the limited purpose before mentioned, unless continued by the mutual assent of the parties. It is not compulsory on either side; and it cannot be made compulsory to subserve the ends of third parties. If the agent continues to act as such, and his so acting is subsequently ratified by the principal, or if the principal's assent is evinced by any other circumstances, then third parties may safely pay money for the use of the principal into the agent's hands, but not otherwise. It is not enough that there was an agency prior to the war. It would be contrary to reason that a man, without his consent, should continue to be bound by the acts of one whose relations to him have undergone such fundamental alteration as that produced by a war between the two countries to which they respectively belong; with whom he can have no correspondence; to whom he can communicate no instructions, and over whom he can exercise no control. It would be equally unreasonable that the agent should be compelled to continue in the service of one whom the law of nations declares to be his public enemy. If the agent have property of the principal in his possession or control, good faith and fidelity to his trust will require him to keep it safely during the war, and to restore it faithfully at its close. This is all. The injustice of holding a principal bound by what an agent, acting without his assent, may do in such cases, is forcibly illustrated by Mr. Justice Davis in delivering the opinion of this court in *Frits v. Stover*, 22 Wall. 206. In that case the agent had collected in Confederate funds the amount due on a bond. Having asserted that the agent had

no authority to do this, the learned judge adds: "If it were otherwise, then, as long as the war lasted, every northern creditor of southern men was at the mercy of the agent he had employed before the war commenced. And his condition was a hard one. Directed by his government to hold no intercourse with his agent, and therefore unable to change instructions which were not applicable to a state of war, yet he was bound by the acts of his agent in the collection of his debts the same as if peace prevailed. It would be a reproach to the law if creditors, without fault of their own, could be subjected to such ruinous consequences." These observations have a strong bearing upon the point now under consideration.

What particular circumstances will be sufficient to show the consent of one person that another shall act as his agent to receive payment of debts in an enemy's country during war may sometimes be difficult to determine. Emerigon says that if a foreigner is forced to depart from one country in consequence of a declaration of war with his own, he may leave a power of attorney to a friend to collect his debts, and even to sue for them. *Traité des Assurances*, vol I, p. 567. But though a power of attorney to collect debts, given under such circumstances, might be valid, it is generally conceded that a power of attorney cannot be given, during the existence of war, by a citizen of one of the belligerent countries resident therein to a citizen or resident of the other, for that would be holding intercourse with the enemy, which is forbidden. Perhaps it may be assumed that an agent *ante bellum*, who continues to act as such during the war, in the receipt of money or property on behalf of his principal, where it is the manifest interest of the latter that he should do so, as in the collection of rents and other debts, the assent of the principal will be presumed unless the contrary be shown; but that, where it is against his interest, or would impose upon him some new obligation or burden, his assent will not be presumed, but must be proved, either by his subsequent ratification or in some other manner.

In some way, however, it must appear that the alleged agent assumed to act as such, and that the alleged principal consented to his so acting. It is believed that no well-considered case can be found anterior to these life insurance cases which have arisen out of the late civil war, in which the existence or continuance of an agency, under the circumstances above referred to, have been established contrary to the assent of the alleged parties to that relation. The case of *Conn. v. Penn.*, Peters' C. C. Rep. 496, is the leading authority on this subject in this country. The question in that case was whether the claimants of land in Pennsylvania under contracts of purchase from the proprietaries (the Penns) before the revolutionary war, were entitled to an abatement of interest during the war; and Justice Washington held that this depended on the question whether, during the war, the proprietaries (being alien enemies) "had in the United States a known agent, or agents, authorized to receive the purchase-money and quit-rents due to them from the complainants" (the vendees). To enable the parties to adduce proof on this point the court allowed further evidence to be taken. The same thing was held, at the same term, in the case of *Dennison et al. v. Imbrie*, 3 Washington's C. C. Rep. 408, where Justice Washington says: "We think that if the alien enemy has an agent in the United States, or if the plaintiff himself was in the United States, and either of these

facts known to the debtor, interest ought not to abate." It is obvious that, in these cases, the judge assumed that the relation of agency, if it existed, did so with the mutual consent of the parties thereto. And the same observation, it is believed, may be made with regard to all other cases on the subject except some that have been very recently decided.

The same inference may be deduced from the cases decided in this court when the subject of payment to agents in an enemy's country has been discussed. Amongst others we may refer to the following: *Ward v. Smith*, 7 Wall. 447; *Brown v. Piatts*, 15 Wall. 177; *Montgomery v. United States*, id. 395; *Frets v. Stover*, 22 Wall. 198.

In some recent cases in certain of the State courts of last resort, for whose decisions we always entertain the highest respect, a different view has been taken; but we are unable to concur therein. In our judgment, the unqualified assumption on which those decisions are based, namely, "once an agent always an agent," or, in other words, that an agency continues to exist notwithstanding the occurrence of war between the countries in which the principal and the agent respectively reside, is not correct: and that the continuance of the agency is subject to the qualifications which we have stated above.

Now, in the present case, except at the very commencement of the troubles, before the president's proclamation of non-intervention had been issued, and when it was yet uncertain what the differences between the two sections would amount to, there is not the slightest evidence that the defendant authorized Garland to act for it at all, and the latter expressly refused to do so when requested, both on the ground of having received no receipts from the company (which were his only authority for receiving payments), and of the liability of the funds to be confiscated in his hands. The war suspended his agency for all active purposes, and it could not be continued even for the collection of premiums without the defendant's consent; and this, so far as appears, was never given, either expressly or by subsequent ratification. Under these circumstances it cannot be affirmed that the plaintiff could bind the defendant by a tender of payment to the supposed agent. However valid a payment may be, if made to an agent in time of war, where he consents to act as such, and has the assent of his principal in so acting, an offer of payment cannot have any force or effect if neither of these circumstances exists.

Waiving, therefore, the consideration of any question that may be made with regard to the validity of an insurance on the life of an alien enemy, we think that in the present case there was not the slightest foundation for the court to charge, as it did in effect, that a tender of the premium to Garland in Petersburg was a good tender and binding on the company.

We do not mean to say that if the defendant had continued its authority to the agent to act in the receipt of premiums during the war, and he had done so, a payment or tender to him in lawful money of the United States would not have been valid; nor that a stipulation to continue such authority in case of war, made before its occurrence, would not have been a valid stipulation; nor that a policy of life insurance on which no premiums were to be paid, though suspended during the war, might not have revived after its close. We place our decision simply on the ground that the agency of Garland was terminated by the

breaking out of the war, and that, although, by the consent of the parties, it might have been continued for the purpose of receiving payments of premiums during the war, there is no proof that such assent was given either by the defendant or by Garland; but that, on the contrary, the proof is positive and uncontradicted, that Garland declined to act as agent.

The judgment of the Circuit Court must be reversed, with directions to award a *ventre factas de novo*.

REPRESENTATIONS ON APPLICATION FOR LIFE INSURANCE.

SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1877.

MUTUAL BENEFIT LIFE INS. CO., plaintiff in error, v. HIGGINBOTHAM, administrator.

1. One whose life had been insured in a company at Newark, New Jersey, but who had failed to keep up the premiums, so that the policy lapsed, applied for a reinstatement of the policy to the agent at Washington, D. C., on the first of October. He paid the premium and gave his certificate of health to the agent on that day, and the physician of the company signed his certificate of examination, all of which were forwarded at once to the company. On the 12th of October the company returned its renewal receipt dated back to the time of the lapsing of the policy, and this receipt was, on the 14th, given to the insured, who made no statement as to his health then. In an action on the policy it was claimed by the company that between the 1st and the 14th of October there was a change in the health of the insured that would have caused the rejection of the policy, and the court was, at trial, asked to charge that the representation, as to health, was a continuing one up to the 14th, which request was refused. *Held*, that such refusal was no error. The jury would have been warranted in finding that the contract was understood and intended by the parties to take effect by relator to the 1st of October, and the question was proper for submission to the jury.
2. Where the disposition of a subject by a judge can work no legal injury to the party objecting to it, there is no error.

IN error to the Supreme Court of the District of Columbia. The facts fully appear in the opinion. Mr. Justice HUNT delivered the opinion of the court.

This was an action by Mrs. Martha J. Day against the Mutual Benefit Life Insurance Company (incorporated by the State of New Jersey), to recover the amount of a policy of insurance issued to Mrs. Day upon the life of her husband, the late Dr. Richard H. B. Day, of Washington, in which judgment was rendered against the company for the amount insured, \$5,000, and interest.

The policy, dated the 16th of July, 1869, was for life, and stipulated for the payment of the annual premium of \$137.50 on or before twelve o'clock on the 16th day of July in every year, and provided that "in case the said premium shall not be paid on or before the several days hereinbefore mentioned for the payment thereof, at the office of the company, in the city of Newark, or to agents, when they produce receipts signed by the president or the treasurer, then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine."

The first premium was duly paid; but when the next premium became due, on the 16th of July, 1870, it was not paid.

In the following October, Dr. Day made application to the company for the reinstatement of the policy, and the company consented to reinstate it upon the conditions and in the manner following.

On the 1st of October, 1870, Dr. Day paid the premium to the agent of the company at Washington, and received a receipt for the same. At the same time he gave to the agent his certificate of health, and the physician of the company signed his certificate of examination, which were forwarded to the company at Newark, New Jersey.

The policy was renewed and the renewal-receipt was sent by the company to its agent, October 12, 1870. This receipt was dated July 16, 1870, and was given to Day on the 14th of October.

On the 22d day of January following Dr. Day died. Eleven special pleas are interposed, to which it is not necessary particularly to refer, as the questions to be decided arise upon the rulings of the judge at the trial, made upon points not connected with the pleadings.

The chief subject of contention arises upon the refusal of the judge to charge as requested by the defendant in the following prayers:

1. If the jury find from the evidence that the certificate of health in evidence was made by Dr. Day, the insured, on or about the 1st of October, 1870, and by him delivered to the agent of the defendant, at Washington city, and by such agent sent to the principal office of the defendant, at Newark, New Jersey, and that the receipt in evidence, dated July 16, 1870, was thereupon forwarded from the main office of the defendant to its agent at Washington city, and by him delivered to the insured on or about the 14th day of October, 1870, and that, between the time when said certificate was made and the time of the delivery of said receipt to the insured, Dr. Day had had any derangement of health, and did not disclose that fact to the agent of the defendant when the receipt was handed to him by the agent, or before, they will render a verdict for the defendant upon the sixth plea.

2. On refusing to instruct the jury as prayed by defendant, as follows: If the jury find from the evidence that when the certificate in evidence, dated October 1, 1870, was given to the agent of the defendant at Washington city, the latter was not authorized to and did not assume to reinstate the policy in suit, but accepted the premium and forwarded the certificate to his principal, and that the receipt in evidence, dated July 16, 1870, was then in the home office of the defendant, in New Jersey, and that said receipt was forwarded to the agent of the defendant on or about the 12th day of October, 1870, and by him delivered to the insured on or about the 14th day of the same month; and if the jury further find, that after the date of said certificate, and before the delivery of said receipt to the insured, the insured had had any derangement of health, or that at the time of the delivery of said receipt to him he was not in sound health, they would render a verdict for the defendant.

The state of Dr. Day's health during the summer and autumn of 1870 was the subject of contradictory testimony. The defendant gave evidence tending to prove that he was compelled by ill-health to give up his business as a teacher on the 18th day of October, 1870; that for several weeks prior to that time he was much debilitated, and was conscious of that fact; that in November he had the consumption, of which he died in January, and that he was in feeble and disordered health from the spring of 1869 until his death. The plaintiff on the other hand gave evidence tending to show that he was in sound health till the latter part of October, 1870, and that he did not

have the consumption until the month of November, 1870.

The exceptions we are to consider assume that on the first day of October, 1870, when he presented his certificate of health to the agent at Washington, Dr. Day was in a condition of health that made him a satisfactory subject for the reinstatement or continuance of his policy of insurance.

It is contended that between the time of thus making and presenting his certificate to the agent and the date (fourteen days later) on which the agent delivered to him the receipt by which his insurance policy was continued in force until July 16, 1871, there had been a change in his health which would have caused the rejection of his application to continue the policy had such change been made known to the company, and that the failure to make known such change was a fraud, which invalidated the policy thus renewed or continued.

It is not contended that there were any false representations made on the 14th of October, or any devices or contrivances to deceive the company. No affirmative action on that occasion is complained of. The contention is that the representation made on the 14th of October was a continuing one, from the time it was made till the delivery of the renewal-receipt on the 14th, and that if not true at the latter date, the contract was avoided.

In reaching a conclusion on this point, we may notice — 1st, that no inquiry was made of Day or demand for information as to his condition between the 1st and the 14th of October. The company was particular and specific in its inquiries as to his condition on the first of the month, and required prescribed forms of evidence as to that condition. There it stopped, and neither by expression nor by implication intimated a desire for later information.

It is to be observed, 2dly, that the issuance made to him on the 14th of October relates back to the 16th of July in the same year. The certificate reads: "Policy No. 59,667, on the life of Richard H. B. Day, is hereby continued in force for one year from date (July 16, 1870), settlement of the premium having been made as per margin." The settlement in the margin showed the payment of \$137.50, being the amount of the premium of insurance for one year on the sum of \$5,000, as stated in the original policy of insurance.

It will be observed, 3dly, that the distance between Washington and Newark is about two hundred miles only, and that the certificates of Dr. Day's health and the application which were forwarded by the agent to the company at Newark would, in the ordinary course of the mails, reach the office at Newark on the morning or during the day of the 2d; that all the forms of the company to authorize a renewal were complied with, and that the risk was such as the company would accept as a desirable one, and that the receipt for the renewal was received in Washington on or about the 14th of October, and was on that day delivered to Dr. Day.

The prayer of the insurance company did not include a request that the jury should determine as a matter of fact whether, upon the evidence submitted, the representation was or was not a continuous one, whether the contract was consummated on the 14th of October, or by relation on the 1st of October; but the Judge was requested to charge, as a matter of law, that the representation was a continuing one.

The facts referred to, we think, show that although

actually completed on the 14th of October, the jury would have been warranted in finding that the contract was understood and intended by the parties to take effect by relation as of the first of that month. The money was paid to the agent at Washington on that day. The insurance was post-dated so as to include that day. The full amount of the premium for one year was paid by the applicant, viz., \$137.50. The company cut off the insured from two and a half months of his policy when they issued it on the 1st of October, and dated it as of July 16th, although taking payment of the premium for a year. We think that they did not necessarily intend to cut off an additional fourteen days, but may have meant it to be as of the date when the insured paid his money and presented a risk that they were willing to take, and of the time that it would have taken effect if they had responded without a delay of two weeks. Had it been otherwise we cannot conceive how the sagacious business men who control this company would have assented to the delivery of the policy without inquiry as to the intermediate time. More than three months elapsed before Day's death, monthly returns being made by the agent, and the company must have known and assented to the delivery of the renewal receipt not only, but to the fact that there had been no inquiry or information as to Day's health after Oct. 1st. The jury might account for it on the theory that the whole contract was intended to be and was as of October 1st, and that it spoke from that date.

There is every indication that Day thus relied upon that contract, nor is there any reason to believe that he intended to deceive or to conceal. The company made inquiries to its own satisfaction, so far, in such direction, upon such points, and within such periods, as it thought proper. It was not for him to advise the company of what it should do, or to volunteer information which it did not seek. He paid his money, delivered his certificate, received the renewal when the company chose to give it, found upon examination that it covered the whole period from the July proceeding. He lived in the same town with the agent and received no suggestion from him that any thing further was expected, and was warranted in assuming that his contract was intended to take effect from an earlier period than its actual delivery. He probably died in the honest belief that he had thus provided for his widow. It would be far from good faith to his representatives should it now be held otherwise.

In *Coll v. Phoenix Fire Ins. Co.*, 54 N. Y. 597, it is said: "The defendant must not be made liable where by the terms of the contract it is fairly exempted, however harsh the result may appear; nor can it be excused where the exemption is claimed upon a strict and rigid interpretation of words without regard to the circumstances surrounding the transaction, and the apparent intent of the parties." See, also, *Tipton v. Ferner*, 20 N. Y. 423.

In *May on Ins.*, § 190, it is laid down: "Where renewals are made upon the statements in the original application, whether the truth of the statements is to be tried by the circumstances existing at the time of the renewal or at the time when the original application was made, is a question upon which the authorities do not agree, some taking the view that a renewal makes a new contract, and others that it merely continues the old one. Special circumstances, however, seem to control the decision, according as the circumstances indicate the intent of the parties."

If we assume it to be true, as a general proposition, that the policy speaks from the date of its issue, and that the obligation of the applicant to make a full disclosure continues down to the completion of the contract, and that the occurrence of a material change before the contract is consummated must be communicated to the company, we do not advance essentially in the case before us. The question recurs, when was the contract of Dr. Day consummated? If on the 14th of October, when the renewal-receipt was delivered, as the company contends, then the rule mentioned bars the plaintiff's right to recover. If, as the plaintiff contends, the contract by the intention and understanding of the parties relates to the first of October, when the premium was paid by the applicant and the certificates of health presented and transmitted, or to a point of time within a few days thereafter, within which the company ought to have examined and to have accepted a risk in all respects suitable to be accepted within its own rules, then the general rule quoted is not applicable. The case is governed by different principles. It is not necessary, therefore, to question the principle assumed in the authority quoted, or to examine the cases cited to sustain it.

We are of the opinion that the exceptions to the charge of the judge, upon the theory that the representations by Dr. Day were made on the 14th day of October, or that concealment was then practiced by him, on the ground that the previous representations, necessarily and as a matter of law, were continuous, and that the contract was consummated on that day, cannot be sustained. It was a question proper under all the circumstances for the consideration of the jury. If they had found for the plaintiff we are of the opinion that the verdict would not have been vacated as being without or against the evidence.

In many English companies a formal acceptance of the proposal for insurance is issued. In some companies this acceptance is unconditional, so that the premium be paid within the month, the letter of acceptance running to the effect that the proposal has been accepted, and that a receipt is ready at the office for the premium, upon the payment of which the assurance will commence, but that if the same be not paid within thirty days a reappearance and fresh certificate will be required. In other companies the acceptance is qualified by the condition, not only that the insurance shall not commence till the payment of the premium, but that no material change shall have occurred prior thereto. Bunyon, p. 58, cited Bliss, § 99.

The practice is not uniform, and there is nothing remarkable in allowing a certificate of health to stand good for thirty days, no reappearance or examination for that interval being required.

Among the cases relating to this subject the following may be referred to as showing the effect of the contract by relation, and that the consummation of the contract does not necessarily depend upon the delivery of the policy.

In *Lightbody v. N. Am. Ins. Co.*, 23 Wend. 24, it was held that a policy bearing date on the day the premium is paid takes effect by relation from that day, although the policy be not delivered for several days afterward. In this case the buildings were burned on the day after the premium was paid and before the policy was delivered.

In *Perkins v. Wash. Ins. Co.*, 4 Cow. 465, the rule was applied in a case where the agent was authorized

to make insurances, "provided the office shall recognize the rate of premium and be otherwise satisfied with the risk," it was held that the company was bound to issue a policy where the insurance was a proper one and the premium was paid or tendered, although before the premium was received at the home office the property was consumed by fire.

In *Chase v. Humilton Ins. Co.*, 22 Barb. 527, the agent forwarded a proposition for insurance, which was altered by the company, and the alteration communicated to and accepted by the applicant, and the premium paid to the agent. Held, that the company was bound to issue its policy and was liable for the loss.

In *Insurance Co. v. Webster*, 6 Wall. 129, the party having received his policy, it was held that he was not affected by afterward signing a memorandum that the insurance was to "take effect when approved by E. D. P., general agent." See also, *Cooper v. Pacific M. L. Ins. Co.*, 3 Big. Ins. R. 656; 7 Nev. 616; *Carpenter v. M. S. Ins. Co.*, 4 Sandf. Ch. 408; *Am. Horse Ins. Co. v. Patterson*, 28 Ind. 17; *City of Davenport v. Peoria M. and F.*, 17 Iowa, 276; *Le Furom v. Insurance Co.*, 2 Big. Ins. R. 158.

Second objection.

At the close of his charge the judge instructed the jury as follows: "That the plaintiff is not responsible for or in any way affected by any of the statements in Dr. White's affidavit, unless the jury find that before and at the time of filing it with the agent of the company she had actual knowledge of its contents and adopted and used them as her own declarations. That affidavit is her declaration or no, as she knew and was advised of it and procured and approved it." To which instruction the counsel for the insurance company then and there excepted.

In establishing her case at the trial the plaintiff was bound to prove that notice of the death of her husband, Dr. Day, had been given to the company, and that a demand of payment of the amount claimed had been made. For that purpose only she offered in evidence the proofs of loss which had been furnished to the company, except the affidavit of Dr. White, forming a part of the same, which she did not offer in evidence. Those proofs contained the sworn statement of Mrs. Day herself, the sworn statement of Dr. Isaac White, certificates of the clergyman and undertaker, and proof of identity by J. F. Patterson.

These affidavits were all on one paper, and the court required that the proofs of loss should be put in as an entirety; that is, that all the papers containing the preliminary proofs should be put in evidence, and the same were thereupon put in evidence by the plaintiff, including the affidavit of Dr. White. In Dr. White's affidavit thus introduced occurred the following questions and answers: "How long have you known the deceased? I have known Dr. R. H. B. Day seventeen years. How long was deceased sick? About five months. Date of your first visit? November 23, 1870. Date of your last? January 22, 1871. Of what disease did he die? Pulmonary consumption." It appeared further that Dr. White was not a resident of Washington, but left that city immediately after making the affidavit mentioned, on the 28th of January, 1871.

Mrs. Day testified that Dr. White had not seen her husband at any time between September, 1869, and the latter part of November, 1870.

The struggle as to Dr. White's affidavit and the ruling upon it are quite immaterial. He stated in answer to one of the questions that Dr. Day had been ill about

five months, and as he died on the 22d of January, 1871, this would carry his illness back to the 22d of August, 1870, of course including all the month of October of that year. The insurance company apparently sought the benefit of this evidence on the contest in regard to Day's health.

It is, however, manifest that White's statement was not one of personal knowledge, but was upon rumor, or made without sufficient reflection. This is evident both from the testimony of Mrs. Day, which is entirely unimpeached and uncontradicted, that Dr. White did not see her husband during all of the year 1870 until the latter part of November. Upon this subject she could not well be in error. It was equally evident from the statement of White himself, that this first visit to Day was on the 28th of November, 1870.

Day's bodily health on the first day of October, 1870, was satisfactory to the company, and the attempt was to show an unfavorable alteration between that date and the 14th of the same month. But White had not seen him during those fourteen days, nor for months before nor for more than six weeks afterward.

Whether the presentation of the affidavit of White by Mrs. Day made its contents evidence; whether she knew its contents or not; whether she did or did not adopt or procure it, was not of the slightest consequence. The paper contained nothing that was legal evidence upon the point in issue, and a verdict founded upon it could not have been sustained. The disposition of the subject by the judge was one that could not possibly work legal injury to the insurance company. There was, therefore, no error. *Starbird v. Barron*, 43 N. Y. 200; *Pepin v. Lachenmeyer*, 45 id. 27; *People v. Brandreth*, 36 id. 191; *Porter v. Ruckman*, 38 id. 211; *Corning v. Troy Iron and Nail Works*, 44 id. 577.

The effect of facts set forth in preliminary proof as admissions is discussed in *Insurance Company v. Newton*, 22 Wall. 32. Where an agent of the insurance company stated that the proofs were sufficient to show the death of the insured, but that they showed that he committed suicide, it was held that the whole admission must be taken together. Where the party or her agent stated in the preliminary proofs that the deceased had committed suicide, furnishing the verdict of a coroner's jury to that effect, and where the narration of the manner of the death of the deceased was so interwoven with the death of the deceased that the two things were inseparable, it was held that the whole was competent to go before the jury.

We see no occasion to question the positions of that case.

Upon the whole case we are all of the opinion that the judgment must be affirmed.

UNITED STATES SUPREME COURT ABSTRACT.

ACKNOWLEDGMENT.

1. *What is substantial compliance with statutes of Tennessee relating to.*—By the statutes of Tennessee deeds for the conveyance of lands are to be "acknowledged by the maker or proved by two subscribing witnesses" and the prescribed formula of acknowledgment is "Personally appeared before me, etc., the within named bargainer with whom I am personally acquainted and who acknowledged that he executed the within instrument, etc." Held, that an acknowledgment wherein it was certified that the individual executing it was "Personally known" to the acknowl-

edging officer was a compliance with the statute and the acknowledgment was valid. Decree of Circuit Court, W. D. Tennessee, affirmed. *Kelly et al., appellants, v. Calhoun et al.* Opinion by Swayne, J.

2. *Deed from corporation.*—There is no statutory provision in Tennessee as to the execution or acknowledgment of deeds by corporations. In such cases the officer affixing the seal is the party executing the deed within the meaning of the statutes requiring deeds to be acknowledged by the grantor. (*Lovett v. Steam Mill Association*, 6 Paige, 69). *Ib.*

ADMIRALTY LAW.

Liability of shipowners in cases of collision: limit of liability of stipulators.—Shipowners are in no case liable for any loss, damage or injury occasioned by collision beyond the amount of their interest in the colliding ship and her freight pending, except for costs and interest by the way of damages in case of default of payment and suit to recover the amount. Nor are the stipulators, either for cost or value, ever liable for any default of their principal beyond the amount specified in the stipulation which they gave, except for costs and interest by the way of damages in case of their own default to make payment pursuant to the terms of the stipulation. (9 *Stat. at Large*, 635; *The Cordes*, 21 How. 28; *The Ann Caroline*, 2 Wall. 548; *The Union*, 4 Blatch. 92; *The Palmyra*, 12 Wheat. 10; *Housman v. North Carolina*, 15 Pet. 51; *The Hope*, 1 W. Rob. 155; *The John Dunn*, 1 id. 160; *The Volant*, 1 id. 386; *The Dundee*, 2 Hagg. 143; *Ex parte Rayne*, 1 Gale & Davison R. 377; *Gall v. Laurie*, 5 Barn. & Cross. 163; *Ives v. Bank*, 12 How. 165; *The Diana*, 3 Wheat. 58; *Sneed v. Wister*, 8 id. 696). Decree of Circuit Court S. D. New York, affirmed. *Sparrow et al., appellants, v. Avery et al.* Opinion by Clifford, J.

BANK CHECK.

Check properly stamped and paid not object of taxation under revenue law: collector entering place where kept.—Under section 3,177 of the United States Revised Statutes, authority is given to any collector, deputy collector, or inspector of internal revenue to enter, in the day time, any building or place within his district, where any articles or objects subject to such taxation are made, produced, or kept, so far as it may be necessary for the purpose of examining such objects or articles, and the provision is that any owner of such building or place, or any person having the agency or superintendence of the same, who refuses to admit such officer or suffer him to examine such articles or objects shall for every such refusal forfeit five hundred dollars. Held, that under this provision paid bank checks, which were duly and sufficiently stamped at the time they were made, signed, and issued, are not articles or objects subject to taxation, and an officer of a bank where such checks are may lawfully refuse to suffer the collector to examine such checks. (Cases, etc., cited, *United States v. Cook*, 17 Wall. 74; 1 Bishop Cr. Pro. [2d ed.] sec. 81; Arch. Cr. Pl. & Ev. [18th ed.] 54 Rev. Stat. sec. 3,418; 18 Stat. at Large, 310; *The Mary Ann*, 8 Wheat. 389; *The Hoppet*, 7 Cr. 393; 2 Pars. on Ship and Admr. 386; *The Caroline*, 7 Cr. 500; *The Anne*, 7 id. 571; Conkl. Treat. [5th ed.] 546; 2 Colby Cr. Law, 114; *People v. Wilbur*, 4 Park. C. C. 21; *Com. v. Cook*, 18 B. Mour. 149; *Steel v. Smith*, 1 Barn. & Ald. 99; Conkl. Treat. [5th ed.] 548.) Judgment of Circuit Court, Minnesota, affirmed. *United States, plaintiff in error, v. Mann*. Opinion by Clifford, J.

CONTRACT.

Construction of contract for surrender and re-issue of railroad bonds.—There being matters of dispute between S. and D. and A. Railroad Company, in which certain bonds of the company were involved, S. proposed in writing to surrender all of such bonds and procure a release from D., if the company would in exchange therefor execute and deliver to him a specified number and amount of new bonds secured by mortgage on the railroad. A portion of the old bonds were handed in and canceled and new ones issued. With reference to the other old bonds there was a dispute between S. and third parties. *Held*, that the company was not bound to make the exchange with reference to the remaining bonds until S. obtained control of them and surrendered them. Decree of Circuit Court, Kansas, reversed. *Union Pacific R. R. Co., appellant, v. Stewart.* Opinion by Wait, C. J.

FORFEITURE.

1. *Of leased land upon which a distillery stands: acts of distiller bind owner of land.*—The unlawful acts of the distiller bind the owner of the property, in respect to the management of the same, as much as if they were committed by the owner himself. Power to that effect the law vests in him by virtue of his lease, and if he abuses his trust it is a matter to be settled between him and his lessor, but the acts of violation as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner. (*The Vrouw Judith*, 1 C. Rob. 151; *Spring Valley Distillery*, 11 Blatch. 265; *The Reindeer*, 2 Cliff. 68; *U. S. v. Bags of Coffee*, 8 Cr. 464; *The Ship Crockery*, Parker R. 220.) Judgment of Circuit Court, Iowa, affirmed. *Dobbins, plaintiff in error, v. United States.* Opinion by Clifford, J.

2. *Confessions of lessee of distillery admissible against owner in proceedings for forfeiture.*—Accordingly admissions by the lessee of property upon which a distillery is situated, which was proceeded against under the revenue act for the purpose of forfeiture, *held*, admissible against the owner of such property in such proceeding. *Ib.*

MUNICIPAL CORPORATION.

1. *Construction of guaranty: contract with private corporation.*—Where an ordinance of a city authorizing a contract with a gas company and the issue to it of bonds of the city, provided that the company should "guarantee the said bonds and assume the payment of the principal thereof at maturity," *held*, 1st, that the guaranty embraced both the principal and interest of the bonds; and 2d, that the ordinance contemplated two undertakings by the company—one to the bondholder and one to the city. The guaranty was to be for the security of the bondholder; it was to be an undertaking to answer for the city's liability. The other undertaking was to be for the security of the city by placing the company under obligation to provide for the payment of the principal of the bonds on their maturity, an obligation which otherwise would not have existed. Judgment of Circuit Court, Louisiana, affirmed. *Jefferson City Gas-light Co. v. Clark et al.* Opinion by Field, J.

2. *What amounts to substantial compliance with contract.*—The indorsement by the president of the company on the bonds guaranteeing "the payment of the principal and interest" thereof, was a substantial compliance with the provision of the ordinance and contract as to the guaranty. *Ib.*

3. *Legislative right to compel payment by city of equitable claims.*—It is competent for the legislature to impose upon a city the payment of claims, just in themselves, for which an equivalent has been received, but which from some irregularity or omission in the proceedings by which they were created cannot be enforced at law. (*Blanding v. Burr*, 13 Cal. 343; *The Town of Guilford v. Supervisors of Chenango County*, 16 Barb. 615; Same case in Court of Appeals, 3 Kern. 143.) *Ib.*

4. *Retroactive law.*—A law requiring a municipal corporation to pay such a claim is not within the constitutional provision inhibiting the passage of a retroactive law. *Ib.*

STATUTE OF FRAUDS.

1. *Necessary contents of note or memorandum.*—The note or memorandum required by the statute of frauds must furnish evidence of a complete and practical agreement, and unless the essential terms of the sale can be ascertained from the writing itself or by reference in it to something else the writing is not a compliance with the statute, and if the agreement be thus defective it cannot be supplied by parol proof. Accordingly receipts given for the payment of money on an alleged purchase of real estate not containing any thing to show what real estate was the subject of purchase, *held*, not sufficient under the statute. (*Baptist Church v. Bigelow*, 16 Wend. 31; *Morton v. Dean*, 13 Metc. 385; 2 Kent's Com. [12th ed.] 511; *Norris v. Latin*, 16 Johns. 151; *Dung v. Perkins*, 52 N. Y. 494; *Balleen v. Nicolay*, 53 id. 467; *Wright v. Weeks*, 25 id. 153; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; 14 id. 15; *Barry v. Coombs*, 1 Pet. 648; *Clark v. Burnham*, 2 Story C. C.; *Story on Sales* [4th ed.] sec. 267.) Decree of Supreme Court, D. C., reversed. *Williams et al., appellants, v. Morris, executor.* Opinion by Clifford, J.

2. *Part performance: what party claiming benefit of must show.*—Where the attempt is to take the case out of the statute upon the ground of part performance, the party making the attempt must show by clear and satisfactory proof the existence of the contract as laid in his pleading, and the act of part performance must be of the identical contract which he has in that manner set up and alleged. It is not enough that the act of part performance is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill or answer. (*Phillips v. Thompson*, 1 Johns. Ch. 149; *Browne on Fraud*, sec. 452; *Jones v. Peterham*, 8 Serg. & R. 543; *Morphett v. Jones*, 1 Swanst. 172; *Ex parte Hooper*, 19 Ves. 477; *Frame v. Dawson*, 14 id. 386; 7 id. 341; 3 Parsons on Cont. [6th ed.] 60; *Chitty on Cont.* [10th ed.] 66 and 278; 1 Story's Eq. [9th ed.] sec. 761.) *Ib.*

COURT OF APPEALS ABSTRACT.

ARREST AND BAIL.

Cause of action not entitling to arrest included in complaint takes away right to arrest.—If a plaintiff unites a bailable and a non-bailable cause of action in the same complaint he waives his right to bail in both, and an order of arrest cannot be sustained, if, upon any one of the causes included in the action, the defendant is not liable to arrest. (*Smith v. Knapp*, 30 N. Y. 581; *McGovern v. Payne*, 32 Barb. 83.) Order below reversed. *Madge v. Puig.* Opinion by Allen, J.
[Decided Dec. 11, 1877.] Digitized by Google

ASSESSMENT.

Statutes relating to must be strictly followed: official oath in form prescribed must be taken by officials.—In statutory proceedings affecting the property of a citizen the statute must be strictly followed and any departure in substance from the formula prescribed by law, vitiates the proceedings. Accordingly where a statute required commissioners to make a village improvement and assess the cost upon property to be benefited to make oath before entering upon their duties "faithfully and fairly to discharge the duties," etc.; an oath by each one to perform the duties "to the best of his ability," held, not a compliance with the statute and the acts of the commissioners invalid. (*Gilbert v. Columbia Ins. Co.*, 3 Johns. Cas. 107; *Rex v. Cooke*, 1 Cowp. 76; *Adams v. S. & W. R. R. Co.*, 10 N. Y. 323; *Doughty v. Hope*, 3 Den. 596; *Seymour v. Judd*, 2 N. Y. 464; *Sharpe v. Spier*, 4 Hill, 81; *Thatcher v. Powell*, 6 Wheat. 119; *Thompson v. White*, 4 S. & R. 135; *In re Cambria Street*, 75 Penn. St. 357; *People v. Connor*, 46 Barb. 333.) Judgment below reversed. *Morris v. Village of Portchester*. Opinion by Allen, J.

[Decided Nov. 27, 1877.]

BILLS OF LADING.

When fraudulent bills by general owner of cargo give no title: estoppel: fraudulent delivery by owner wrongfully in possession.—Fraudulent bills of lading of wheat purporting to have been shipped by N. at Buffalo by certain canal-boats and consigned to defendants at New York, were made and transferred to defendants, and defendants paid certain drafts drawn by N. against the supposed cargoes. At the time the wheat described was on board a vessel in transit between Milwaukee and Buffalo, under a bill of lading which had been transferred to plaintiff as security for the payment of a note of N., discounted to enable him to pay a draft drawn on plaintiff for the purchase price of the wheat. Subsequently, without authority of plaintiff, or any act on its part enabling him to do so, N. fraudulently shipped the wheat by the canal-boats mentioned, and delivered it to defendants, they not parting with any value at the time on the faith of such delivery. Held, that at the time of the making of the false bills of lading plaintiff was the pledgee and special owner of the wheat in possession; that N. had no authority to transfer title to the same; that N.'s unauthorized interference with the wheat and delivery to defendants did not relate back so as to make valid the transfer by the false bills; that plaintiff was not estopped from asserting title to the wheat by the interference of N., and that after demand of the wheat and refusal to redeliver it was entitled to maintain an action for the same against defendants. Judgment below affirmed. *Marine Bank of Buffalo v. Fiske*. Opinion by Allen, J.

[Decided Dec. 4, 1877.]

CANALS.

Appropriation of soil for repair of.—Defendants contracted with the State to build a new dam in place of an old one, and a short distance below, across the Mohawk. Thereafter the State took proceedings to appropriate an acre of plaintiff's ground near the dam, and gravel was taken from the acre to tighten the old dam, so that it could be used for canal navigation while the new dam was being built. Held, that the appropriation was not in violation of the provision of the statute authorizing the canal commissioner to enter

upon lands for the purpose of taking material for repairs when the navigation of the canal is endangered (1 R. S. 221), and that plaintiff had no claim against defendants for that reason for the gravel taken from such land. Judgment below reversed. *Ten Broek v. Sherill*. Opinion per Curiam.

[Decided Nov. 27, 1877.]

EVIDENCE.

1. *When judgment admissible in collateral action: to show status of witness.*—In an action in which the former husband of a witness was plaintiff, for the purpose of showing the status of the divorced wife and her competency as a witness, the judgment of divorce was introduced in evidence by plaintiff. Held, that it was admissible for the purpose mentioned, and could not be impeached collaterally, and that objections (1), that it was improper and immaterial, and (2), that the record showed upon its face that the divorce was granted upon improper and illegal testimony, would not lie. Judgment below affirmed. *Woltrick v. Friedman*. Opinion by Allen J.

2. *Questions designed to show bias of witness.*—For the purpose of showing a hostile relation between a witness for plaintiff and defendant, defendant asked witness if a suit for crim. con. brought by witness against defendant was not pending, to which he answered there was such a suit. Held, that the question was competent and a question by plaintiff, asking if witness had not a had suit several years ago against defendant for crim. con. which was settled, it not being shown that there were two suits, was also competent. Ib.

[Decided Nov. 20, 1877.]

INJUNCTION.

Liability of plaintiff: undertaking: terms of under taking fix liability thereunder.—Without some security before the granting of an injunction or without some order of the court or judge requiring some act on the part of the plaintiff which is equivalent to giving security such as a deposit of money in court, the defendant has no remedy for any damages which he may sustain from the issuing of the injunction. And when an undertaking is executed by sureties defendant has no greater or other reliance than is afforded by the terms of that instrument. Accordingly, where a bond was given under old code, § 222, the condition of which was that the plaintiff would pay to the defendant such damages, not exceeding a specified amount, as the defendant might sustain by reason of the injunction, "if the court shall finally decide that the plaintiff was not entitled thereto," and after the suit had progressed and the injunction had been modified by the court, the parties of their own free will made a settlement and the suit was, in pursuance thereof, discontinued, held, that the condition of the undertaking was not broken by plaintiff's failing to pay damages, and an action could not be maintained thereon. Orders below reversed. *Palmer v. Foley*. Opinion by Folger, J.

[Decided Nov. 13, 1877.]

MUNICIPAL CORPORATION.

1. *Charter of Saratoga Springs: mandamus: issue of corporate bonds: warrant to pay moneys.*—Under the provisions of the charter of the village of Saratoga Springs moneys cannot be paid from the treasury save on the warrant of the trustees. By Laws 1875, chap. 517, the trustees of the village are authorized to raise money by the issue of bonds for the payment of the

floating indebtedness of the village, and from the moneys so raised claims are to be paid on the warrant of the auditors. *Held*, in order to entitle one holding a claim against the village, which, if valid, would be included in the floating indebtedness, to compel by mandamus the receiver of taxes or financial officer of the village to take steps in order to pay his claim, he must procure a warrant from the auditors directing such payment. An authenticated copy of the proceedings of the village auditors, showing the audit of plaintiff's claim, is not a warrant, and would not be sufficient. Order below affirmed. *People ex rel. Cooke v. Wood*. Opinion by Folger, J.

2. *Title a part of legislative act in this State*.—In this State, especially in local and private acts, the title is part of the act. *Ib*. [Decided Dec. 4, 1877.]

NOTES OF RECENT DECISIONS.

Carrier of passenger: liability of steamboat company for loss of baggage.—A steamboat company is liable for the value of passenger's baggage destroyed by a fire on the steamer, unless it be clearly proved that the fire occurred from some cause over which the company had no control. *Court of Q. B., Quebec, Dec. 14, 1877. Canadian Nav. Co. v. McConkey* (Mont. L. News.)

Fire insurance: omission to state previous insurance: verbal notice to agent.—The plaintiff, when making application for insurance, mentioned to the defendants' agent that there was a previous insurance in the Gore Mutual, but could not remember the amount which was on the property insured with the defendants. The policy contained a proviso that in case the insured should have already any other insurance against loss by fire on the property, and not notified to the company and mentioned in or indorsed upon the policy, the insurance should be void. The policy contained no mention of the insurance in the Gore Mutual. *Held*, that the plaintiff could not recover. *Court of Error and Appeal, Ontario, Dec. 17, 1877. Billington v. Provincial Ins. Co.* (Mont. L. News.)

Life tenancy: open mines: waste: right of life tenant to pursue, underground, veins of open mines restricted.—A. died, seized of two tracts of land, separated by an intervening tract. Upon one of them a coal mine had been opened in A.'s lifetime. A.'s widow who was a tenant for life under A.'s will, leased both the tracts to the Westmoreland Coal Company, who owned the intervening tract. The coal company pursued underground a vein of coal from the open mine on one tract, through their intervening tract, and within the boundary of the other tract. *Held*, that the taking of coal from the second tract constituted waste. *Sup. Ct. Pennsylvania, Nov. 5, 1877. Westmoreland Coal Company's Appeal* (4 W. N. Cas. 533).

Maritime law: life salvage; liability of owners of lost ship to contribute.—Where lives and cargo have been saved from a ship, but the ship has been totally lost, the owners of the cargo are liable to pay salvage in respect of the lives, and the owners of the lost ship are not liable to contribute to such payment. Life salvage awards can only be made out of the resalved, and not against owners of a ship personally. *Eng. High Ct. of Justice, P. B. & A. Div., Nov. 27, 1877. The Specie ex Sarpedon* (37 L. J. Rep. N. S., 505).

Municipal corporation: grading and paving: after contract is properly let the city has no right to alter it by an ordinance: no recovery can be had by a con-

tractor on a quantum meruit.—Where the law requires that all municipal work of a certain character shall be performed under contract let to the lowest and best bidder after due advertisement, no recovery can be had for work done in any other manner; and neither the municipality nor its subordinate officers can make a binding contract for such work except in compliance with the requirements of the law. *Sup. Ct. Pennsylvania, Nov. 12, 1877. Addis v. City of Pittsburgh* (4 W. N. Cas. 529).

Negligence: carrier of passengers: person invited on horse car by driver.—Where the driver of a street car invites a boy to get on the car and give him a glass of water, and then directs him to get off while the car is in motion, and refuses to stop the car when requested, but, on the contrary, increases its speed, *held*, that the company was liable for an injury to the boy in getting off the car. In order to render the company liable for injuries caused by the acts of its servants it is not necessary that the relation of passenger and carrier should exist. *N. Y. Sup. Ct. Gen. Term, 2d Dept., Dec., 1877. Day v. Brooklyn R. R. Co.* (N. Y. Week. Digest).

NEW BOOKS AND NEW EDITIONS.

THE NEW RULES OF COURT.

Rules of all the Courts of Record of the State of New York, with Notes, References and an Index, by Marcus T. Hun, Reporter of the Supreme Court. New York: Banks & Brothers, 1877.

General Rules of Practice of the Supreme Court, with Rules of the Court of Appeals and other Courts of Record of the State of New York, with Annotations and an Index. New York: Baker, Voorhis & Company, 1878.

THESE books purport to cover the same ground and may therefore be conveniently noticed together. Each gives the rules of the various courts in force on the first of January, with notes referring to decisions and kindred statutes. The first is the more elaborately, the second the more accurately, annotated. Indeed we are surprised at Mr. Hun's inattention to, or ignorance of, some matters that should be within the cognizance of every lawyer, and more especially of every one who undertakes to prepare such a work as that to which he has set his hand. Here are a few of the errors that a casual reading has discovered: On page 7 he gives in full chapter 322, Laws 1874, which was expressly repealed by chapter 417, Laws 1877, but he nowhere gives, so far as we observe, § 191 of the Code of Civil Procedure, which takes the place of ch. 322. Of the 18 statutes cited as in force on page 29, all but two were repealed by the same act. The statutes as to law schools given on page 39 were repealed by the same act and were superseded by § 58 of the new code, which Mr. Hun forgets to note. On page 57 he announces that "the Supreme Court is authorized by the Revised Statutes (2 R. S. 199, §§ 21 to 23), to compel the discovery of books, etc.," and that these provisions were not repealed by "section 888 of the Code"; but he neglects to say that they were repealed expressly by chapter 417 of last year, and that their place is taken by §§ 803 to 809 of the new Code. Mr. Hun has also omitted to notice a number of recent cases pertinent to the matter in hand, but the errors of commission already cited will suffice, we believe, to justify the assertion that he has not done his work well.

On the other hand the book bearing the imprint of Baker, Voorhis & Co., and which we understand was annotated under the supervision of Mr. Bliss, seems to

have been honestly and accurately done. It is not so voluminous, but we miss nothing that now strikes us as desirable. The notes are pithy and brief, and, so far as we have examined, reliable—the chief virtue in such a work. One of its most useful features is a table of corresponding rules “showing in what rules of the Supreme Court of 1877, the superseded rules of 1874, 1871 and 1858, are represented.

HUBBELL'S LEGAL DIRECTORY—EIGHTH YEAR.

Hubbell's Legal Directory for Lawyers and Business Men, containing the names of one or more of the leading and most reliable attorneys in nearly three thousand cities and towns in the United States and Canada; a synopsis of the collection laws of each State and Canada, with instructions for taking depositions, the execution and acknowledgment of deeds, wills, etc., and a concise synopsis of the Bankrupt Law, with registers in bankruptcy. Also, time for holding courts throughout the United States and territories for the year commencing October 1, 1877. To which is added a list of prominent banks throughout the United States. J. H. Hubbell, Editor and Compiler. New York: J. H. Hubbell & Company, 1877.

While works of the character of the one before us are, as a rule, of only present value, and must be frequently revised, the practicing lawyer and the business man cannot dispense with them any more than the merchant can with his daily market report. There is hardly an individual in active business that does not several times in the course of a year wish to know what are the laws of a distant State on the subject of collections or transfer of property and who is a reliable attorney in some section of such State, and he frequently would be willing to pay more than the price of this volume for such information. And the practicing lawyer is frequently asked questions in relation to these matters which he is unable to answer without a tedious investigation of authorities with which he is unfamiliar. In this work a summary of the laws of each State and Territory and of the Provinces of Quebec and Ontario, up to October 1, 1877, in respect to the collection of debts, taking of depositions, etc., is given. The points touched upon in the space devoted to each State may be understood by instancing a single one. In Indiana first is noticed the condition of the statute law, next the judicial reports, then follow these topics: Practice, Jurisdiction of the Courts, Insolvent Laws, Voluntary Assignments, Actions, Limitations, Testimony, Proof of Claims, Promissory Notes and Bills, Service, Statute of Frauds, Arrests, Attachments, Garnishment, Appeals, Stay of Execution, Judgments, etc., Supplementary Proceedings, Redemptions, Exemptions, Liens, Claims against Deceased Persons, Descents, Aliens, Corporations, Divorces, Married Women, Dower, Interest, Taxes, Wills, Mortgages, Chattel Mortgages, Record of Instruments, etc. A number of appropriate forms applicable to the transaction of legal and other business in the State are also given. The statements of principle under each head are much more elaborate than might be expected and seem to be thoroughly accurate. The list of attorneys in those localities, with which we are familiar, presents some of the best names, and all the persons mentioned known to us are reliable. The list of banks is not entirely to be depended upon. The Bank of Lansingburg, for instance, which became insolvent nearly a year ago, is recommended. This, however, does not detract from the merit of the book in other respects. The arrangement of the work is excellent and it is well printed and bound.

THE SOUTHERN LAW REVIEW.

The Southern Law Review, December-January, 1877, 1878. New Series. Vol. III., No. 5. Published Bi-monthly. St. Louis: G. I. Jones and Company, 1877.

The current number of this able magazine opens with an article upon the Principles of Natural Jurisprudence, by Wm. O. Bateman. This is an elaborate discussion (covering sixty-two pages) of the science of the duties enjoined and of the rights conferred by the nature of man. It is worthy of the attention of all who take pleasure in investigating the philosophy of the law. The second essay upon “Power of Sale Mortgages, and Trust Deeds,” by Leonard A. Jones, is a practical treatise upon a subject of very great interest to the profession generally. “Master's Liability to Servant,” by Francis Wharton, is a valuable contribution to a rapidly developing and important branch of jurisprudence. “Notes of Current European Law,” by Prof. Hammond, of the Iowa State University, is worthy the attention of every lawyer and cultivated man who desires to keep himself posted in the jurisprudence of the old world. The concluding article upon the “Effect of Tender to discharge Liens,” etc., by L. W. Keplinger, is brief but of interest upon the subject treated. The book reviews, notes and digest are, as usual, carefully considered and form a very valuable part of the magazine.

COURT OF APPEALS DECISIONS.

THE following decisions were handed down on Tuesday, January 15, 1878:

Judgment affirmed with costs—*People v. Lord*; *People v. Stephens*; *Carpenter v. Eastern Transportation Line*; *New York and Brooklyn Saw Mill company v. City of Brooklyn*; *Wilcox Silver Plate company v. Green*; *Thornton v. St. Paul, etc., Railroad company*; *Briggs v. New York Central, etc., Railroad*; *Willlover v. Hill*; *Phelps v. Nowlen*; *City of Rochester v. Montgomery*; *Dewey v. Moyer*; *Dunn v. Hornbeck*; *Higenbotham v. Stoddard*; *Mathez v. Neldig*; *Ahern v. Goodspeed*; *Whitney v. Black River Ins. Co.*; *Coe v. Cassidy*; *Coe v. Hobby*; *Wright v. Wright*; *Wells v. Ross*; *Kidder v. Horrobin (3 cases)*; *Sheridan v. Jackson*.—Judgment affirmed—*Quinn v. People*.—Order affirmed with costs—In re application of Myers. —Order affirmed with costs, payable out of estate—*Thomson v. Taylor (in re Matterson)*.—Order affirmed and judgment absolute for defendant on stipulation with costs—*Weeks v. New York, New Haven, etc., R. R. Co.*; *Germania Fire Ins. Co. v. Memphis and Charleston R. R. Co.*—Motion for reargument denied with \$10 costs—*Allen v. Meyer*.—Judgment reversed and new trial granted, costs to abide event—*Horton v. Town of Thompson*.—Appeal dismissed with costs—*Bastable v. City of Syracuse*; *Brown v. Sigourney*.—Appeal from order affirming order denying motion to set aside judgment, dismissed with costs—*People v. Stephens*.—Judgment of Supreme Court and decree of surrogate reversed, and proceedings remitted for rehearing by surrogate, with costs to appellant to be paid out of the estate—*Wright v. Wright*.—Judgment reversed, and judgment for defendant declaring him entitled to the office, etc., with costs—*People ex rel Conliss v. North*.—Judgment modified so as to be without prejudice to the right of the defendant to build an extension or addition to his house to the same depth and height as the extension to the house on the Ludlow lot adjoining defendant's lot on the south, and as thus modified affirmed without

costs of appeal to this court to either party—*Lottimer v. Livermore*.—Judgment of Supreme Court and decree of surrogate reversed and proceedings remitted for rehearing by surrogate without costs in this court or in Supreme Court to either party as against the other, or as against the estate—*Deralsmes v. Deralsmes*.

BENCH AND BAR.

Pemberton, an eminent judge in the reign of Charles II, rose to legal eminence in a curious way. A rake and spendthrift, he found himself in prison, for years, for debt. There he began to take an interest in all the debt difficulties of his companions, and became perfectly versed in bankruptcy law, whence he turned his attention to other legal study, and at length emerged from prison primed with precedents and cases, which he speedily turned to valuable account.

Richmond Mumford Pearson, Chief Justice of North Carolina, died at Raleigh on the 5th inst. He was born in North Carolina, June 28, 1805, was graduated at the university of that state in 1823, and was admitted to the bar in 1826. He was chosen judge of the Superior Court in 1836, and in 1848 became Supreme Court judge, and became chief-justice in 1859. In 1868 he was elected to the same position which he held until his death. He was an able lawyer, a conscientious judge and possessed the confidence of the citizens of North Carolina without distinction of party. W. H. N. Smith, a well known lawyer of Raleigh, has been appointed to the position made vacant by his death.

A countrywoman was carrying on a very simple process against a neighbor in one of the small courts of Germany. The attorney of the opponent pestered her with so much chicanery and legal subtleties that she lost all patience, and interrupted him thus: "My Lord, the case is simply this: I bespoke of my opponent, the carpet maker, a carpet with figures which were to be as handsome as my lord the judge, and he wants now to force me to take one with horrible caricatures, uglier even than his attorney. Was I not right in breaking off the bargain?" The court laughed at the comparison, the attorney was stupefied, and the woman won her suit.

The following passage of words once took place between Lord Justice James when he was a vice-chancellor and Mr. Karslake, Q. C. The Vice-Chancellor observed to Mr. Karslake, "You have told me that three times before. My custom is this: When a thing is told me once I make a mental note of it; when it is told me twice I begin to forget it; and when it is told me a third time my mind becomes a perfect blank on the subject." "Your honor," replied Mr. Karslake, Q. C., "I am obliged to you for the information. I will now tell it to your honor for the fourth time, in order that it may come on the perfect blank and be made a mental note of as for the first time."

NOTES.

THE January number of the *Journal of Jurisprudence and Scottish Law Magazine*, contains a learned article upon the "The Science and Art of Jurisprudence," in which the views of various speculative writers are analyzed and sustained or condemned. Also articles upon "Equity in Entails," a subject that is of no great importance on this side of the water, "On the Title to Sue," and several other matters of only local interest. The concluding contribution entitled, "Curious Case of Mistaken Identity," is of interest as illustrating the uncertainty of human testimony as to identity. The editorial notes and the record of decisions of Scottish courts are as usual of interest and value. — There has been a change in the editorial management of the *Washington Law Reporter*, Mr. Walter L. Perry retiring and Mr. George B. Cork-

hill assuming charge. The first number issued under the new arrangement gives evidence that the *Law Reporter* will be conducted during the coming year with ability and enterprise, and that it will fully meet the needs of the profession in the Federal capital. — The *San Francisco Law Journal* has commenced to publish the *unwritten* opinions of the California Supreme Court. Hereabouts it is more than the reporters and the profession care to do to keep up with the written opinions. But California is not blessed with as many courts and judges as we are.

Mr. Hoyt Post has tendered his resignation of the office of State Reporter of Michigan, to take effect March 31, 1878, and the court has accepted it and appointed to succeed him Mr. Henry A. Chaney. Mr. Chaney is the author of the last Michigan Digest, of an excellent Manual for Notaries Public, and editor of the *Michigan Lawyer*. His work clearly proves his entire fitness for the position to which he has been appointed. We have often been indebted to him for opinions of the Supreme Court and other courtesies, and hope now, that he is to be Reporter, that he may be able to place us under obligations for like favors still more frequently.

Anent the article on "The Law of Descent," a correspondent in New Orleans sends us the following provisions of the Louisiana Civil Code, which deserve to be copied in all the States: "Art. 1498 [1480] Donations *inter vivos* or *mortis causa* cannot exceed two-thirds of the property of the disposer if he leaves a legitimate child; or half, if he leaves two, and one-third if he leaves three or more. Art. 1494 [1481] Donations *inter vivos* and *causa mortis* can not exceed two-thirds of the property if the disposer, without children, leaves a father, mother, or both. Art. 2399 [2369] Every marriage contracted in this State superinduces of right a partnership or community of acquests or gains, if there be no stipulation to the contrary.

The judge of the Sheffield (England), County Court has no confidence in the veracity of woman. A short time ago he stated from the bench that there is ten times more perjury committed by women in his court than by men, and he added that women do not seem to care in the least what they swear to. — The shortest opinion on record covering the whole case was recently delivered by the Master of the Rolls. It is as follows: "I do not believe the plaintiff on her oath, nor do I believe her witness. I do believe the defendant on his oath; therefore, I dismiss the action, with costs."

A bill has been introduced in the New Jersey Legislature with fair prospects of passage, allowing writs of error in all criminal cases to issue of course and not as matter of grace as now. — In the case of *Roberts v. Davids*, recently decided at the General Term of the Second Department, it is held that section 1303 of the Code of Civil Procedure does not apply to appeals from Justices' Courts. — The question as to whether other than fermented wine can be used for communion, has troubled total abstinence clergymen in this country. Dr. Stephen, Q. C., to whom a controversy between the Bishop of Lincoln and a rector who had used unfermented wine was submitted, has decided that neither by the scripture, the prayer-book nor the law of England is the use of unfermented wine illegal.

The Index to Volume 16 of this JOURNAL will be issued with the next number. A "strike" of the compositors in the Printing House has rendered this delay inevitable.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, JANUARY 26, 1878.

CURRENT TOPICS.

THE Commissioners to revise the New York Statutes have presented their annual report to the legislature, in which they review the plan of the entire Revision, and the work so far done, present some forcible arguments in favor of the part already adopted and of the completion of the Revision, and make a very satisfactory showing as to the work of the year past. To the objection made to the new Code that it is a "new system," the Commissioners answer that it is *not* a "new system," that whatever ground there was for such a charge against the "Code of Remedial Justice" was removed by the amendments made by the legislature, and add:

"About one-third of the 1496 sections of which the 'new Code', as thus amended, is constituted, consists of a re-enactment of the 'old Code', amended, and with a few new provisions added thereto, so as either, (1) to settle questions which remain yet undecided by the courts; or, (2) to embody in the statute, decisions of the courts; or, (3) to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text', in accordance with the directions of the statute creating this commission. Its remaining provisions contain a re-enactment of other (mostly antecedent) statutes, relating to the subjects embraced in its caption, revised in the same manner, so that the whole is rendered homogeneous in substance and in form."

Beside the bill containing the remaining nine chapters of the Code which the Commissioners again submit, they purpose to report a bill at this session relating to fees and salaries, designed as a supplement to the Code of Civil Procedure, and which, with the Code, will fill entirely the place of Part III of the existing Revised Statutes. Of the work of the Commissioners during the past year, they report that Commissioner Throop has completed (except the final revision) Part II, which is entitled "An act relating to property and other matters connected with private rights," and which consists of 1250 sections; Commissioner Emott has nearly completed Part IV, "relating to crimes and the punishment thereof; criminal courts; criminal procedure; and prisons and other places of confinement;" while Commissioner Caverno has made very considerable progress on Part I, which

treats of "government, including 'civil' polity and the political rights and duties of citizens." Of the date of the completion of the Revision the Commissioners say:

"It only remains for us to say, that, if the legislature should determine to go on with the work, we are of the opinion that the entire Revision can be completed, so that the last installment thereof may be submitted to the legislature, ready to be enacted into a law, at the session of 1881. The remainder of the present year, after the adjournment of this session, should be nearly, if not quite, devoted to the review and reprinting of Parts II and IV, and the preparation of the necessary supplemental and repealing acts. Another year would probably be consumed in the preparation of the drafts of Parts I and V, and still another in the review thereof, the preparation of the supplemental and repealing acts adapted thereto, and the preparation of Part VI, and its appropriate supplemental and repealing acts. The work upon the latter Part will, it is supposed, consist of little besides compilation."

An analysis of Part II, and so much of Part IV as is now completed, is appended to the report. Both of these Parts will be submitted to this legislature, but no action is recommended as to them until they can be revised.

A point of considerable practical interest was passed upon in the case of *Exchange Fire Ins. Co. v. Early*, decided at the Special Term of the New York Court of Common Pleas, on the 18th inst. A resale of mortgaged premises sold under foreclosure was asked by an infant defendant upon the ground among others, that the judgment of foreclosure was irregular, because the referee appointed to compute the amount due had neglected to take the oath prescribed by section 1016 of the Code of Civil Procedure. The court held the point well taken and set aside the sale. As under the lax provisions of the former statutes it had become a very uniform custom in these proceedings for referees to omit the formality of an official oath, we suppose a very considerable proportion of the foreclosures by action, which have taken place since the first of last September, are defective in this particular. The requirement of the new Code, however, is proper and should be enforced according to its tenor.

The annual attempt to exempt mortgaged real estate from taxation and throw the burden on the holders of the mortgages is being made in a bill just introduced in the Assembly, wherein it is proposed to deduct the amount for which real estate is mortgaged from the valuation before assessment. Nothing is said about making the mortgagee pay the tax, but that will come in the way of an amendment. If the bill should pass in its present shape, almost all the real property in the State will be mortgaged by the first of next July.

Notwithstanding the prospect of war the movement in favor of a codification of the English law will be continued this winter, so the speech of the Queen delivered at the opening of Parliament, on the 17th inst., informs us. A bill is to be laid before Parliament, the object of which is to simplify and express in one act the whole law and procedure relating to indictable offenses. The work of Mr. Stephen on Criminal Law, in the form of a digest, which has been republished and extensively circulated in this country, will no doubt form the basis of the proposed legislation. In this matter, progress in England has been continuous since the movement was entered upon. Although only the law regulating procedure has as yet been codified, steps have been taken in the direction of a Code embracing, as did that of Justinian, the entire body of jurisprudence, the work beginning with the law relating to crimes. This Code will of course be carefully prepared and considered, and if its practical operation is satisfactory, of which we think there is no doubt, it will, we are confident, in substance, be adopted in most if not all of our States.

The bill introduced in the assembly, providing that "no clerk or officer of any court, or paid employee of any of the departments of any city government of this State shall hereafter act as assignee, referee or receiver, in any case, action or special proceeding whatever, during his term of office, or while so employed," ought to pass. The clerks and officers of our courts, and the employees in departments of municipalities, are usually paid large salaries for doing very little, and permitting them to add to their emoluments by securing appointments to receiverships, references, etc., is unfair. Besides, in many instances the official uses his position as a means of obtaining such appointments, obstructing the progress of an action or proceeding unless he is given a bribe in the form of a reference of some kind therein. The profession are familiar with the evil, and will rejoice that there is a prospect that it may, in some measure, be done away with.

In addition to those elsewhere specially noticed, the following bills of interest to the profession were introduced in the legislature during the past week: Amending sections 637 and 1242 of the Code; authorizing the formation of town fire insurance companies for insuring farm property; providing for compelling the attendance and examination of witnesses in proceedings instituted by or in behalf of municipal authorities or boards. The amendment to section 637 of the Code provides for the issue of a warrant of attachment against defendants in all actions for damages, for the commission of wrongs when the wrong charged would, if committed, amount to a felony.

The Dean of the Harvard Law School, in his recent report of the condition of that school, makes a very proper discrimination between the province of the school and the office in fitting young men for the legal profession. The purpose of the law school is to prepare the student to perform the duties of counselor or advocate, while that of the office is to prepare him to act as attorney. The school has no means or facilities for the education of attorneys, while its facilities for educating counselors are unrivaled, and the very circumstances which render it unfit for the former office increase its fitness for the latter. The art of the attorney must be acquired in the place where it is to be practiced, and that is the office of the practicing attorney. The tendency has been to make a knowledge of this art the test of fitness for admission to the bar, and the legal profession generally have measured the qualifications of young men in the profession by the same test. This has been undoubtedly one great cause of the prejudice against law schools existing in the minds of the older members of the bar. Nothing is more common than to speak slightly of the training of a law school by saying that a graduate therefrom does not know how to draw a simple pleading, or do some act which is within the capacity of every office boy. The law school cannot teach the art of the attorney, which is all that a great number of the profession ever learn. The accomplished lawyer can only be produced by the training of the office supplemented by that of the school, and we think most of our future lawyers will receive their education in this way.

The English judiciary not being able to keep up with the work brought before the courts, what is known as a "short act" will be introduced in Parliament at its present session, providing for the appointment of additional judges. The difficulty is fortunately in the courts of first instance and can be remedied. With us the courts of last resort are the ones where the calendars are most crowded and where delay in litigation occurs.

NOTES OF CASES.

IN *Sebastian v. Johnson*, 72 Ill. 282; S. C., 22 Am. Rep. 144, the Supreme Court of Illinois held that where an administrator is authorized by a decree of court to sell land for the payment of debts, the sale must be made by him personally, or by his agent in his presence. If made by an auctioneer in the absence of the administrator, it is not valid. The court cited, in aid of its decision: *Taylor v. Hopkins*, 40 Ill. 442; 2 Williams on Executors, 944; *Berger v. Duff*, 4 Johns. Ch. 368; *Hoyer v. Deares*, 2 id. 154. In the last case, which was that of a sale of mortgaged premises under a decree, the master, being sick, did not attend the sale, but deputed a

competent agent, who attended and sold the land; the sale was set aside for that reason solely, there being no other objection to the fairness and regularity of the sale. Judicial sales must be conducted by the person designated in the decree, or under his immediate direction. *Blossom v. Railroad*, 8 Wall. 205; *Reynolds v. Wilson*, 15 Ill. 894; *Williamson v. Berry*, 8 How. (U. S.) 495, 544; *Blakely v. Abert*, 1 Dana, 185. "Such sales," said the court, in *Blossom v. Railroad*, "must be made by the person designated in the decree, or under his immediate direction and supervision, but he may employ an auctioneer to conduct the sale if it be made in his presence." Where a power of sale is given to executors they cannot sell by attorney. *Newton v. Bronson*, 18 N. Y. 587; *Hawley v. James*, 5 Paige, 487; Sugd. on Powers, 222 (6th ed.); *Williams v. Matlocks*, 8 Vt. 189; *Floyd v. Johnson*, 2 Litt. 109. See *Neal v. Pullen*, 47 Ga. 78. A sale executed by a delegated agent is void. *Pearson v. Jamison*, 1 McLean, 197. All the executors who qualify must join in executing the power of sale. *Shelton v. Homer*, 5 Metc. 466; *Hulbert v. Grant*, 4 T. B. Monr. 580; *Bank v. Baugh*, 9 Sm. & M. 290; *Kling v. Hummer*, 2 Penn. St. 349. But if one executor is removed (*Matter of Bull*, 45 Barb. 334), or is relieved of his trust (*Matter of Crossman*, 20 How. Pr. 350; *Gould v. Mather*, 104 Mass. 288), or dies (*Chandler v. Rider*, 102 Mass. 270), the remaining or surviving executor may exercise the power, unless it clearly appear from the will that a joint exercise thereof was intended. But trustees for sale may employ an agent according to the usage of business, if they use proper prudence. *Ord v. Noel*, 5 Mad. 498; *Sinclair v. Jackson*, 8 Cow. 582; *Gillispie v. Smith*, 29 Ill. 478. But such agent should only be intrusted with details of the sale, the trustees keeping the business in their own hands and executing the deed. *Hawley v. James*, 5 Paige, 487; *Cranston v. Crane*, 97 Mass. 459.

Henderson v. Palmer, 71 Ill. 579; S. C., 22 Am. Rep. 117, recalls a familiar principle of law, but one which is sometimes lost sight of in these days of many embezzlements and breaches of trust. In that case a promissory note, and a mortgage to secure it, were given in consideration that a prosecution for a felony should be discontinued. The mortgage was afterward foreclosed by a proceeding in which a want of consideration could not be pleaded as a defense, and the property was sold to an agent of the mortgagee. Held, (1) that the consideration of the note and mortgage was illegal and void; and (2) that a court of equity would cancel the note and mortgage, and set aside the foreclosure and the sale. That contracts to suppress evidence, or to interfere in any way with the course of justice, whether within the terms of any statute or not, are against public policy and void, has frequently been decided. *Nerot v. Wallace*, 8 T. R. 17; *Coppock v. Bower*, 4 M. & W.

361; *Swan v. Chandler*, 8 B. Monr. 97; *Clark v. Ricker*, 14 N. H. 44; *Commonwealth v. Johnson*, 3 Cush. 454; *Gardner v. Maxey*, 9 B. Monr. 90; *Hinesburgh v. Sumner*, 9 Vt. 23; *Soule v. Bonney*, 37 Me. 128; *Porter v. Havens*, 37 Barb. 343. In *Buck v. First National Bank* (27 Mich. 293), 15 Am. Rep. 189, a note, given to one who had been robbed, in consideration of his promise to petition the court to mitigate the punishment of the felon, was held void as against public policy. So in *Peed v. McKee* (42 Iowa, 689), 20 Am. Rep. 681, a mortgage, executed in settlement for money embezzled by the mortgagor's son, and in consideration of an agreement that the son should not be prosecuted, was held void. On the other hand, in *Bibb v. Hitchcock* (49 Ala. 468), 20 Am. Rep. 288, a clerk in a post-office having embezzled funds for which the postmaster was liable, the latter, to secure himself, induced the clerk to give him a note with surety, agreeing not to prosecute criminally for the embezzlement. The note was held to be valid and the surety liable; but expressly on the ground of the obligation of the clerk to make good to the postmaster the money embezzled—the agreement not to prosecute being conceded to be illegal. The correctness of this decision is open to serious doubt. The agreement not to prosecute criminally was in fact a part of the consideration for which the note was given, and it is well settled that a note given in part to suppress a prosecution is void even if for a just debt. *Bowen v. Buck*, 2 Williams, 808; *Murphy v. Bottomer*, 40 Mo. 87; *Brown v. Padgett*, 36 Ga. 609. But a contract or note to compound a private misdemeanor, such as a suit for slander or bastardy proceedings, is good. *Wallridge v. Arnold*, 21 Conn. 484; *Merrill v. Fleming*, 42 Ala. 234; *Clark v. Riker*, 14 N. H. 44. So is a note given after conviction for the legal costs and expenses of the prosecution. *Beesley v. Wingfield*, 11 East, 46; *Kirk v. Strickwood*, 4 B. & Ad. 421; *Baker v. Townshend*, 1 J. B. Moore, 120. See, also, *Bell v. Wood*, 1 Bay, 249; *Cameron v. McFarland*, 2 Car. Law Repos. 415; *Corley v. Williams*, 1 Bailey, 588; *Ford v. Cratty*, 52 Ill. 313; *Keir v. Leeman*, 6 Q. B. 308, where the authorities are fully reviewed. When a man accused his cashier of stealing money, and the cashier acknowledged that he had, and gave a note with an indorsement and a mortgage for the amount; and no prosecution was instituted nor any agreement made not to prosecute, the note was held valid. *Catlin v. Henton*, 9 Wis. 476; and see *Reg. v. Daly*, 9 C. & P. 342. It has been held that to receive a note signed by a person guilty of larceny as a consideration for not prosecuting him is compounding a crime, and indictable. *Commonwealth v. Pease*, 16 Mass. 91; 1 Camp. 45; 2 M. & S. 201. But merely taking back one's goods which have been stolen, or receiving reparation without agreement not to prosecute, or otherwise interfere with the course of justice, is no offense. *Reg. v. Stone*, 4 C. & P. 379; 1 How. P. C. 59; *Plumer v. Smith*, 5 N. H. 558.

A POINT IN THE LAW OF FIRE INSURANCE.

THE Supreme Court of Iowa has been subjected to some criticism for its decision in *McClure v. Girard Insurance Company*, 43 Iowa, 349; S. C., 22 Am. Rep. 249; but we incline to the opinion that the decision was sound in principle and reasonably well sustained by the authorities. In that case a policy of insurance was issued on a carriage described as "contained in a frame barn." The carriage was destroyed by fire while at a carriage shop undergoing repairs. The court held that the loss was covered by the policy.

It is true, as the court said, that any statement or description on the face of the policy which relates to the risk is a warranty, and that representations in regard to circumstances affecting the risk amount to a stipulation that no change will take place, whereby the risk will be increased; but when the property insured is ambulatory in its nature, words describing its location ought not to be construed as warranting a continuation of the same location, unless such was manifestly the intention of the parties.

The court said: "The words which are used must be construed with reference to the property to which they are applied. Carriages which are kept for sale and are insured as contained in a certain warehouse could not be removed to a different warehouse without avoiding the policy. There is nothing in the nature of the property to indicate that they will be removed, and the insurance is not made with reference to such fact. But where a person procures a policy upon his horse, harness, buggy and phaeton, as contained in a certain barn, the presumption must be that they are in use, and that the policy is issued with reference to such use. This doctrine was held substantially not only by this court, in *Peterson v. Miss. Valley Insurance Company*, 24 Iowa, 494, but in Massachusetts, in *Fitchburg R. R. Co. v. Charlestown Mutual Fire Insurance Company*, 7 Gray, 64."

A different doctrine was apparently held in *The Annapolis Railroad Company v. The Baltimore Insurance Company*, 32 Md. 37; S. C., 3 Am. Rep. 112, where a policy on cars "contained in car-house No. 1," was held not to cover the cars while on the line of the road. But in that case the car-house was also insured, and the court said:

"The intention of the railroad company was evidently to insure their buildings and their contents against fire, there being much greater danger of fire to their buildings located in a city and surrounded by other buildings, than to their trains upon the road and in charge of conductors and brakemen. While some of the cars which were insured were in use, others were not; but each car in its turn took its place in the car-house, and while actually contained therein was covered by the policy, so that, by the terms of the contract, the appellee would have been liable for all damages by fire to any of the in-

sured cars which might have occurred while they were actually in the car-house."

The words "contained in" being obviously used as words of limitation, the court so construed them in accordance with the well-known rule, that in construing contracts of insurance, the courts will give effect to the intention of the parties to be gathered from the terms of the contract, if not inconsistent with the established rules of law.

It is a reasonable rule, though one not universally followed, that the court must look at the nature of the property insured as well as the words of the contract to ascertain the intention of the parties. *Fitchburg Railroad Co. v. Charlestown Insurance Co.*, 7 Gray, 64.

In *Peterson v. Mississippi Valley Insurance Co.*, 24 Iowa, 494, a policy was issued on plaintiff's "dwelling-house, \$400; grain in the stack or crib, \$600; hay in stack, \$320; seven horses, \$750; cattle, \$275; situate in section 22, town 99, range 7 west." While the insured was hauling his grain to market he stopped for the night at a hotel, the barn of which, with one of his horses, was burned. Held, that the contract did not limit the use of the property to section 22; but that the language used was intended to describe the location and not to limit the use of the horses to the land mentioned. So in *Mills v. Farmers' Insurance Co.*, 37 Iowa, 400, the issuers of a policy on live-stock were held liable for a horse killed at a place not upon the premises specified, if it was being used in the ordinary course of business.

In *Everett v. Continental Insurance Co.*, 21 Minn. 76, the policy was on a threshing machine "stored in barn," etc. The machine was not in the barn when destroyed, but in a field where it had been in use. The policy provided that only such false or erroneous representations as were material should avoid it. The court held that the representation as to location was not material, but that its object was simply to identify the machine. The court continued: "but whatever might have been the purpose of the location of the machine in the application and policy, there is no ground whatever for contending that it was, in letter or spirit, a promissory stipulation on the part of the insured, or a condition of insurance on the part of the insurer, that this location should remain unchanged, or if changed, that while changed, the insurance should cease or be suspended." Citing *Smith v. Mechanics & Traders' Ins. Co.*, 32 N. Y. 399; *Blood v. Howard Fire Ins. Co.*, 12 Cush. 472; *Flanders on Fire Ins.* 241, 255, 269, 455.

An insurance on a house includes every thing accessory or appurtenant to the main building, as a rear building separated by a small yard and used as a kitchen. *Workman v. Insurance Co.*, 2 La. (O. S.) 507; and see *White v. Insurance Co.*, 8 Gray, 566;

Blake v. Insurance Co., 12 id. 265. So a policy on "stock contained in a chair factory," was held to cover stock, not only in the main building, but also in the engine-house appurtenant to, but ten feet distant from, the main building. *Liebenstein v. Baltic Insurance Co.*, 45 Ill. 301. So a policy "on machinery, consisting of cards, mules, pickers, shafting and belting * * * on the first story of a four story and basement building, situate," etc., was held to cover pickers, which were not in the first story of the building when the policy was issued, nor when they were burned, but were in the "picker house," a one story extension. *Meadowcroft v. Standard Insurance Co.*, 61 Penn. St. 91. So a policy on cars, etc., on the line of their road, and in actual use, covers cars on a branch road 440 feet from the line of the plaintiff's road. *Fitchburg Railroad Co. v. Charlestown Insurance Co.*, *supra*.

In *Fair v. Manhattan Insurance Co.*, 112 Mass. 320, the policy was "on stock of dry goods * * * contained in the frame building known as Hunt Building * * * as per plan filed." The goods insured were at the time in one store in said Hunt Building, which the plan filed showed to be divided into several stores. At the time of the loss the goods were distributed through all the stores. Held, that the words of the policy did not restrict the insured to a particular part of the building, and that the policy covered the loss.

In *Farmers' Loan and Trust Co. v. Harmony Fire Insurance Co.*, 51 Barb. 38; *affd.*, 41 N. Y. 619, the plaintiffs as trustees effected an insurance "on any property belonging to the said trust company as trustees and lessees as aforesaid, and on any property for which they may be liable, it matters not of what the property may consist, nor where it may be, provided the property is on premises owned or occupied by the said trustees, and situate on their railroad premises in the city of Racine." The plaintiffs as such trustees owned and occupied a wharf to which the cars came, and which was used in transferring freight between boats and cars. Plaintiff's dredge boat was burned while fast to this wharf, and the court held that the loss was within the meaning of the policy. In *Webb v. National Insurance Co.*, 2 Sandf. 497, the policy was on timber in a ship-yard, and the court admitted evidence that it was usual to keep such timber on the sidewalk, outside of, but in the vicinity of the ship-yard, and that, such usage being proved, the policy covered timber on the sidewalk. So, when a policy covered "furniture" generally in a house which was described, furniture stored in a garret and but rarely used was held to be included. *Clark v. Firemen's Insurance Co.*, 18 La. (O. S.) 481.

On the other hand, in *Eddy Street Foundry v. Camden Insurance Company*, 1 Cliff. 300, the property to be insured was described as being in a build-

ing in the rear of 82 Eddy street, used as a furnace house. The property was destroyed in a storehouse, which could not properly be described as being in the rear of 82 Eddy street, but as in the rear of 82 and 84 of that street. It was held that the insured could not recover because the property was not at the place described. So where goods were described as "in the store part" of a building, but when lost they were in the second and third stories of the building, whilst the store part was occupied by other parties, it was held that the insurers were not liable. *Boynton v. Clinton Insurance Company*, 16 Barb. 254.

A policy on a "new bark now being built at Butler's ship-yard at Baltimore," was not held not to cover material and other work prepared to be put on the bark and lying in the ship-yard and in said lofts therein. *Mason v. Franklin Insurance Company*, 12 Gill & J. 468. A policy "on chair lumber contained in the two story frame building," etc., was held not to include chair lumber in the engine-house, though connected by a platform with the building. *Liebenstein v. Aetna Insurance Company*, 45 Ill. 308.

In *Providence, etc., R. R. Company v. Yonkers Ins. Company*, 10 R. I. 74, the plaintiffs, the P. & W. R. R. Co., procured insurance in the defendant insurance company, the policy of insurance containing the following proviso: "Provided, all the property hereby insured is on premises owned or occupied by the Providence & Worcester Railroad Company, in Massachusetts and Rhode Island. * * * It matters not whether the property is in motion on the road, at rest, or in buildings." Held, that by reason of this proviso the defendant insurance company was not liable for a loss occurring upon premises not used or occupied by the plaintiffs at the time of the issuing of the policy, although so used and occupied by them at the time of the loss.

In *Bryce v. Lorillard Insurance Company*, 55 N. Y. 240; 8 C., 14 Am. Rep. 249, the policy was on merchandise "contained in letter C, Patterson stores." The "Patterson stores" constituted a warehouse divided into sections by fire-proof walls, and were designated by letters of the alphabet. The merchandise was in fact in "letter A" at the date of the policy and of the loss. In an action to reform the policy on the ground of mistake, and to recover the loss, it was held that the description of the locality of the insured goods was a warranty, and that the defendants were not liable.

RUFUS CHOATE.

IX.

WHEN the Rev. A. P. Putnam, D. D., was about leaving Brooklyn for his summer vacation, knowing that he was a native of Danvers, and that

he proposed to remain for some time in the vicinity of Mr. Choate's early dwelling-place, I asked him to keep in mind the subject to which these articles have been devoted, and to favor me, at his convenience, with such impressions as occurred to him, and such facts as he might learn. I gratefully acknowledge the kindly and generous spirit in which he has complied with the request, and take pleasure in placing his contributions before the readers of the JOURNAL.

J. N.

BROOKLYN, Jan. 7, 1878.

MY DEAR JUDGE:

I beg you to accept my thanks for the copies which you have kindly sent to me of THE ALBANY LAW JOURNAL, containing your exceedingly interesting and timely articles illustrative of the life and character of Mr. Choate. I rejoice that your efforts to rescue so much valuable testimony to his worth and so many facts concerning his habits and history, before those, who, from their personal friendship or acquaintance, are best qualified to furnish such material, have quite passed off the stage, are so widely and gratefully appreciated. Though a native of Danvers, where he began the practice of the law, yet, while he was there, I was too young to see and hear him as many of the older residents were wont to do. But I recall how frequently he was a favorite theme of conversation with my father, who was associated with him not a little in political and town affairs, and who had the greatest respect and admiration for his talents and virtues. After he removed from Salem to Boston, the charm of the man and of his eloquence lingered long in the minds of all classes of people in Essex county, and stories of his early successes at the bar, and predictions of his brilliant future continued to be rife in and about the scenes of his opening professional career. I well remember how, on one occasion, when thirty or forty years ago he came from Boston to Danvers to try a case of local interest, a most eager desire to see him was manifested by the villagers, who assembled about the hotel to witness his arrival, and then crowded into the hall to listen to his argument. I was myself but a boy in the thronged apartment, and have no very distinct recollection of what he said at the time, but I shall never lose the impression which his look, manner and voice made upon me. In form, features and expression he was then the perfection of manly beauty, while he had already won an enviable fame as an orator and advocate. Long afterward it fell to me to go to the city to engage him for a lecture. I found him at home, seated in a soft, comfortable arm-chair and suffering severely from neuralgic pains in his head. The brief interview is precious to me in memory, as well because it was the only opportunity that was ever permitted me to exchange words with him, as because he seized the moment to pay a tender tribute of esteem and affection to one who had recently died and who was yet dearer to me than to himself. I always, however, sought to hear him whenever it was announced that he would speak in public, and whenever it was possible for me to be present. Some of his later political speeches found no response in one of my own anti-slavery convictions, but there was magic in his spell, and there was also truth in the man. For, however questionable his reasoning may now seem, in view especially of all that has since occurred in our national history, who can for a moment doubt

that a soul so sensitive and conservative, yet so patriotic and unselfish as his, must have been deeply in earnest, as he foresaw and dreaded the conflict that was near at hand, and did all that he could to stay the storm. One of the ablest utterances I ever heard from him was, I think, his speech on the Judiciary question, July 14, 1853, in the Massachusetts Convention, held during that year in Boston, for revising and amending the State Constitution. It was an exceedingly powerful argument, and it was as captivating in style and delivery as it was lofty and irresistible in its logic. The hall of the House of Representatives was crowded in floor and in gallery, and the attention of all was riveted to the end. The peroration was a splendid tribute to the people of Massachusetts, and ended thus: "They have nothing timorous in them as touching the largest liberty. They rather like the exhilaration of crowding sail on the noble old ship, and giving her to scud away before a fourteen knot breeze; but they know, too, if the storm comes on to blow; and the masts go overboard; and the gun deck is rolled under water; and the lee shore, edged with foam, thunders under her stern, that the sheet anchor and best bower then are every thing! Give them good ground tackle, and they will carry her round the world and back again till there shall be no more sea." The effect of such a speech, with these concluding words, may be better imagined than described. Immediately as he finished it, he put on his wraps, even though it was summer, and like some mysterious personage walked out of the assembly, followed by the gaze of the impressed and admiring multitude.

His judgment respecting one of the notable men of the Convention is interesting. The towns and cities of the Commonwealth seemed to have vied with each other in electing as members their leading statesmen, politicians, lawyers, jurists, scholars, authors, editors, teachers, reformers, clergymen, merchants, or farmers. It was a very remarkable body of men, and among them were Rufus Choate, Charles Sumner, R. H. Dana, Jr., Marcus Morton, Otis P. Lord, Henry Wilson, Charles W. Upham, Benjamin F. Butler, William Appleton, J. Thomas Stevenson, John C. Gray, Sidney Bartlett, N. P. Banks, Anson Burlingame, Charles Allen, Samuel A. Elliot, George N. Briggs, George S. Boutwell, Henry L. Dawes, F. B. Crowninshield, George S. Hillard, and many others of State, if not National reputation. But Mr. Choate told a friend of mine, who was a member from Roxbury, that the man who was the ruling genius of the body, most powerfully controlling its deliberations and shaping its proceedings, having the most thorough knowledge of all his associates, and being most fertile of resources in adapting means to ends, always carrying the whole business of the Convention in his mind, ever watching his opportunity, and never failing to accomplish his purpose—was Henry Wilson. Such testimony from such authority, with regard to the "Natick Cobbler," giving him so proud a pre-eminence amidst the assembled wisdom of the State, was a tribute indeed.

While spending my summer vacation at Beverly a few months ago, I took the cars one day for Essex in order to visit the spot where the great advocate was born. On reaching the village, I went with a friend to the head of the creek where the ship-builders launch their barks, and there joining two of Mr. Choate's nephews, Rufus and William, we rowed together down

the winding stream for about a couple of miles until we came to the small bay whose waters inclose the island where he first saw the light and which is itself shut in by the enfolding arms of the white sand beaches that project from, or lie along the shore. The land on either side, as we had proceeded on our way, was mostly level and marshy, but about midway on our left it rose into a gentle swell, and was largely shaded by a noble growth of oaks, presenting a lovely site for a summer residence. It was long a cherished dream of Mr. Choate's—to which his biographer makes a passing allusion—that he should one day build himself a house here, where he might each year come and rest awhile from his arduous professional toils, and refresh himself with the cool sea air, and the old familiar scenes of his infancy and youth. Yet it was too lonely a spot for the younger members of the family, and the project was never realized. Also at the left, and within the little bay, is what is known as Dean's island. It is a small extent of land, covered with trees and entirely uninhabited. One could easily believe concerning it, that it was never the abode of any living creature. Mr. Choate was one day gliding past it, in company with the nephew who bears his name, and was hearing the latter tell how he had visited the silent and unfrequented spot. It was at a time when the cholera was raging in various parts of the country, and was the subject of general and anxious remark, and the uncle, affecting a great horror of the scourge, said with a touch of his subdued yet delicious humor, "And Rufus, did you find any cholera there?"

The island on which Mr. Choate was born is just opposite the mouth of the creek, and is separated from the mainland by a wide channel of water at high tide, but may with some difficulty be reached with a horse and wagon, when the tide is out. Its surface consists of about three hundred acres, and the whole rises into a well-rounded eminence whose summit must be about two hundred feet above the level of the water. Its bald, naked aspect is quite unrelieved by trees and vegetation, except as the more southern slopes are brought under some degree of cultivation by those who occupy the three farm houses which are situated there. In one of these houses Rufus Choate was born, but when he was only six months old the family removed to the village where he grew up to early manhood. The house is painted white, and has latterly received a piazza on the front, which faces the south. The island has been in the possession of the Choate family for seven generations. Its proper name is "Choate island"—a name to which the facts of its original and continued proprietorship well entitle it, and which is actually given to it in the maps of the Coast Survey. It is now the inheritance of the nephew Rufus, and was bequeathed to him by his illustrious namesake. The uncle always turned to his birthplace with fond affection, and was wont to go thither in the summers for a time, taking with him some books and friends. It is reasonable to suppose that the spot and its surroundings must have exercised more influence upon his mind and character than those who have written about him have been wont to trace. Who can tell how much of the marvelous beauty of his lost lecture on "The Romance of the Sea," or how much of the pathos, or witchery, or eloquence, of many another of his productions, must have been due to what, in youth as in maturer life, he thus often saw and felt there at his "native isle." From the brow of the hill he could discern in clear weather, far away

at the north, the mountains of Maine and New Hampshire. Beyond the marshes and the village that lay immediately at the west, he could see not a few of the towns and villages of Essex county, numbering many a glittering spire, and delight himself with a richly diversified and most pleasing landscape. Just at the south-east the great cape extended its lofty ridge far out toward the sea, while close along the nearer shore lay various larger or smaller islands or sand-bars, with their white cliffs and shining levels, washed on the one side by the waters of several rivers that poured down their currents from the interior, and on the other by the waves of the ocean, whose vast expanse, broadening to the view, specked with sails, and fascinating with its ever-changing hues, completed the circuit of the range. In all this scenery there was a breadth and a variety, a certain lonely grandeur and perpetual revelation, which, to one who was such an ardent lover of nature, and who was so susceptible and imaginative as Mr. Choate, could not have failed to possess for him an indescribable charm.

We drank at the well from the "old oaken bucket, the iron bound bucket," whose water was as cool and reviving as that which at Salisbury, N. H., once evoked from Mr. Webster, in his old age, the fervent ejaculation, "This water of my father's well; it is sweeter than the nectar of the Gods." And then we entered the house, saw the room where the infant Rufus made his advent, and the other apartments which have been so familiar to successive generations of his name, listening to many an interesting story of the lives of those who have there had their home. A fresh breeze had sprung up as we returned to our boat, and we were borne gaily up the stream down which we had been rowed and took tea with the family of the late David Choate at the homestead to which Rufus was taken when an infant and which was from that time his abode until he went forth into the wider world. It was pleasant to talk with such of the nearest relatives of the departed as are still living in Essex, hear them speak of one of whom they are so justly proud, and see the memorials and keepsakes that tell of their love for him.

Some of the early letters of Mr. Choate have come to light since Prof. Brown published his Memoirs. These, in view of the fact that they were written, chiefly, in his school-day life, and in consideration of the paucity of such materials as illustrative of his history, may be regarded as of some interest and importance, though there is nothing in them of very remarkable significance. I was permitted to take them for a time and make such use of them as I might see fit, and a few extracts from them may prove welcome to the readers of these pages as showing more fully his habits of study, his tastes and predilections, and his peculiarities of mind, in that formative period of his life. It is possible that one or more of these letters may have been partly given in some form to the public before, but I am not aware that such has really been the case, and I am told by his nephew that, as a whole, they are quite unknown beyond the immediate circle of his friends or relatives. Some of them abound in fun and absurdities. Others are thoughtful and sad. Nearly all of them indicate an original cast of mind, an earnest love of knowledge, and a strong determination to conquer, with a tender and ardent affection for his home and the dear ones who were there.

The first is dated June 17th, 1815, and was written to

his brother David from Hampton, N. H., where he was fitting himself at an academy to enter college. He refers at the outset to a charge which he had received from the "combined powers," or "the folks," at home that he should write immediately "a long, solid letter." Then he proceeded thus: "Did you ever see a definition of the word 'solid'?" If not, I will give you one from Bailey's Dictionary. '*Solid* (F. Solide, L. Solidus), massive, hard, firm, strong, real, substantial, sound, lasting.' How," he asks, "can I build a 'solid letter,' then, with such materials as these, viz.: thin paper, no bigger than a $4\frac{1}{4}$ penny, shallow brain, and no life at all?" Instantly he dashes off into a strain of bombast, interspersed with quotations about the storms and desolations of winter and the sunshine and loveliness of the season that has succeeded, suggesting that it may all serve to "fill up" what he evidently means as a sort of burlesque of the thing his family have asked for. Toward the end of the letter he writes that he has begun the *De Oratore*, and hopes soon to be "fit." But he depends much on spending a month or two at home "before the Dartmouth 'Scrape' comes on." He is now in the sixteenth year of his age.

Then there is another of these letters from Hampton, dated July 20th, of the same year, and addressed also to his brother David, in which he debates the question, in lawyer-like fashion, whether he shall go home before the end of the quarter, the disputants being "*Rufus & I*." The reasons for his going prevail. "The die is cast." He says, "I want some time for relaxation and delivery from purgatory previous to besetting Dartmouth College."

He entered college in the summer of 1815, and in a letter written from Hanover and dated December 5, 1815, he gives an account of his expenses, which certainly were small enough, and arranges with his brother for a visit home early in January. He adds: "Only about ten or twelve of my class remain. The rest have taken schools. How thankful ought I to be that I am not *obliged* to resort to this for assistance. We who remain have a chance to improve in the languages particularly."

Early in the following March he had returned to Dartmouth and writes to David, "Should I have my health, my acquirements *ought* to be great. Whether the measles are hanging about me or not is uncertain. I feel rather unwell, but a few days will decide. Respecting the affairs of the college, every thing is at present in dread uncertainty. A storm seems to be gathering, the sky lowers and ere long may burst on the present government of the college. What the event may be, time will discover. If the State (and there is no doubt of it) be Democratic, a revolution will take place. Probably President Brown will be dismissed. In that case the college will fall. However, say nothing—all may yet be well, and if not, we are not to blame." . . . "The class is ambitious, and to be among the first, in one which is pronounced the best in college, will be an arduous undertaking. Good health will be absolutely necessary for a candidate." . . . "These hints about *health* may make you uneasy, but you must not mind it. I sincerely hope to be able to study hard, but shall never injure myself in that way. I suppose Washington* is getting through with the Reader. He *must* attend closely to Latin and

Greek. Two years would make a thorough scholar out of any thing, and if this college should fail the more he must study to enter at Cambridge." He says he has paid Mrs. D. for his board, has "discharged all debts" and has "some left," but, as certain, necessary expenses will soon absorb what little money remains to him, he half sportively adds, "I don't know what more to write, but suppose in about a month you send me a little money!" And again, "I will now close, requesting you to write immediately and pay the postage."

On November 3, 1816, he again writes from Hanover to David, who had evidently been very sick: "My dear brother: My feelings on receiving another letter from you I shall not pretend or attempt to describe. You can conceive with what anxiety I was waiting news from home and the joy I must have felt in recognizing your well-known hand—the hand indeed of one, as you observe, 'almost literally raised from the dead.' How grateful ought we both to feel. And if I know any thing of myself, I do feel so. These gloomy forebodings that distracted my waking hours, and the dreams that haunted my sleep, have now left me, and I can think of home without its appearing dreary and melancholy; but I will only add, 'My heart's desire is, that the cure may be perfected.'—Respecting my own situation, I would tell you that it is in the highest degree pleasant. My room is good and room-mate agreeable, and our fellow students in the house, seven in number, mostly seniors, friendly and familiar. Compared with last term, my eyes are well, though I do not attempt studying evenings, this circumstance rendering application in the day time necessary. I have too much neglected exercise and my head suffers for it. Since conversing, however, with Dr. Mussey, I have altered my habits and regularly exercise once a day. The instruction we enjoy is most excellent. Pres. Brown hears us in Horace and Prof. Shurtleff in Algebra, and it is our own fault if we do not make suitable advances. By abridging hours of recreation, I have made myself master of the French grammar and read, without a translation, one or two pages in the original of Telemachus as an exercise every morning. We have a task assigned the class of rather a singular nature, and such a one as will, with difficulty, be well performed: it is the rendering into English poetry one of the Odes of Horace, and this, with two or three other exercises which fall upon us, will, I fear, oblige me to hurt my eyes by application in the evening. I forgot to observe, when speaking of instruction, that Prof. Adams corrects our compositions."

Yet again he writes from Hanover to David, under date of Dec. 16, 1816: "I have been unavoidably prevented, till this moment, from answering your last, and expressing my joy at its contents. You will be sorry to hear what I have to tell you, respecting affairs of the college. Intelligence has just reached us, that another act has passed both branches of the Legislature and become a law, authorizing nine of the new trustees only to do business, a number which it is supposed can very easily at any time be assembled. That this body will convene immediately, perhaps before the end of the term, and remove the whole of the present government of the college, and supply their places with men of their own party, is what the best amongst us confidently expect. The situation of the institution is, you perceive, critical in the extreme: 'Consternation turns the good man pale.' You may judge better of the singular state of the college, and of the confusion

*A younger brother who was born January 17, 1803, and died during his senior year at college.

which prevails, from the following circumstance. It is customary for the sophomore class to take on itself the business of getting the catalogue of officers and students annually printed. It was, as usual, done by my class this fall, with the introduction, if I may so express it, '*Catalogue of the Officers and Students of Dartmouth College.*' The few democrats and fellows of 'the baser sort' amongst us immediately employed our Hanover democratic printer to strike off an 'edition' in this form: '*Catalogue of the Officers and Students of Dartmouth University, together with the Trustees (old and new) and Overseers of the same!*' So much for affairs of college . . . "I have been exceedingly troubled with *headache* and my eyes have become somewhat *weak*. I, therefore, look with impatience for the close of the term. I would, however, observe, that, if my health is continued, I shall employ the coming vacation in diligent and profitable study, and excepting the Londonderry visit, which I heartily dread, I shall shut myself up. I have secured Smith's Botany and a 'Telemaque' of Dr. Mussey, to which my attention will this winter be devoted."

The last of these letters which I have in hand was written to Mr. Choate's sister Hannah, while he was studying law under Mr. Wirt at Washington, and is dated Sept. 29, 1821. It begins thus: "We sent you such a storm of letters two or three weeks since, that somehow we hardly thought to be turned off with but *one* in answer, however full and excellent it might be, and so have waited and waited, unreasonably you will say, in daily expectation of another or two. But I have taken hold at last and a letter you shall have — with nothing in it though, but very much love to you all, very much joy at David's so gratifying recovery and the word '*all's well*.'" A little further on he writes, "M. and E. went to Mount Vernon yesterday, and have brought back leaves, acorns, etc., plucked from the grave that hallows that place and makes it a spot so dear to the heart of every American. Sister S. and I hope to go down next Saturday." Besides his regular study of the law, he tells us that he is "engaged every other day in the week, three hours in a school of young ladies as a *portant* — all for cash: of which the Dr. does not manage to have any very great abundance, or for which I do not choose to ask him." He continues, "I have some trifling debts which it is my determination you at home never shall pay, and seriously as I regret the inroad on my hours of study, I cheerfully resign from 11 to 2. You can hardly imagine how much I long to go back to you, and look around once more on our family circle, and on the hills, dales and waters of our much loved birth-place. Sometimes I almost determine to return this fall, but then what shall I do for money and how shall I dispose of my professional studies? So on the whole I must stand by, I think, till June, 1822. In the meantime, as soon at least as the session begins, we must contrive to hear from each other oftener, and when D., who I hope is nearly well enough already, has so recovered as to write, *once a week* must be the word. I like this city very little, and hope and believe I never shall make up my mind to stay here for life. That question, as to the place of my future residence, begins at last to be a very serious one, and I think of it daily and nightly. Yet there are more than two years to me yet before I need decide, and all I ought to wish to do is to improve them to the very utmost." Again, as often in the course of these letters, his fond affection for his brother David

finds its wonted expression. "You don't know how it delights me to hear of D.'s recovery, and how we want to see it under his own hand and seal."

This David, who died about five years ago at the age of seventy-six, was, I need scarcely add, a man of much prominence and great usefulness. He possessed in no small degree, many of the extraordinary natural gifts that distinguished his more celebrated brother, and, though he had had less favorable opportunities for early culture, he nobly justifies the bright hopes that clustered about his promising youth by the solid and lasting service which he rendered, through all his manhood, in the interests of Education, Law and Religion.

Among several scraps which I have in Mr. Choate's handwriting, is a letter which he wrote from Washington, when he was no longer a law student there, but, about twelve years later, Feb. 4, 1833, when he was a member of Congress. A short extract affords us a glimpse of what some of the national representatives were thinking about and doing: "Things stand pretty dubiously yet. However, the *Union* is well enough. The *Tariff* we may save by a bargain."

The last law case which Mr. Choate was ever engaged in has been referred to in a previous communication. A brief, written at the time with his own hand, is also in my possession, and is a curiosity in its way. Its chirography makes quite credible the story, which, however, comes to me from very good authority, that a now deceased member of the Middlesex bar once received from him a letter respecting a suit in which the two were associated with each other, and being unable to read it or to find any one else who could do so, he took it back to the writer, who was actually unable to decipher its strange characters himself. And were the latter to reappear amongst us, after this lapse of years, I fear he would be equally unsuccessful in making out the brief I have mentioned.

I have often heard Massachusetts lawyers speak of the strong prejudice which Mr. Choate soon encountered from the older and more conspicuous members of the profession after his advent at the Boston bar. The way he had of gaining victories by his brilliant style, his captivating eloquence, his wonderful power over juries, and his new and novel methods of procedure, was deemed an impertinent departure from the long-established rule and routine. Few could understand him and more than a few persistently disparaged his talents and attainments, ridiculed his efforts and peculiarities, and sought to annoy and perplex him in court by unusual rudeness. On one occasion when he had borne patiently many an unfriendly interruption and bitter taunt, some one who was near asked him why he endured such treatment and why he did not retort. "I shall retort," he said, "by getting the case." And he got it.

Others, who were fitted for the task, have already, perhaps, given us a satisfactory analysis of Mr. Choate's mind and character. It is not for me to attempt it and my letter is even now too long. But I cannot forbear adding a word about what has always seemed to me one of the very finest of his traits. During my summer sojourn at Beverly, I was a near neighbor of the venerable Dr. Boyden, whose testimony, as that of the only surviving college classmate of the great lawyer, you gave to the public in connection with your last article. In several interviews I had with him, he dwelt much upon the many rare virtues and excellencies of

his distinguished and life-long friend, and touched particularly upon his generous appreciation of whatever was good in others, and his absolute freedom from all envy and jealousy. Rufus Choate always wished and aimed to excel, but he was glad to see his companions and competitors excel, also, and was ever ready to help them in their struggles and toils. He coveted no pre-eminence that must needs be purchased at the cost of those who were striving with him for fame and glory. He had no habit of disparaging his associates or rivals at school, at the bar, in legislative hall or in the political arena. I can think of only one instance by way of exception. When Charles Francis Adams, during the early years of the Free Soil movement, was pointing the people to the one straight path of duty and safety, Mr. Choate, whose honest views and sympathies and actions took a very different direction, indulged in the sarcasm of referring to John Quincy Adams as the "last of the Adameses." He did not live to see, to the full extent, how unfortunate was the word. For when the awful conflict came which no oratorical gifts or skillful compromises could avert, and the peerless magician of the courts and of popular assemblies had, himself, forever quit the stage, it was that same son of the "old man eloquent," who, through long and perilous years, rendered his country a service abroad which history will claim as scarcely inferior, in measure and value, to any that was performed by the wisest and best of our statesmen at home.

Yours, very truly,
A. P. PUTNAM.

LAW REFORM IN CONNECTICUT.

THE land of steady habits" gives some promise of better things in legal procedure than it has yet known. The governor of Connecticut, in his recent message, spoke as follows of a reformation of legal procedure.

"I beg also in this connection, and as tending in the same direction, to call your attention to our system of legal procedure. I think it difficult for the human mind to invent a more artificial plan of remedies than those provided by the common law. They are founded sometimes on absurd fiction, and often on puzzling and metaphysical subtleties, which are not seldom the despair of both the bar and the bench, and in the midst of which justice often miscarries.

"The system has some merits, but it serves too often only to cudgel the brains of lawyers and entangle the rights of parties.

"Our plan of judicial proceedings is borrowed from the English law. It has been freed from time to time by the decisions of courts and by occasional legislation, from some of its clogs and trammels, but it is still cumbersome, inconvenient, and fruitful of delay and expense. In England they have at last, under the lead of the best lawyers of the kingdom, cut up the system root and branch, and reduced the multiplied and complicated remedies of law and equity to the most direct and simple forms.

"The same work has been done in part, but less boldly, in several of our sister States. This work, if attempted here, must be done with a wise moderation and with the utmost care and painstaking. It requires the best legal ability of the State. I recommend that a commission be raised to take this matter into consideration, and if they shall think it expedient, to report to the next assembly a bill for the simplification of our

system of legal procedure, and for the more speedy administration of justice. There is no use of scratching the skin where incision and surgery are needed."

EXAMINATION OF ADVERSE PARTIES UNDER THE NEW CODE.

NEW YORK SUPREME COURT, JANUARY 10, 1878.

PEOPLE V. MUTUAL GAS-LIGHT CO. OF BROOKLYN.

A director of a corporation may be examined under the provisions of sections 870 and 873 of the Code of Civil Procedure, relating to the taking of the deposition of a party to an action.

MOTION at Special Term of Supreme Court, Second District, to vacate order to take deposition of a director of defendant corporation. The facts sufficiently appear in the opinion.

GILBERT, J. An order having been made at Special Term that Alexander Studwell, a director of the defendant corporation, be examined and his deposition taken pursuant to sections 870 and 873 of the Code. Mr. Studwell now moves to vacate the order on the ground that it was not authorized by the sections referred to. The ground of the objection is that Mr. Studwell is not a party to the action, and his examination would not be an exercise of the right given to have the deposition of a party taken. The objection, if allowable, must necessarily frustrate the statute in every case where a corporation is the party against which the examination is sought. And such a construction was given by this court in *Goodyear v. Phenix Rubber Co.*, 48 Barb. 522; to a similar provision of the former Code. The contrary was held in *Carr v. Gl. West. Ins. Co.*, 3 Daly, 160. See, also, 1 Robt. 610; 22 N. Y. 353.

With this conflict of direct adjudication upon the point before me, I must yield to my own opinion upon the subject. I think it is the duty of courts to enforce statutes if a way for doing so can be devised, and that they have no power in any case to frustrate a statute if it be practicable to carry it into effect.

The right given by section 870 of the Code to take the deposition of a party to an action is an absolute one. 2 Wait's Pr. 710. No exception of a corporation has been made. In respect to this right to examine, therefore, a corporation stands on the same footing with a natural person. Being a party, the adverse party has a right to take its deposition. The only difficulty in giving effect to such right arises from the incapacity of a corporation to make answers under oath. The same difficulty existed in the administration of the former practice of courts of equity, in cases of discovery, against corporations. As a corporation could not answer upon oath but only under its common seal, the plaintiff was permitted to make individual members of the corporation parties defendant, although they had no pecuniary interest in the controversy, for the sole purpose of compelling a discovery upon oath. This practice was a relaxation of a well-established general rule that a mere witness cannot be made defendant, and it was permitted because otherwise there would be a failure of justice. Aug. & Am. on Corp., 10th ed., §§ 674-676; 1 Danl. Ch. Pr., 4th Am. ed., 144 *et seq.*, and cases cited; *Vermilyea v. Fulton Bank*, 1 Pai. 37; *Masters v. Bessie Galena Lead Mining Co.*, 2 Sandf. Ch. 301; *McIntyre v. Union College*, 6 Pai. 229; *Many v. Beekman Iron Co.*, 9 Id. 188. Bills of discovery have been abolished, but the substance of that remedy has

been preserved by section 870 of the Code. To make the latter efficacious in the case of a corporation defendant, it needs only the adoption of a means of compelling the officers of a corporation to submit to an examination analogous to that resorted to by courts of equity, to which reference has been made, namely, the making of them parties to the proceeding for a discovery. That is done by inserting in the order for an examination the name of an officer as trustee of the corporation, and requiring him to attend and be examined.

Considering the facilities afforded by general laws for the formation of corporations, their capacity for evil, and the numerous instances of maladministration of the affairs thereof, the right given by section 870 of the Code must be regarded as a valuable safeguard against frauds and breaches of trust, which should be preserved and enforced by every reasonable and fair intendment.

The motion is denied, and Mr. Studwell is required to appear on the 12th instant at 10 A. M. and be examined.

LIABILITY OF PRINCIPAL FOR FRAUDULENT MISREPRESENTATION OF AGENT.

JUDICIAL COMMITTEE OF PRIVY COUNCIL, NOVEMBER 23, 1877.

SWIRE *et al.*, appellants, v. FRANCIS.

S., who was agent of the respondent, and practically carried on his business, sent to the appellants, in the ordinary course of business, an account showing that certain advances had been made on goods on their account, and drew a bill on them for the amount, which was duly honored. The advances had not been made, and S. had appropriated the amount to his own use.

In an action brought by the appellants against the respondent to recover the amount of the bill:

Held (reversing the judgment of the court below), that the case fell within the principles laid down in *Barwick v. The English Joint Stock Bank* (16 L. T. Rep. [N. S.] 461; L. Rep., 2 Ex. 259), and *Mackay v. The Commercial Bank of New Brunswick* (30 L. T. Rep. [N. S.] 180; L. Rep., 5 P. C. 412), and that the appellants were entitled to recover.

THIS was an appeal from a decree of C. W. Goodwin, Esq., acting chief judge of Her Majesty's Supreme Court for China and Japan, at Shanghai, made on the 15th Feb., 1877, on a special case. The questions stated for the opinion of the court were, whether the respondent was liable to the appellants in the sums of taels 6073.30 and taels 57.18 respectively, together with interest from the 2d April, 1876. The court decreed that the respondent should pay to the appellants the sum of taels 57.18, and that the claim of the appellants for the sum of taels 6073.30 and interest should be dismissed, and that the appellants should pay to the respondent the costs of suit. This appeal was entered against so much of the said decree as relates to the claim for the sum of taels 6073.30 and interest, and to the costs of suit.

It appeared from the special case that the appellants acted as general agents in China of the China Navigation Company (Limited), an English Joint Stock Company owning a line of steamers running between ports on the River Yangtze. The respondent, who resided and carried on business at Shanghai, also carried on business under the style of Francis & Co., at Kiukiang, one of the ports on the said river, and he acted as agent of the company at Kiukiang, under the di-

rection of the appellants. The business of the respondent at Kiukiang was practically carried on by one W. H. Shaw, who was employed and paid by the respondent, and who signed the name of Francis & Co., per procuration.

The respondent was remunerated by a commission on the freight and passage moneys earned through his agency.

It was part of the business of the appellants (on their own account, and not as agents of the company) to make advances through the respondent and other local agents, at the various ports on the river, to Chinese merchants upon goods intended for shipment, or in the course of shipment. Such advances were from time to time made through the respondent at Kiukiang; they were made either with sycee remitted for the purpose by the appellants, or with the proceeds of drafts drawn in respect of them by the respondent on the appellants. The respondent's firm rendered accounts to the appellants monthly, or, if required, oftener. The respondent derived benefit from the advances, because, unless he had facilities for making advances, the native shippers would, in many cases, have gone to rival companies, and so the respondent would have lost his commission.

In one of these accounts rendered by Shaw it was represented by entries that respondent had advanced money on goods which appellants were entitled to assume were under the control of the company mentioned. In fact, no such advances had been made, and the entries stating that they had been were false. At the time this account was rendered, Shaw, in the name of respondent's firm, drew for the balance shown by the account, and the draft was duly honored by appellants. Subsequently a similar account was rendered, containing similar false entries, and a draft was made, and the sums said to have been advanced by the respondent to native merchants had in fact never been advanced, and Shaw appropriated them to his own use, out of moneys of the respondent under his control as agent and manager of respondent.

The court below was of opinion that the appellants were not entitled to recover the said sum of taels 6073.30, and dismissed the claim of the appellants for the said sum and interest, and directed the appellants to pay to the respondent the taxed costs of suit.

From this judgment the present appeal was brought. The respondent did not appear, and the appeal was consequently heard *ex parte*.

G. Bruce (*Benjamin*, Q. C., with him), for appellants, cited *Swift v. Jewsbury*, 30 L. T. Rep. (N. S.) 31; L. Rep., 9 Q. B. 801; *Re United Service Company*, 23 L. T. Rep. (N. S.) 520; L. Rep., 6 Ch. 212; *Western Bank of Scotland v. Addie*, L. Rep., 1 H. of L. Sc. 145; *Barwick v. English Joint Stock Bank*, 16 L. T. Rep. (N. S.) 461; L. Rep., 2 Ex. 259; *Mackay v. Commercial Bank of New Brunswick*, 30 L. T. Rep. (N. S.) 180; L. Rep., 5 P. C. 394; *Udell v. Atherton*, 4 L. T. Rep. (N. S.) 797; 7 H. & N. 172; *Makersy v. Ramsay*, 9 Cl. & F. 818.

Their Lordships' judgment was delivered by

Sir ROBERT COLLIER, who, after going through the facts of the case as set out above, continued: Their Lordships are of opinion that it was within the scope of the authority of Mr. Shaw, as that expression has been defined in many cases, to make out the account which is spoken of, to insert in it the advances made on goods on account of the plaintiffs; and to

draw the bill for the purpose of covering the balance of the account. All this was in the ordinary course of business. It is of course not to be assumed that he was authorized to commit a fraud by making the false entry of the advances of 5800 taels; but it would have been within the scope of his authority to make an advance of that kind, and to enter it in the account when made, and the case, therefore, in their Lordships' opinion, falls within the principle which is well stated by Willes, J., in the case of *Barwick v. The English Joint Stock Bank* (16 L. T. Rep. [N. S.] 461; L. Rep., 2 Ex. 259), where he observes: "In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he had not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." This doctrine has been also laid down by this board in the case of *Mackay v. The Commercial Bank of New Brunswick* (L. Rep., 5 P. C. 394; 30 L. T. Rep. [N. S.] 180). Their Lordships are disposed to infer that Shaw, instead of advancing the 5800 taels, which he pretended had been advanced to merchants upon cargoes to be shipped, in reality appropriated so much of his master's money to his own use, and having so misappropriated it, drew a bill in the name of his master and in the course of business upon the plaintiffs for replacing that money, and that the plaintiffs have repaid to Mr. Francis the money of his own, which had been misappropriated by his agent. But even if it be assumed, as perhaps it was in the court below, that Shaw appropriated only the proceeds of the bill which had been drawn for the increased balance to the extent of 5800 taels, still it appears to their Lordships that no substantial difference would arise in the legal bearings of the case. The bill was drawn by him in pursuance of a general authority which he had to draw on behalf of Francis & Co., whose sole representative he was in the business which Francis carried on at Klukiang; it was paid by the defendants to the account of Francis & Co. for a general balance, which was improperly increased by the amount of 5800 taels. The proceeds of this bill belonged to Francis & Co., and the case comes to this, that 5800 taels were paid to Francis & Co., by the plaintiffs, without any consideration whatever, and that Shaw fraudulently misappropriated that money. In either aspect of the case it appears to their Lordships to fall within the authority of the case which has been referred to, of *Barwick v. The English Joint Stock Bank*, as well as within the authority of *Mackay v. The Commercial Bank of New Brunswick*. Their Lordships have only further to observe that it would appear to them that the court below was somewhat misled by the assumption that the law concerning the relations of bailor and bailee applies to this case. If the question had arisen with respect to an actual transmission of bullion or coin which had been stolen by Shaw, the observations of the court would have been applicable, but it appears to their Lordships that this case is governed by other considerations, to which they have referred. Under these circumstances their Lordships will humbly advise Her Majesty that the judgment of the court below be reversed, and that judgment be entered for the plaintiffs for 8073.30 taels (Shanghai currency) in addition to the sum for which it is at present entered, together with interest to be

fixed and calculated, in the manner provided by the special case, and that the record be remanded to the Supreme Court at Shanghai for this purpose. The appellants will have the costs of the appeal.

STATE INTERFERENCE WITH PATENT RIGHTS.

UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

WOOLEN V. BANKER.

A State statute requiring notes given for patent rights or patented inventions to bear the words "given for a patent right" is contrary to the Constitution of the United States and void.

ACTION upon a promissory note.—Upon the trial in the District Court before Swing, J., and a jury, the statute mentioned in the following opinion was held unconstitutional, and a verdict was rendered for the plaintiff. A motion for a new trial was heard by Mr. Justice Swayne. The opinion is as follows:

SWAYNE, J. The plaintiff brought his action upon a promissory note of \$500, containing the words, "given for a patent right." The defendant set up failure of consideration for that the patent right was void for want of novelty, and of no value, relying upon the statute of Ohio, passed May 4, 1869, §66, O. L. 93, which provides that "any note the consideration for which shall consist in whole or in part of the right to make, use or vend, any patent invention or inventions claimed to be patented, shall have the words 'given for a patent right' prominently and legibly written or printed on the face of such note above the signature, and such note or instrument in the hands of any purchaser or holder shall be subject to the same defenses as in the hands of the original owner or holder."

The reply sets up that the plaintiff's intestate purchased said note for value, without notice, before maturity.

Upon a trial to a jury, the defendant offered evidence to show that when the note fell due, and demand was made, he offered to return the patent right and cancel the obligation. The court refused to admit the evidence, and defendant's counsel excepted. An exception was also taken to the refusal of the court to admit evidence that the patent was void for want of novelty, and of no value, and also to the charge of the court, because the jury were not instructed that the defendant was entitled to the same defenses against the plaintiff, although an innocent purchaser for value before maturity, as he would have against the original payee.

These exceptions raise the question of the constitutionality of the statute of Ohio above quoted, and how much soever it might be disagreeable to this court to pronounce upon the unconstitutionality of a State statute before the Supreme Court of that State has done so, the merits of this case require such duty of us, and we cannot shrink from it.

A construction has been given to the statute in one of its bearings by the Supreme Court of the State of Ohio in *The State v. Peck*, 25 Ohio St. 29, in which the court say: "To construe the phrases 'patent right, patented invention, and inventions claimed to be patented' as used in the act to mean machines manufactured under letters patent by the patentee or his assigns, would give to them not only an unusual, forced and unnatural import, but would seriously interfere with and

injure the manufacturing interests and commercial prosperity of the State, which cannot be presumed to have been intended by the General Assembly in the passage of the act."

That the Constitution of the United States has conferred upon the Congress the power "To promote the progress of science and the useful arts, by securing, for a limited time, to authors and inventors the exclusive right to their respective writings and discoveries" by § 8, art. 1, is no more certain than that such power has been exercised by the enactment of patent laws, and that no State can limit, control, or even exercise the power. Congress has not only regulated the manner in which a patent may be obtained, but it has prescribed the manner in which it may be sold and conveyed, and has imposed the penalties for the infringement thereof. The national government has, therefore, made a patent right property. The patentee has paid the government for the monopoly, and it is bound to protect him and his assignee in the use and enjoyment of it. Any interference whatever by any State, that will impair the right to make, use, or vend any patented article, or the right to assign the patent or any part of it, is forbidden by the highest organic law. The statute in question is such an interference and is unconstitutional.

We are supported in this opinion by every court that has had occasion to pass directly upon the question.

DAVIS, J., *In re Robinson*, reported in 2 Bisl. 309, pronounced the Indiana law, similar in terms to the Ohio law, clearly unconstitutional.

The Supreme Court of Indiana, in *Helm v. First National Bank*, 43 Ind. 167, held that as the Federal government has continuously, from the adoption of the Constitution down to the present time, legislated on the subject of patents, and as, from the nature and subject of the power, it cannot conveniently be exercised by the State, it must necessarily be exercised by the national government exclusively, and adds: "We are of the opinion that the legislature of Indiana possessed no power to pass the statute under consideration, and it must, therefore, be held unconstitutional and void."

And so in *Hereth v. Merchants' National Bank*, 34 Ind. 380, it was held that a maker of a promissory note in the hands of an innocent purchaser for value before due, could not be heard to plead fraud, or failure of consideration, although "given for a patent right" was in the body of the note, and that these words did not put the purchaser on his guard, or convey any notice whatever, being equivalent to "value received." And so, in *Hiscock v. Whitmore*, 19 Me. 102; *Smith v. Hiscock*, 14 id.

There is no error in rejecting the evidence offered, nor in refusing to charge the jury as requested. The decision of the court below is sustained, and judgment may be entered on the verdict. Leave to have the cause certified to the Supreme Court refused.

UNITED STATES SUPREME COURT ABSTRACT.

BANKRUPTCY.

Mere passive non-resistance to judicial proceedings not giving a preference.—The mere non-resistance of a debtor to judicial proceedings against him, when the debt is due and there is no valid defense to it, is not the suffering and giving a preference under the bankrupt act. It is also held that the facts that the

debtor does not himself file the petition in bankruptcy under such circumstances, and that the creditor was aware of the insolvency of the debtor, do not avoid the judgment and execution. (*Wilson v. The City Bank*, 17 Wall. 473.) Judgment of Circuit Court, S. D., New York, reversed. *Tenth National Bank of New York, appellants, v. Warren et al.* Opinion by Hunt, J.

CONSTITUTIONAL LAW.

Depriving person of property without due process of law: origin and history of constitutional provision: definition.—An assessment of the real estate of plaintiff in error in the city of New Orleans for draining the swamps of that city was resisted in the State courts, and is brought here by writ of error, on the ground that the proceeding deprives the owner of his property without due process of law. The origin and history of this provision of the Constitution considered as found in *magna charta* and in the fifth and fourteenth amendments to the Constitution of the United States. The difficulty and the danger of attempting an authoritative definition of what it is for a State to deprive a person of life, liberty, or property, without due process of law, within the meaning of the fourteenth amendment suggested, and the better mode held to be to arrive at a sound definition by the annunciation of the principles which govern each case as it arises. Judgment of Supreme Court of Louisiana affirmed. *Davidson, plaintiff in error, v. Administrators of New Orleans.* Opinion by Miller, J.

2. *What due process of law does not require.*—It has already been decided in this court that due process of law does not require that the assertion of the rights of the public against the individual, or the imposition of burdens upon his property for the public use, should in all cases be done by a resort to the courts of justice. (*Murray v. Hoboken Co.*, 18 How., and *McMillan v. Anderson*, at this term.) *Ib.*

3. *Tax or assessment imposed by State statute: what is due process of law.*—In the present case we hold that when such a burden or the fixing of a tax or assessment is by the statute of the State required to be submitted to a court of justice before it becomes effectual, with notice to the owners and the right on their part to appear and contest the assessment, this is due process of law within the meaning of the Constitution. *Ib.*

4. *What are matters in which State authorities are not controlled by Federal Constitution.*—Neither the corporate agency by which the work is done, the excessive price allowed for the work by statute, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the Federal Constitution controls the State authorities. *Ib.*

5. *State law authorizing dams across small navigable rivers.*—In the absence of legislation of Congress regulating the matter, acts of the legislature of Wisconsin providing for the erection of dams and booms upon small streams wholly within the State, but navigable a short distance up from their mouths, but whose chief value for water carriage is for logs, sawed lumber, etc., the structures mentioned being necessary to develop and utilize such value, held not invalid, as being in contravention of the commerce clause of the Federal Constitution. Judgment of Circuit Court, W.

D. Wisconsin, reversed. *Pound et al., plaintiffs in error, v. Turck et al.* Opinion by Miller, J.

CONTRACTS.

1. *Statute requiring contracts to be in writing: contract under, void if not in writing.*—The provision of the act of Congress of June 2, 1862, entitled "An act to prevent and punish fraud on the part of officers intrusted with the making of contracts for the government," requiring every contract by or on behalf of the secretary of war, secretary of the navy, or secretary of the interior, or officers under them, to be made in writing, etc., is mandatory, and a parol contract is not binding. Judgment of Court of Claims affirmed. *Clark, appellant, v. United States.* Opinion by Bradley, J.

2. *Performance by one party of parol contract raises an implied contract to pay quantum meruit.*—But a parol contract, for the hire of a vessel by the United States, performed on the part of the owner of the vessel, will entitle the owner to recover for the value the use of the vessel as upon an implied contract for a quantum meruit. *Ib.*

3. *Bailee for hire, when not liable for loss of property bailed.*—If, however, the vessel is lost, and the government officers were exercising ordinary diligence in its care, the loss falls upon the owner. A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence, in the care of the property bailed. This is not only the common law, but the general law on the subject. (*Jones on Bailm.* 88; *Story on Bailm.* 398, 399; *Domat, Lois Civiles*, lib. I, tit. IV, § 3, par. 3, 4; *Bell's Com.* 481, 483, 7th ed.) *Ib.*

COURT OF APPEALS ABSTRACT.

BANK CHECK.

Not an equitable assignment of the fund drawn on: check in payment of insurance policy.—An insurance company gave petitioner a check upon a banking institution where it had funds sufficient to meet the check, in settlement of a policy upon the life of petitioner's husband. Before the check was presented to the institution on which it was drawn a receiver of the company was appointed, who withdrew the funds from the banking institution. *Held*, that the check did not operate as an equitable assignment of the fund upon which it was drawn *pro tanto*, and that petitioner was only entitled to the rights of a general creditor. (*Haines v. Clark*, 8 N. Y. 119; *Lunt v. Bank of N. America*, 49 Barb. 221.) Judgment below reversed. *Attorney-General v. Continental Life Insurance Co. In re Petition of Merrill.* Opinion by Church, C. J. [Decided November 27, 1877.]

BOUNDARIES.

Must be got at by calls of deed.—The boundaries of land conveyed must be got at by the calls of the deed, where they are definite and distinct, and no extrinsic facts or parol evidence of intent can in such case be resorted to to control or vary the description. (*Waugh v. Waugh*, 28 N. Y. 94; *Drew v. Swift*, 48 id. 204.) Accordingly, where a lot conveyed is described by a reference to a number on a village map as the west half of lot No. 169, "bounded on the north by lot No. 171, south by Middle street, east by lot No. 170, and west by an alley," there is no need of hesitation in determining its exact locality, and the question whether the grantor had a title to the alley free from the public easement which he could convey would not

arise. The title to the alley was not involved, and the east line of the conveyed lot would not be further west than the middle of lot 169, as described in the deed Judgment below affirmed. *Lawrence v. Palmer.* Opinion by Folger, J.

[Decided December 11, 1877.]

EVIDENCE.

Testimony as to an impression admissible.—The testimony of a witness was that he had "an impression to that effect." *Held*, not inadmissible on the ground that it was an impression. A witness may testify to impressions. (*Snell v. Moses*, 1 Johns. 96, *sed vide*, *Cutter v. Carpenter*, 1 Cow. 81.) Judgment below affirmed. *Carrington v. Ward.* Opinion by Folger, J.

2. *Cross-examination: how far within the discretion of the court.*—The extent and range of a cross-examination is very much within the discretion of the court. It must be some question pointing to a material matter, which, if rejected, makes ground of error. *Ib.*

[Decided December 4, 1877.]

MARRIED WOMEN.

Promise by, to repay money: advancement to procure separate estate.—A promise of a married woman to repay money advanced to her is valid when it is advanced as a part of a transaction, the purpose and end of which is to create for her a separate estate. Plaintiff, upon the promise of a married woman that he should be repaid in an event not unlikely to happen, assigned to her a bond and mortgage, which became a part of the purchase-money of a farm, of which she received the deed and which became her separate estate. *Held*, that upon the happening of the event, which made her promise operative, her separate estate would be liable for the performance thereof. (*Westervelt v. Ackley*, 62 N. Y. 506. *Fricking v. Rolland*, 53 id. 525.) Judgment below affirmed. *Harrington v. Robertson.* Opinion by Folger, J.

[Decided November 27, 1877.]

MORTGAGE.

A mortgage given to secure the payment of a specific sum on demand, a part of which is owing and due, which is intended as a continuing security to cover the present and continuing indebtedness of the mortgagor to the mortgagee, is valid between the parties thereto, and when free from fraud as to creditors also. (*Robinson v. Williams*, 22 N. Y. 380; *Fassett v. Smith*, 23 id. 252; *Miller v. Lookwood*, 82 id. 293; *McKinsler v. Babcock*, 26 id. 373.) Judgment below affirmed. *Brown v. Kiefer.* Opinion by Earl, J.

[Decided December 17, 1877.]

NEW BOOKS AND NEW EDITORS.

AMERICAN CRIMINAL REPORTS, VOL. 1.

American Criminal Reports. A series designed to contain the latest and most important criminal cases determined in the Federal and State courts in the United States, as well as selected cases important to American lawyers, from the English, Irish, Scotch and Canadian Law Reports, with notes and references. By John G. Hawley, late Prosecuting Attorney at Detroit, Vol. 1. Chicago: Callaghan & Company, 1878.

THE need of collections of decisions upon particular branches of the law like the one before us is felt by every member of the profession. It is as much as a lawyer, in ordinary practice, is able to do to purchase the reports of his own State and those of the Federal

courts; and, even to do this, is becoming burdensome. The business of many of the profession is special, and cases relating to his own specialty are all that are of importance to one so engaged. And even those who undertake to do a general business soon find that the cases which are brought to them, so to speak, run in a certain groove of the law only; now and then an exceptional one being outside and involving questions that are not daily brought up. A very large number of practitioners devote their attention to criminal practice as a specialty. The criminal law is largely statutory; the statutes of England and our own States being very similar, and not always clear. Cases wherein the meaning of statutes is construed, wherein the competency and sufficiency of evidence is considered, and wherein the points of procedure common everywhere are passed upon and explained, appear in every volume of State, Federal and English reports. These cases are, compared with the whole number of reported decisions, few, but scattered throughout a vast number of volumes, and a collection of them for a practicing attorney, full of business, must be of great value; even, as is not usually the case, though the original volumes wherein they are found are accessible to him. But we need not offer reasons why such volumes as this one are useful. Their presence in every law library in the land shows that the profession appreciate them. The present volume appears to give only those cases appearing in late numbers of the various reports, though there is nothing, except in the cases themselves, to indicate how wide a range the volume covers. The selection of cases seems to be well made; but the arrangement, which is designed to be according to the subject-matter, is faulty. A few of the titles will explain our meaning. The subjects are arranged alphabetically and a few of them come in order, thus—"Homicide;" "House of Ill Fame;" "Incest;" "Insanity;" "Larceny;" (all the cases relating to burglary being arranged under this head.) Oftentimes a case involves two or more subjects, and cannot be well arranged in this way. The true method in such a work is to arrange by states and countries, leaving to the index the division into subjects. The head-notes to the cases reported are concise and seem to be accurate, and the facts are stated briefly, or not at all, when the opinion states them. The index is a fair one. In most respects the volume will be found excellent, and will, undoubtedly, find its way into the libraries of all criminal practitioners.

PLATT'S RELIGION AND JURISPRUDENCE.

The Influence of Religion in the development of Jurisprudence. By W. H. Platt, formerly of the Mobile Bar, San Francisco, 1877.

This is a work upon a subject which interests those given to the study of jurisprudence as a branch of philosophical knowledge more than it does lawyers in active practice. To what extent the common law is indebted to that of Moses, or to the maxims for the government of human conduct enunciated in the Old and New Testaments, for the principles which compose it, will always be a matter of dispute. By some it will be claimed that the many points of agreement between the common law and the code of morals deduced from the Scriptures, conclusively show the source of the law, while others will maintain that both the law and the Bible, where they agree, express principles of justice which are recognized by all man-

kind, and cannot be asserted to have originated in any age or among any people. The book before us is an able argument in favor of the theory of those who believe in the Hebraic origin of our jurisprudence. The history of the various distinguishing principles of the English law is carefully examined and traced back to corresponding rules in the Jewish law, or to some regulation in the government of the Christian church. According to the view of the author all the existing law of Europe is derived from two sources, the Mosaic code, and such ideas as were embodied in the religion known as the worship of ancestors. From the latter source sprang the laws of Solon and the twelve tables of the Romans, and it contributed toward making up the code of Justinian. From the Mosaic code sprang the law of Christianity. This law furnished the most of the material out of which the old Anglican customs were formed, some things in these customs, however, being directly derived from the Mosaic code. These customs furnish the basis of the common law, which was largely re-enforced by the Canon law, a code made up chiefly from the law of Christianity, but deriving much from that of Justinian. The author maintains his views with great strength and ingenuity, and what he has written is worthy the perusal of every one who takes an interest in such discussions.

CORRESPONDENCE.

MR. HUN'S ANNOTATED RULES.

To the Editor of the Albany Law Journal:

SIR: My attention has been called to a criticism in THE ALBANY LAW JOURNAL of January 19, of an edition of the rules prepared and annotated by myself.

The article points out four alleged errors in a volume of 242 pages, as follows, viz.:

1. "On page 7 he gives in full chapter 322, Laws of 1874, which was expressly repealed by chapter 417, Laws of 1877, but he nowhere gives, so far as we observe, section 191 of the Code of Civil Procedure, which takes the place of chapter 322."

Chapter 322 of 1874 is in substance, though not in phraseology, the same as section 191 of the Code of Civil Procedure; it is inserted in the book in a place by itself and not among the rules, simply for the purpose of showing the application of some eighteen cases following it, and decided under the phraseology of that statute and not under section 191. The first sentence following Rule 1 of the Court of Appeals, on page 11, reads "Code of Civil Procedure, §§ 190-191. Jurisdiction of the Court of Appeals," thus, at the very beginning of the rules of that court, calling attention to the new statute defining its jurisdiction. Your critic could not have "observed" the work very carefully.

2. "Of the eighteen statutes cited in force on page 29, all but two were repealed by the same act" (i.e., chapter 417 of 1877). Immediately preceding these statutes, the insertion of which in my work you regard as an error, are printed in full all the sections (789 to 795, both inclusive) of the new Code relating to that subject. It is impossible, therefore, for any one to be misled by the insertion of the statutes in question, while in the examination of the authorities following them, and other cases decided under them, but useful in giving a construction to the provisions of the new Code, I thought it might be of great convenience to

have in one table references to all the previous statutes relating to that subject.

3. "The statutes as to law schools, given on page 39, were repealed by the same act, and were superseded by section 58 of the new Code, which Mr. Hun forgets to note." This relates to paragraph No. 6, which reads as follows: "By section 58 of the Code of Civil Procedure, it is provided that" (here follows section 58 verbatim). At the end is the following in parenthesis: ("see also Chap. 310 of 1855; 267 of 1859; 187 of 1860; 202 of 1860").

The statutes prevailing before the new Code were simply put in parenthesis at the end of the new law, (§ 58) for the purpose of showing under what statutes the decisions following it had been made. It would appear to be difficult to "note" section 58 more emphatically than by setting it out in full.

4. "On page 57 he announces that the Supreme Court is authorized by the Revised Statutes (2 R. S. 199, §§ 21 to 28) to compel the discovery of books, etc., and that these provisions were not repealed by section 388 of the Code, but he neglects to say that they were repealed expressly by chapter 417 of last year, and that their place is taken by sections 803 to 809 of the new Code."

The paragraph referred to purports to give the decision of the Court of Appeals in *Rice v. Ehle*, 55 N. Y. 518, and consequently states what that case decided. Just preceding it, and immediately following the rule under which this paragraph occurs, will be found sections 803 to 809 of the new Code, each being followed by a brief memorandum of its contents.

The criticism further contains the remark that "Mr. Hun has also omitted to notice a number of recent cases pertinent to the matter in hand." This general statement, of course, I cannot show in this note to be untrue, but to show that I have not been entirely neglectful of recent cases, I wish to call your attention to only one page of my book (page 8), where you will find no less than three cases decided in the Court of Appeals, never published, I believe, in any way, two of which are to appear in 67 New York Reports.

I regret very greatly that your critic, after only a "casual reading," should have undertaken to criticize my work, as he has done equal injustice to my book and the character of your paper.

Indeed, the article has so little of the spirit of fairness and just criticism, which is usually found in your notices of new books, that I am led to believe that it was prepared by some one interested in the volume of Rules published by Baker, Voorhis & Co., and, through inadvertence on your part, obtained a place in your Journal.

MARCUS T. HUN.

ALBANY, January 22, 1878.

[Mr. Hun may dismiss his belief as to the origin of the notice of his performance, since it was written by the Editor of this Journal, who has no interest in "the volume of Rules published by Baker, Voorhis & Co.," nor in any other "Volume of Rules" further than that they be what they pretend to be; nor need he be seriously apprehensive that the critic has done injustice to "the character" of this paper until he can furnish a better answer to the criticism than that contained in the foregoing communication. The specific criticism of Mr. Hun's performance was that he had printed *repealed statutes without stating that they were repealed*. This he admits, but he attempts to parry the

force of the charge by saying that he has either printed or called attention to the provisions of the Code of Civil Procedure on the same subject. This is simply an evasion of the charge. So far as appears in his pages the repealed statutes and the provisions of the Code of Civil Procedure are concurrent laws. The tendency of his book is to mislead the busy practitioner into the belief that *repealed statutes* are still in force.

Of the propriety of printing, especially at length, statutes which have no longer an existence, there can hardly be two opinions; nor, we venture to add, can there be two opinions of the judgment of an author who devotes a page to a repealed statute, and a line to the statute passed to fill its place.

We can assure Mr. Hun that when we had pointed out "four alleged errors in a volume of 242 pages" we stopped for lack of space to devote to him, and not from lack of errors to point out. We should not feel much hesitation in binding ourselves to point out forty errors if it were worth our while. We did not even attempt to point out all the errors on the pages to which we did refer, otherwise we should have called his attention to the fact that he devotes half of page 39 to a statute relating to rules for the admission of attorneys, which was expressly repealed by chapter 417, Laws 1877 (which fact he does not mention), and only a half line to the provisions of the new Code on the subject. Indeed, it is only our good nature that prevents our calling Mr. Hun's book what Mr. Amos called Blackstone's Commentaries, "*a charnel house of dead law*."

Mr. Hun says truly that he has, on page 8, cited three cases not yet published in the regular reports, but he has also omitted to cite two that were reported (*Ryan v. Waule*, 63 N. Y. 57, and *Sprague v. Western Union Telegraph Co.*, 64 id. 658) which on examination he will find very pertinent to the matter of that page, and to have been decided under the repealed statute, which the cases on that page are supposed to illustrate.

We mention these omissions on this one page simply because Mr. Hun has himself pointed to that page as a specimen of his work. What we have pointed out may serve to show him that our assertion that he has omitted to notice a number of recent cases pertinent to the matter in hand is not, as he intimates, "untrue."—ED. A. L. J.]

NOTES.

Mr. H. G. Wood, author of a treatise on "Nuisances" and on "Master and Servant," has in the press of Banks & Brothers a treatise on "The Law of Fire Insurance." There would seem to be no dearth of books on this subject, but we can safely promise that Mr. Wood will make a book that no one interested in the subject will care to do without. The critical analysis to which he subjects the adjudications of the courts and the exhaustive research that he gives to every subject upon which he writes, make his books much better than the average treatise.

The lawyers of Columbia county have done what the lawyers of every county in the State should do, formed a Bar Association. The following officers were elected: President, John Gaul, Jr.; Vice Presidents, J. C. Newkirk, H. W. McClellan; Recording Secretary, E. P. Magoun; Corresponding Secretary, Willard Peck; Treasurer, Cornelius Esselstyn; Executive Committee, R. E. Andrews, John Cadman, S. L. Magoun, Samuel Edwards, J. Rider Cady; Committee on Admission, A. F. B. Chace, C. L. Beale, S. Edwards; W. Peck, C. M. Bell; Committee on Grievances, Francis Sylvester, J. C. Newkirk, Nelson F. Boucher, E. D. DeLamater, C. Hawver.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, FEBRUARY 2, 1878.

CURRENT TOPICS.

THE case of *Hannibal & St. Joseph R. R. Co. v. Husen*, just decided by the Supreme Court of the United States, and appearing in the abstract of recent decisions of that court in our present number, determines another question upon the important subject of the limitation of State rights by the Federal Constitution. The court holds that a statute of Missouri which forbids the driving or conveying Texas, Mexican, or Indian cattle into the State during a certain season of the year, is in conflict with the clause of the Constitution which gives Congress authority to "regulate commerce with foreign nations, and among the several States and with the Indian tribes." The object of the statute was to prevent the introduction of cattle disease, with which cattle of the kinds mentioned were liable to be infected, but the court hold that a State cannot exercise its power to enact sanitary laws to such an extent as to work a practical assumption of the powers conferred by the Constitution upon Congress.

In the State legislature the following bills of interest to the profession were introduced during the past week. To amend the law relating to interest by reducing the legal rate to six per cent; making a threat to make public facts disadvantageous to the reputation of another, for the purpose of extorting money, a misdemeanor; providing for the revision and codification of the poor-laws; permitting aliens to hold and convey title to real estate; providing that judges in charging juries shall not review the evidence given on the trial, except so far as may be necessary for a proper presentation of the law involved in the case; amending section 830 of the Code of Civil Procedure, relative to the testimony of husband and wife in certain cases; enabling married women to enter into contracts with the same effect as if they were single. The assembly judiciary committee has agreed to report in favor of the adoption of the constitutional amendment providing for an additional justice of the Supreme Court in the Second Judicial District, and also of a bill enacting the nine chapters of the Code of Civil Procedure which passed last year, but failed to receive the executive approval.

On Wednesday the judiciary committees of both houses of the legislature reported in favor of the adoption of the supplemental nine chapters of the Code of Civil Procedure substantially as they were passed last winter. With such a prompt and emphatic indorsement, the fate of the new Code is put beyond question. Not only will there be no repeal, but the nine chapters will be passed and by a majority sufficiently large, it is said, to carry them over the veto of the Governor, should he withhold his approval. These chapters are an essential part of the Revision, and the present Code is incomplete in many respects without them. A large part of the complaints which are made in reference to the Code arise from the fact that it does not cover all the subjects which the practitioner expects to find there. He has to look, not only in the new but in the old Code also, to find out what he is to do, and he is thus led to condemn the Revision. With a complete and harmonious system of procedure, embracing all the statute law upon the subject and sufficiently comprehensive to cover every exigency, there would be little just cause for complaint. This is what the Revisers intended to give the profession, and if what became law only partially covered the field, the fault lay elsewhere than with them. That there should be a strong feeling in favor of the re-enactment of the previous Code among those who have grown up with that Code is not surprising. But it proves nothing, except that these members of the profession are averse to giving up what they are familiar with for something which they have accustomed themselves to look upon as entirely new and different. The branch of jurisprudence which comes nearest home, not only to the members of the legal profession, but to litigants in the courts, is that relating to practice. No excellence in a system of law in other respects will compensate for defective and uncertain rules of procedure. Justice may be denied as effectively by a technical application of a rule of practice as by an unconscionable decision on the merits. The members of the bar have a duty to the public to see that the methods of litigation shall be as free from difficulty as is consistent with its decorous conduct, and it will be for their own best interests to properly perform that duty.

It is a well-established rule of the common law that no civil action lies for an injury which results in death, and that consequently the death of a human being, though clearly involving pecuniary loss, is not the ground of an action for damages. This rule receives an illustration in the case of *Mobile Life Insurance Co. v. Brame*, just decided by the Supreme Court of the United States, and reported on another page. The court holds that a life insurance company has no right of action against one willfully causing the death of a person whose life it has in-

sured, although in consequence of such death it has been compelled to pay the amount of the insurance. The statute of the 9th and 10th Victoria giving a right of action to the representatives of a deceased person, under certain circumstances, which has been incorporated into the legislation of many of the States, does not apply to remote claimants such as the plaintiff in this action. The decision is one of great importance, particularly to insurance companies.

The Court of Appeals, on the 25th ult., in answer to several applications to it to modify the present rules and regulations relating to the admission of attorneys, made in behalf of students who were, at the time of the adoption of the rules, in attendance upon law schools in the State, as well as those who have pursued their studies at law schools out of the State, and also in behalf of gentlemen who have been admitted to the bar in other States, and have, without notice of any change in the rules affecting the admission of attorneys in this State, removed here, handed down an order declining to grant the applications. The court says that after deliberation it deems it inexpedient to modify or in any way interfere with the rules. As the classes of applicants mentioned embrace all who can, with any show of justice, ask for a change in the rules for their benefit, the action of the court indicates a determination on its part to adhere to the position heretofore taken in respect to this subject.

The bill introduced in the assembly by Mr. Peck is designed to place married women in the same position in respect to their personal contracts that all other individuals are. Its provisions are embraced in a single section reading as follows:

"A married woman may enter into any contract with any person other than her husband in the same manner and with the same effect as if she were sole."

The legislature has for thirty years been endeavoring to bring the law relating to married women into a satisfactory condition. But notwithstanding there are several quite elaborate statutes in existence, the only thing accomplished has been to enable the married woman to deal with her separate property or to carry on a separate business in her own name. She is yet unable to make a contract binding on herself; to be enforceable it must in some way relate to a separate business or a separate estate. We trust the bill of Mr. Peck, which is simple and seems to meet the difficulty fairly and fully, may become a law.

A bill has been introduced into the legislature of Pennsylvania providing for a simple mode of procedure in suits of a commercial nature and in certain other suits where there is a default made. The provisions of the bill are very similar to

those of our Code in relation to civil actions. The prospects of the passage of the bill are fair, as the mercantile community, being tired of the technicality and delay of the system of practice now in force in Pennsylvania, are in its favor.

NOTES OF CASES.

IN the case of *Lanning v. Christy*, decided by the Supreme Court Commission of Ohio at the December, 1876, term, and to appear in 30 Ohio St. 115, it is held that an action will not lie for statements contained in an answer alleged to be libelous, if such statements were honestly made without malice, and if they were relevant, believed by the defendant to be true, and were made upon probable cause and under advice of counsel. This is according to the rule as stated in *Townshend on Slander and Libel*, § 221, that "whatever one may allege in his pleading by way of defense to the charge brought against him, or by way of counter-charge, counter-claim or set-off, can never give a right of action for slander or libel." In *Hill v. Miles*, 9 N. H. 14, it is said: "An action for libel cannot be sustained for a proceeding before a court having jurisdiction of the subject-matter, if the process was instituted under a probable belief that the matter alleged was true, and with the intention of pursuing it according to the course of the court, even if the matter turns out to be wholly false. * * * It may well be questioned whether an action for libel could be sustained, under such circumstances, even if there was evidence of express ill will." *Kidder v. Parkhurst*, 3 Allen, 393; *Watson v. Moore*, 2 Cush. 133. See, also, 2 Addison on Torts, 933, § 1; *Perkins v. Mitchell*, 31 Barb. 461; *Henderson v. Brownhead*, 4 H. & N. 568; *Hastings v. Luak*, 22 Wend. 410. In *Marsh v. Ellsworth*, 50 N. Y. 311, the court says: "The law is well settled that a counsel or party conducting judicial proceedings is privileged in respect to words or writings used in the course of such proceedings, reflecting injuriously upon others, when such words and writings are material and pertinent to the questions involved; and that, within such limit, the protection is complete, irrespective of the motive with which they are used; but that such privilege does not extend to matter having no materiality or pertinency to such questions." See further, *Rex v. Salisbury*, 1 Ld. Raym. 341; *Dawling v. Wenman*, 2 Show. 446; S. C., 3 Mod. 108; *Cox v. Smith*, 1 Lev. 119; *Brown v. Mitchell*, Cro. Eliz. 500; *Hoar v. Wood*, 3 Metc. 193; *Gosselin v. Cannon*, *Briggs v. Byrd*, 2 Ired. 377; *Forbes v. Johnson*, 11 B. Monr. 48.

In the case of the *Appeal of Hartranft*, recently decided by the Supreme Court of Pennsylvania, the question arose whether the Governor of the State can be called before a grand jury to answer in respect to the manner in which he has performed

certain acts in the line of his official duty. The court held that the Governor is not answerable to the courts for the manner in which he discharges the discretionary duties confided to him, nor are his subordinates or agents answerable to any one but himself. The Court of Quarter Sessions, of Allegheny county, had subpoenaed the Governor and some other executive officers to testify before its grand jury in relation to certain acts performed by them, or under their orders, in suppressing the late labor riots. The parties subpoenaed having refused to appear, attachments were issued, and the question whether the attachments should be enforced was submitted to the Supreme Court, which decided against the validity of the attachments. The decision is in harmony with numerous adjudicated cases. See *Thompson v. German Valley R. R. Co.*, 22 N. J. Eq. 111, where a subpoena *duces tecum* was issued to the Governor of New Jersey, requiring him to produce before the court an engrossed copy of a private bill signed by him. He refused to obey the subpoena, and the Court of Chancery sustained him in his refusal. Also *Gray v. Pentland*, 2 S. & R. 23. Here the refusal of the Governor and Secretary of State to obey a subpoena, or to permit their depositions to be taken at the State capital, was sustained. In the case of *Aaron Burr*, a subpoena of the same character was issued to the President of the United States, directing him to produce a letter from General Wilkinson to himself. The President refused to obey the subpoena, and Chief Justice Marshall in regard to his refusal said (3 Burr's Trial, 586): "In no case of this kind would the court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. * * * In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it, he himself is the judge."

In the case of *Treasurer of Amer. Tract Society v. Atwater*, 80 Ohio St. 77, a testator bequeathed a sum of money in trust, the trustee being directed "to apply the same so that it may be used for the interests of religion and for the advancement of the kingdom of Christ in the world, as follows, to wit": Certain religious societies were named, to whom the money was to be paid in certain specified amounts. It was claimed that the bequest was void for uncertainty, the uncertainty consisting in this, that in the opinion of men the modes of advancing the kingdom of Christ are as various as the numerous sects ostensibly engaged in accomplishing that object. The court held that it was not void, the object being

stated and the societies named being specified as the means by which to accomplish the object. If there had been simply a devise of property to a trustee named to be used "for the advancement of Christ's kingdom in the world," it would not have been sustainable. In *Chamberlain v. Stearns*, 111 Mass. 267, a devise for "benevolent" purposes was held void, because too general in its meaning. In *Holland v. Peck*, 2 Ired. Eq. 255, executors were directed to pay over and deliver for the benefit of the Methodist Episcopal church in America, the sum of \$5,000 "to be disposed of by the conference, or the different members composing the same, as they in their godly wisdom judge will be most expedient or beneficial for the increase or prosperity of the gospel." This was held void for uncertainty. So, in *Ruth v. Oberbrunner*, 40 Wis. 238, was a devise of land to trustees "to hold the same in trust for the use and benefit of the order of St. Dominican and St. Catharine's Female Academy, and for no other purpose." See, also, *Heiss, exr., v. Murphy*, 40 Wis. 276; *Beckman v. Bonser*, 28 N. Y. 298; *Grimes, exr., v. Harmar*, 35 Ind. 198; *Holmes v. Mead*, 52 N. Y. 332. See, however, as sustaining the principal case, *Miller v. Teachout*, 24 Ohio St. 525; *Board of Education v. Ladd*, 26 id. 210.

In the case of *City of Chicago v. Meker*, decided on the 14th inst., in the Criminal Court of Cook county, Illinois, the court passed upon and held unlawful, an ordinance of the city of Chicago, regulating the sale of fruits and berries and providing a standard of weights and measures, and declaring that whoever, in buying any of the articles mentioned, "shall take a greater number of pounds thereof to the bushel, or in selling shall give less, with intent to gain an advantage thereby," shall be liable to a penalty prescribed, except when authorized to do so by a special contract to that effect. The ground of the decision was that there was no grant of authority to the common council to regulate the trade in berries in the manner mentioned, and that the ordinance was not in itself reasonable, but was in restraint of trade. The court held that municipal corporations are like courts of inferior and limited jurisdiction, and, like such courts, must, for all the purposes of jurisdiction, show the power given them in every case. *Dunham v. City of Rochester*, 5 Cow. 465. This doctrine was adopted by the Supreme Court of Wisconsin, in *Hayes v. City of Appleton*, 24 Wis. 544. In *Boaling v. West*, 29 Wis. 315, the court said: "It is a perfectly well-established principle of law, that a municipal by-law or ordinance must not be inconsistent with or repugnant to the Constitution and law of the United States or the State; that it must be reasonable and in harmony with the principles of the common law. See *Austin v. Murray*, 16 Pick. 121; *Mayor of Mobile v. Gubille*, 8 Ala. 137; *Taylor v. Griswold*, 14 N. J. Law, 254."

SUMNER'S REMINISCENCES OF THE ENGLISH BAR.

THE affection and favor which young Sumner met from the English bar and bench were quite remarkable. Judges made him sit at their side on the bench,—a distinction which he was loth to accept, deeming that "the Queen's counsel row is surely enough." He usually sat in the Common Pleas with Talfourd and Wilde, or in the Queen's Bench with Pollock and the Attorney-General. He writes: "I will not quit the Bench and Bar without speaking of the superior cordiality, friendliness and good manners that prevail with them in England as compared with ours. They seem indeed a band of brothers. They are enabled to meet each other on a footing of familiarity, because all are gentlemen. The division of labor sets apart a select number, who have the recommendations, generally, of fortune or family, and invariably of education, and who confine themselves to the duties of a barrister. In social intercourse the judges always address each other by their surnames, without any prefix; and they address the barristers in the same way; and the barristers address each other in this style. Thus, the young men just commencing their circuits addressed Taunton, the old Reporter, who was on his seventy-fifth circuit, simply as Taunton. I believe I have already written you that I was received as a brother, and was treated with the same familiarity as the other barristers."

Of Talfourd, the author of "Ion," we get some interesting views. We see him stopping at the Garrick Club (of which Sumner was made an honorary member), to get his "negus" on his way to Westminster Hall in the morning, and his midnight potation with a grilled bone and Welsh rare-bit, on returning from Parliament. Sumner calls him a "night bird." Of a dinner at Sir William Follett's he writes: "Talfourd outdid himself; indeed, I have never seen him in such force. He and Pollock discussed the comparative merits of Demosthenes and Cicero; and Talfourd, with the earnestness which belongs to him, repeated one of Cicero's glorious perorations. Pollock gave a long extract from Homer; and the author of 'Ion,' with the frenzy of a poet, rolled out a whole strophe of one of the Greek dramatists." When Sumner spoke to Talfourd of Mr. Montague as a person whom he liked, Talfourd replied, "He is a humbug; he drinks no wine." Whereupon the correct young Charles remarks, "Commend me to such humbugs!" As an advocate, Sumner says of him, "He is a good declaimer, with a good deal of rhetoric and feeling. I cannot disguise that I have been disappointed in him."

Pollock "is deemed a great failure" in the House of Commons, although he was leader of the Northern Circuit. "He has a smooth, solemn voice," but

"is dull, heavy, and they say, often obtuse at the bar." At dinner on one occasion Sumner sat between Follett and Pollock. "To the first I talked about law, and his cases; to the latter about Horace, and Juvenal, and Persius, and the beauty of the English language." Sumner gives us no account of Pollock's personal appearance, but the author of "The Bar" has a few lines on it:

"Pale Pollock, who consumes the 'midnight oil,'
And piles his task with unremitting toll,
Till, as the life-drops from his cheeks retreat,
He looks as though he had forgot—to eat."

Follett, Sumner says, is "a consummate lawyer," "the best of all," "a delightful man, simple, amiable, and unaffected as a child." "He has extended the hand of friendship to me in a most generous way. His reputation in the profession is truly colossal, second only to that of Lord Mansfield; in his manners he is simple and amiable as a child; he is truly lovable." Brougham said in 1838 there were no good speakers at the bar except Follett and Pemberton. Talfourd's first acquaintance with Follett was when the latter was a student, or just after his call to the bar, in getting him released from arrest early one morning for scaling the walls of the Temple. Follett's perception of legal principles and reasoning was intuitive, apparently almost without effort. "With all the praise accorded to him from judges, lawyers, and even from Sir Peter Lawrie (ex-mayor), who thought him the greatest lawyer he ever knew, it does not seem to be thought that he has remarkable general talents or learning. They say he has 'a genius for the law,' but Hayward, of the 'Law Magazine,' says he is 'a kind of law-mill; put in a brief, and there comes out an argument,' without any particular exertion, study, or previous attainment. I have heard him several times. He is uniformly bland, courteous, and conversational in his style; and has never yet produced the impression of power upon me." Sumner attributes Follett's early success to his amiability. As a speaker he was fluent, clear and distinct, with a beautiful and harmonious voice. His business was immense—£15,000 annually—and many of his briefs he hardly read before rising in court. He was equally successful in the House of Commons, where Sumner often heard him called for. His early death prevented his probable elevation to the Lord Chancellorship.

Of Wilde, afterward Lord Chancellor, Sumner speaks as the most industrious person at the English bar, often working from six o'clock in the morning until two the next morning; a man of great power, but harsh and unamiable, with an immense practice; supreme in the Common Pleas, with a great influence over Chief-Justice Tindal; in person short and stout, with a vulgar face; his voice not agreeable, but his manner singularly energetic and intense; reminding Sumner of Webster; his language

having none of the charms of literature, but correct, expressive, and to the purpose; in manners, to his friends, warm and affable; entertaining very elevated views on points of professional conduct. He told Sumner that he should not hesitate to cite a case that bore against him, if he thought the court and opposite counsel were not aware of it. Early in his career he had taken advantage of a trust relation and purchased for himself, and in consequence was banished from the circuit table, and afterward did not mingle with the bar, or if he did, it was with a downcast manner. Sumner predicted that the government, anxious to avail itself of his great talents, might overlook his offense, but that society would not. As to the government, Sumner was right, for Wilde afterward became Solicitor-General, Attorney-General, Chief Justice of the Common Pleas, and Lord Chancellor, with the title of Baron Truro.

Charles Austin, the great parliamentary lawyer, Sumner describes as "one of the cleverest, most enlightened, and agreeable men in London," and in his judgment the first lawyer in England; a finescholar, deeply versed in English literature and the British Constitution; a more animated speaker than Follett, perhaps not so smooth and gentle, nor so ready and instinctively sagacious in a law argument, but immeasurably before him in accomplishments and liberality of views; the only jurist in Westminster Hall; in conversation very interesting, full of knowledge, information, literature, and power of argument; in politics a decided but rational liberal; brilliant and clever, all informed, and master of his own profession, take him all in all the greatest honor of the English bar.

Campbell, the Attorney-General, afterward Lord Chancellor, and author of the *Lives of the Lord Chancellors and Chief Justices*, gets a passing notice. A very powerful lawyer, laborious, plodding, with great natural powers, unadorned by any of the graces, able, dry, and uninteresting. His manner was coarse and harsh, without delicacy or refinement, his accent marked Scotch. Not liked by the bar, all bowed to his powers. As to his politics, the best account is derived from one of Sumner's stories. Lord Plunkett inquired of him the meaning of "locofoco," and he defined it "a very ultra-radical;" whereupon Follett and Pollock both laughed, and cried out to the Attorney-General, "Campbell, you are the locofoco!" Sumner tells us that the *p* in Campbell's name was enunciated, and not omitted, as with us.

Of the judges we have some sharp portraits. Lord Denman he deemed quite an ordinary lawyer, but "honest as the stars," and impartial. In person, every inch the judge, "he sits the admired impersonation of the law;" tall and well-made, with a grave voice and manner; somewhat impatient at times, we infer. "Bland, noble Denman! On

the bench he is the perfect model of a judge,—full of dignity and decision, and yet with mildness and suavity which cannot fail to charm. His high personal character and unbounding morals have given an elevated tone to the bar, and make one forget the want, perhaps, of thorough learning. In conversation he is plain, unaffected and amiable." He thought Brougham one of the greatest judges that ever sat on the woolsack. The wig he considered the silliest thing in England. He was trying to carry a bill through the Lords, allowing witnesses to affirm, in case of conscientious scruples, and asked Sumner what the American practice was, but said he should not venture to allude to it, for it would tell against his measure. We have changed all that, and now John Bull adopts our law reforms and eats our beef!

We have a graphic picture of Tindal, Chief Justice of the Common Pleas, the model of a patient man, who sits like Job, while the debate goes on; very quiet, bent over his desk, constantly taking notes; eyes large and rolling, stature rather short; manner singularly bland and gentle, deficient in decision; learning, patience, and fidelity of the highest order; one of the few judges who study their cases out of court; "one of the kindest men that ever lived." The author of "The Bar" also gives us a glimpse of him:

"Tindal, beneath whose sleepy lurking eye
A fertile mind Lavater would descry,
A treasury filled with intellectual store,
From which, the more he takes, it grows the more,
A thing unheard of in historic fame,
Would the King's treasury always did the same!"

Then we have Park, the oldest judge on the bench, fifty-eight years in the profession, petulant, puritanical, a staunch Tory, who believed in wigs and hated Jack Campbell. He attributed Denman's dislike of wigs to his coxcombery, and desire to show off his person, and when a wig was invented to present the appearance of powder, without its dirt, he resisted its introduction as an innovation on the Constitution, and refused to recognize his own son when he appeared in one. And then comes Vaughan, who was made a judge, it was said, by George IV, at the instigation of his favorite physician, Sir Henry Hallford, and hence was called a judge by prescription. With the smallest possible allowance of law for a judge, he abounded in native strength, sagacity, and freedom of language. He troubled himself very little out of court with his cases. Fond of sports, he showed Sumner four guns, and told him with great glee, how he persuaded Wilde not to make any motions on a certain day, got court adjourned at noon, went fifteen miles into the country, and before four o'clock shot four brace of pheasants, sitting on horseback, as from lameness he was unable to walk to any great extent. A great lover of Shakespeare, he would

often interchange notes with Sumner about the great poet's works, while Follett or Wilde was making a long argument, the spectators of course supposing that it was all about the case under discussion. Seventy years of age, rheumatic and gouty, beside being lame; tall and stout; plain, hearty and cordial in his manners; on the bench, bland, dignified, yet familiar, exchanging a joke or pleasantry with the bar on all proper occasions; less eminent for book learning than for strong sense, knowledge of practice and of human nature. The author of "The Bar" thus depicts Vaughan at the bar:

"Grisly and gruff, and coarse as Cambridge brawn,
With lungs stentorian bawls gigantic Vaughan;
In aspect fearless, and in language bold,
'Awed by no shame — by no respect controlled,'
Straight forward to the fact his efforts tend,
Spurning all decent bounds to gain his end.
No surgeon he, with either power or will,
To show the world his anatomic skill,
Or subtle nice experiments to try —
He views his subject with a butcher's eye,
Nor waits its limbs and carcase to dissect,
But tears the heart and entrails out direct."

In the Exchequer, we have Abinger, Parke, and Alderson described. The first was Scarlett, the greatest advocate of his time, yet never eloquent. Sumner calls him "the great failure of Westminster Hall." Too old to assume new habits when he reached the bench, he lacked the judicial capacity and was jealous of his associates. "Brougham says that Scarlett was once speaking of Laplace's 'Mécanique Céleste' at Holland House as a very easy matter; Brougham told him he could not read it, and doubted if he could do a sum in algebraical addition. One was put, and the future Lord Abinger failed; and as Lord B. said, he did not know so much about it as a 'pot-house boy.'" In politics a thorough Tory; in society cold and reserved; in person the largest judge on the bench. Sumner writes of Abinger: "I was not particularly pleased with him: he was cold and indifferent, and did not take to me, evidently; and so I did not take to him. Neither did I hear him, through a long evening, say any thing that was particularly remarkable; but all the bar bear testimony to his transcendancy as an advocate."

To Parke, afterward Lord Wensleydale, Sumner says the palm for talent, attainments, and judicial penetration is conceded by the profession, who regard him as *facile princeps*. About fifty-six years old, above the common size, erect, "with the brightest eyes I ever saw;" dressed with great care, and in the evening wearing a blue coat and bright buttons; a man of society, "not a little conceited and vain." Not fluent, but with no particular want of words; a well-read lawyer, yet not a jurist. Alderson comes next. He was an excellent scholar, carrying off the highest mathematical and classical

honors at Cambridge. In person awkward, in voice abrupt and uneven, with light hair, and a high forehead. Hasty and crotchety, he was thought an unsafe judge. He had more enemies than any other judge in the Hall. Sumner says he heard from him a higher display of judicial talent than from any other judge in England. Elsewhere he says, in a letter to Story: "Baron Alderson is the first equity judge in the Court of Exchequer, and unquestionably a very great judge. I have sat by his side for three days on the bench, and have constantly admired the clearness, decision, and learning which he displayed. In one case of murder, where all the evidence was circumstantial, I sat with him from nine o'clock in the morning till six at night. His charge to the jury was a luxury. I wish you could have heard it. It was delightful to hear an important case, so ably mastered by one who understood his duty and the law, and did not shrink from laying before the jury his opinions. Alderson's voice and manner remind me of Webster more than those of anybody I have seen here; his features are large, but his hair, eyes, and complexion are light." The author of "The Bar" has a drive at Alderson, when young, pointed at his triumphs as senior wrangler at Cambridge:

"Aspiring Alderson — a sessions 'star,'
Already 'cuts a figure' at the Bar,
Maintains his academic honors past,
And every subject wrangles to the last."

Baron Maule was "a very peculiar person." Distinguished at Cambridge both in classics and mathematics, he kept up his acquaintances with those studies. He was confessed on all hands to be the first commercial lawyer in England, but his moral character rendered him in some respects a strange person for a judge. He always took porter before an argument, he said, "to bring his understanding down to a level with the judges."

Patteson, "the ablest lawyer in the Queen's Bench — some say the first in all the courts," was short and stout, his face heavy and gross, and was very deaf. "Little Johnny" Williams, an excellent classical scholar, had little legal talent, and was principally noted for early rising and for falling asleep in company.

It is curious to note how many of the legal celebrities described by Sumner were concerned in the trial of Queen Caroline — Brougham, Lushington, Wilde, Denman, Tindal.

Comparing the English with the American lawyers, Sumner says: "The English are better artists than we are, and understand their machinery better; of course, they dispatch business quicker. There is often a style of argument before our Supreme Court at Washington which is superior to any thing I have heard here." In regard to the character of the bar and their relations to the bench in England

he says: "I know nothing that has given me greater pleasure than the elevated character of the profession as I find it, and the relation of comity and brotherhood between the bench and bar. The latter are really the friends and helpers of the judges. Good will, graciousness and good manners prevail constantly. And then the duties of the bar are of the most elevated character. I do not regret that my lines have been cast in the places where they are; but I cannot disguise the feeling akin to envy with which I regard the position of the English barrister, with the intervention of the attorney to protect him from the feelings and prejudices of his client, and with a code of professional morals which makes his daily duties a career of the most honorable employment."

LAWFUL ACT MADE CRIMINAL BY SUBSEQUENT INDEPENDENT ACT—LIMITS OF FEDERAL LEGISLATION.

SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1877.

UNITED STATES, Plaintiff, v. FOX.

1. An act which is not an offense at the time it is committed cannot become such by any subsequent independent act of the party, with which it has no connection. Accordingly the statute of the United States which declares that every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor, who within three months before their commencement obtains goods upon false pretenses with intent to defraud, shall be punished by imprisonment, is inoperative to render the act an offense, because its criminal character is to be determined by subsequent proceedings, which at the time the goods were so obtained may not have been in his contemplation, and may be instituted against his will by another.
2. It is competent for Congress to enforce by suitable penalties all legislation necessary or proper to the execution of powers with which it is intrusted; and any act committed, with a view of evading such legislation, or fraudulently securing its benefit, may be made an offense against the United States. But it is otherwise when an act committed in a State has no relation to the execution of a power of Congress, or to any matter within the jurisdiction of the United States. An act having no such relation is one in respect to which the State can alone legislate.

CASE brought before this court on a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of New York. The facts appear in the opinion.

Mr. Justice FIELD delivered the opinion of the Court.

In November, 1874, the defendant filed a petition in bankruptcy in the District Court for the Southern District of New York. In March, 1876, he was indicted in the Circuit Court for that district for alleged offenses against the United States, and, among others, for the offense described in the ninth subdivision of section 5,132 of the Revised Statutes, which provides that "every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor," who, within three months before their commencement, "under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud," shall be punished by imprisonment for a period not exceeding three years.

The indictment, among other things, charged the defendant with having within three months previous to the commencement of his proceedings in bankruptcy purchased and obtained on credit goods from several merchants in the city of New York, upon the pretense and representation of carrying on business and dealing in the ordinary course of trade as a manufacturer of clothing, whereas he was not carrying on business in the ordinary course of trade as such manufacturer, but was selling goods to some parties by the piece for cost, and to other parties at auction for less than cost, and that these pretenses and representations were made to defraud the parties from whom the goods were purchased.

The defendant was convicted, and upon a motion in arrest of judgment the judges holding the Circuit Court were opposed in opinion, and have certified to this court the question upon which they differed. That question is thus stated in the certificate:

"If a person shall engage in a transaction which at the time of its occurrence is not a violation of any law of the United States, to wit, the obtaining goods upon credit by false pretenses, and if, subsequently thereto, proceedings in bankruptcy shall be commenced respecting him, is it within the constitutional limits of congressional legislation to subject him to punishment for such transaction considered in connection with the proceedings in bankruptcy?"

The question thus presented does not appear to us difficult of solution. Upon principle an act which is not an offense at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection. By the clause in question the obtaining of goods on credit upon false pretenses is made an offense against the United States upon the happening of a subsequent event not perhaps in the contemplation of the party, and which may be brought about against his will by the agency of another. The criminal intent essential to the commission of a public offense must exist when the act complained of is done; it cannot be imputed to a party from a subsequent independent transaction. There are cases, it is true, where a series of acts are necessary to constitute an offense, one act being auxiliary to another in carrying out the criminal design. But the present is not a case of that kind. Here an act which may have no relation to proceedings in bankruptcy becomes criminal according as such proceedings may or may not be subsequently taken, either by the party or another.

There is no doubt of the competency of Congress to provide by suitable penalties for the enforcement of all legislation necessary or proper to the execution of powers with which it is intrusted. And as it is authorized "to establish uniform laws on the subject of bankruptcies throughout the United States," it may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system. The object of such a system is to secure a ratable distribution of the bankrupt's estate among his creditors, when he is unable to discharge his obligations in full, and at the same time to relieve the honest debtor from legal proceedings for his debts, upon a surrender of his property. The distribution of the property is the principal object to be attained. The discharge of the debtor is merely incidental, and is granted only where his conduct has been free from fraud in the creation of his indebtedness or the disposition of his property. To legislate, for the prevention of frauds in either of

these particulars, when committed in contemplation of bankruptcy, would seem to be within the competency of Congress. Any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offense against the United States. But an act committed within a State, whether for a good or bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the State can alone legislate.

The act described in the ninth subdivision of section 5132 of the Revised Statutes is one which concerns only the State in which it is committed; it does not concern the United States. It is quite possible that the framers of the statute intended it to apply only to acts committed in contemplation of bankruptcy, but it does not say so, and we cannot supply qualifications which the legislature has failed to express.

Our answer to the question certified must be in the negative; and it will be so returned to the Circuit Court.

LIFE INSURANCE AND MANSLAUGHTER.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

MOBILE LIFE INSURANCE CO., plaintiff in error, v. BRAME.

Defendant wrongfully killed one M., whose life was insured, and the insurance company was compelled to pay the amount of the policy. Held, that the insurance company had no right of action against defendant for the amount it was compelled to pay.

By the common law no civil action lies for an injury which results in death, and the death of a human being, though clearly involving pecuniary loss, is not the ground of an action for damages. And the act of 9 and 10 Victoria, giving an action in certain cases to the representatives of the deceased, which has been incorporated into the statutes of many of the States, does not include a claimant such as the one in this action.

IN error to the Circuit Court of the United States for the District of Louisiana. The opinion fully states the facts.

Mr. Justice HUNT delivered the opinion of the court.

The plaintiff, a life insurance company, brought suit in the United States Circuit Court against the defendant to recover the sum of seven thousand dollars, on the following allegations:

That plaintiff had insured the life of one Craven McLemore, a citizen of Louisiana, for the sum of \$2,000, in favor of John P. Kennedy, for the sum of \$2,500 in favor of Sanders, Garner & Co. (which was subsequently assigned to John H. Garner, Sr.), and for \$2,500 in favor of John H. Garner & Co.

That on the 24th day of October, 1875, while said policies were in force, in the town of Delhi, in Louisiana, the defendant Brame did willfully shoot the said Craven McLemore and inflict upon him a mortal wound, from the effects of which he died on the 26th day of October, 1875. That the said shooting was an illegal and tortious act on the part of said Brame, and caused damage to the plaintiff in the said sum of

\$7,000, being the amount of said policies on the life of said McLemore, which plaintiff acknowledges to be due, and a part of which it alleges has been paid.

Defendant filed an exception (demurrer) to plaintiff's petition.

The Circuit Court gave judgment for the defendant, and to this judgment the present writ of error is brought.

The argument of the plaintiff is this, that the act in question was an injury to or violation of a legal right or interest of the plaintiff, that the plaintiff sustained a loss as a consequence thereof, and that the loss is the proximate effect of the injury.

The answer of the defendant is founded upon the theory that the loss is the remote and indirect result merely of the act charged, and the principle that at the common law no civil action lies for an injury which results in the death of the party injured, and that the statutes of Louisiana upon that subject do not include the present case.

The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the State courts, and no deliberate, well-considered decision to the contrary is to be found. In *Hilliard on Torts*, p. 87, § 10, the rule is thus laid down: "Upon a similar ground it has been held that at common law the death of a human being, though clearly involving pecuniary loss, is not the ground of an action for damages." The most of the cases upon the subject are there referred to. *Baker v. Bolton*, 1 Camp. 493; *Conn. Ins. Co. v. N. Y. & N. H.*, 25 Conn. 265; *Kramer v. Market*, 25 Cal. 235; *Indianapolis v. Kealy*, 23 Ind. 133; *Hyatt v. Adams*, 16 Mich. 180; *Shields v. Young*, 15 Ga. 349; *Peoria v. Frost*, 37 Ill. 333. The only cases that tend to the contrary of this rule, so far as we know, are those of *Cross v. Guthery*, 2 Root, 90, of *Plummer v. Webb*, *Weare*, 75, and of *Ford v. Monroe*, 20 Hurd, 210. These cases are considered by the New York Court of Appeals in the case of *Green v. The Hudson R. R. Co.*, 2 Keyes, 300, and compared with the many cases to the contrary, and are held not to diminish the force of the rule as above stated. In the case of *Green v. Hudson R. R.* the plaintiff alleged that on the 9th day of January, 1856, his wife was a passenger on the defendants' road, and by the gross carelessness and unskillfulness of the defendants a collision occurred by means of which his wife was killed, "whereby he has lost and been deprived of all the comfort, benefit and assistance of his said wife in his domestic affairs, which he might and otherwise would have had, to his damage," etc. A demurrer to this complaint, upon the ground that the facts alleged constituted no cause of action, was sustained by the New York Court of Appeals.

In *Hubyn v. N. O. & C. R. R. Co.*, 6 La. Ann. 493, the same principle was decided, and in the same manner. In giving its opinion the court say: "The exception of the defendants presents the question whether the death of a human being can be the ground of an action for damages." Not being satisfied with this decision, Messrs. Ogden & Duncan asked for a rehearing, the argument for which is reported in the eleven following pages of the same volume, and which was denied in an elaborate opinion delivered by Chief Justice Eustis.

In *Herman v. Carrollton R. R. Co.*, 11 La. Ann. 21,

this principle was again affirmed in an opinion by Chief Justice Merrick.

It is only necessary to refer to one other case, which involves the same principle as those already cited, but which in its facts more closely resembles the case we are considering.

In *Connecticut M. L. Ins. Co. v. N. Y. & N. H. R. R. Co.*, 25 Conn. 265, the declaration alleged that on the 20th day of March, 1850, the plaintiffs had outstanding and in force a policy of insurance for \$2,000 upon the life of Samuel Beach; that Beach was on that day a passenger on the defendants' road; that the defendants so carelessly, negligently, and unskillfully conducted themselves that the train on which Beach was riding was thrown down a bank into the river; that Beach was greatly wounded and bruised, by means whereof he then and there died, by reason of which the plaintiffs were compelled to pay to his administrators the sum of \$2,000 upon the said policy.

The allegation of the present plaintiffs is that Brame tortiously and illegally took the life of McLemore by shooting him. This is open to the inference that the act of Brame was felonious. The case in Connecticut is based upon the allegation of negligence and carelessness, and is the more favorable to a recovery in that it avoids the suggestion existing in the present case, that the civil injury is merged in the felony. The Supreme Court of Connecticut held that the action could not be sustained.

We have cited and given references to the important cases on this question; they are substantially uniform against the right of recovery.

Upon principle, we think no other conclusion could be reached than that stated. The relation between the insurance company and McLemore, the deceased, was created by contract between them. But Brame was no party to a contract. The injury inflicted by him was upon McLemore, against his personal rights; that it happened to injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing. As in *Rockingham Ins. Co. v. Mosher*, 39 Me. 253, where an insurance company brought suit against one who had willfully fired a store upon which it had a policy of insurance, which it was thereby compelled to pay, it was held that the loss was remote and indirect, and that the action could not be sustained. In *Ashley v. Dixon*, 48 N. Y. 430, it was held that if A is under a contract to convey his land to B, and C persuades him not to do so, no action lies by B against C. So a witness is not liable for evidence given by him in a suit, although false, by which another is injured. *Grove v. Brandenburg*, 7 Blackf. 24; *Dunlap v. Gladden*, 31 Me. 435. And in *Anthony v. Slatd*, 11 Metc. 200, a contractor for the support of town paupers had been subjected to extra expense in consequence of personal injury inflicted upon one of the paupers, and brought the action against the assailant to recover for such expenditure. The court held the damage to be remote and indirect, and not sustained by means of any natural or legal relation between the plaintiff and the party injured, but simply by means of a special contract between the plaintiff and the town. Some authorities of text-writers are referred to as holding a different view, but we are not cited to any case in this country or Great Britain where a different doctrine

son abate by death, and cannot be revived or maintained by the executor or by the heir. By the act of Parliament of August 21, 1846 (9 and 10 Victoria), an action in certain cases is given to the representatives of the deceased. This principle, in various forms and with various limitations, has been incorporated into the statutes of many of our States, and among others, into that of Louisiana. It is there given in favor of the minor children and widow of the deceased, and in default of these relatives, in favor of the surviving father and mother. Acts of La., 1855, pr. 223, p. 270. The case of a creditor, much less a remote claimant like the plaintiff, is not within the statute.

In each of the briefs it is stated that the defendant was tried for the homicide and was acquitted. In the view we take of the case, the fact of a trial or its result is a circumstance quite immaterial to the present question, however important it may have been to the defendant.

Judgment affirmed.

RIGHT OF REVENUE COLLECTOR TO EXAMINE PAID BANK CHECKS.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

UNITED STATES, plaintiff in error, v. MANN.

Under section 3177 of the United States Revised Statutes, authority is given to any collector, deputy collector, or inspector of internal revenue, to enter, in the day-time, any building or place within his district, where any articles or objects subject to such taxation are made, produced, or kept, so far as it may be necessary for the purpose of examining such objects or articles, and the provision is that any owner of such building or place, or any person having the agency or superintendence of the same, who refuses to admit such officer or suffer him to examine such articles or objects, shall for every such refusal forfeit five hundred dollars. *Held*, that under this provision, paid bank checks, which were duly and sufficiently stamped at the time they were made, signed and issued, were not articles or objects subject to taxation, and an officer of a bank where such checks are may lawfully refuse to suffer the collector to examine such checks.

ERROR to the Circuit Court of the United States for the District of Minnesota. The facts fully appear in the opinion.

Mr. Justice CLIFFORD delivered the opinion of the court.

Authority is given to any collector, deputy collector, or inspector of internal revenue to enter, in the day-time, any building or place within his district, where any articles or objects subject to such taxation are made, produced, or kept, so far as it may be necessary for the purpose of examining such objects or articles, and the provision is that any owner of such building or place, or any person having the agency or superintendence of the same, who refuses to admit such officer or suffer him to examine such articles or objects, shall for every such refusal forfeit five hundred dollars. Rev. Stat., § 3177.

Founded upon that provision in the act of Congress the complaint filed in the Circuit Court alleges and charges that the defendant, having at the time mentioned the care and superintendence of the described bank and its place of business, in which certain paid bank checks were then and there kept, refused then and there to suffer the collector of the district, who then and there entered the bank for the purpose, to examine the said paid bank checks so kept then and

quested by the collector, which said refusal was then and there contrary to the form of the statute in such case made and provided.

Service was made and the defendant appeared and demurred to the complaint. Hearing was had and the court sustained the demurrer, the reasons for the conclusion not being exhibited in the transcript, but the record contains a statement to the effect that the plaintiffs standing on their complaint, the court rendered judgment for the defendant. Error was assigned by the plaintiffs, and they sued out the present writ of error. It is now contended by the United States that the judgment was for the wrong party, that it should have been rendered for the plaintiffs and not for the defendant, which is the only error assigned for the consideration of this court.

Bank checks, drafts, or notes for the payment of money, drawn upon any bank, broker, or trust company, at sight or on demand, are subject to a tax of two cents, to be paid by the person who makes, signs, or issues the same, or for whose use or benefit the same are made, signed or issued. Rev. Stat., § 3418; 18 Stat. at Large, 310. Exceptions exist to that requirement in behalf of Federal and State officers and in behalf of county, town, and other municipal corporations, when in the strict exercise of functions belonging exclusively to their ordinary governmental or municipal capacity. Id., § 3420.

Cases arise where such an instrument is issued without being duly stamped, and in such a case the provision is that neither the instrument nor any copy thereof shall be admitted or used in evidence in any court until a legal stamp denoting the amount of the tax is affixed thereto, as prescribed by law. Instruments of the kind are required to be stamped at the time of their issue, and the provision is that unless a stamp or stamps of the proper amount shall be affixed to the same and canceled, it shall not be lawful to record the instrument, and that the record, if so made, shall be utterly void. Provision is also made that parties violating those regulations by making, signing, or issuing any such instrument, document, or paper, without being duly stamped, shall for every such offense forfeit the sum of fifty dollars, and that the unstamped instrument shall be deemed invalid and of no effect. Id., § 3422.

Such officer may enter in the day-time any building or place within his district where any articles or objects subject to taxation are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects. Unless articles or objects of taxation are made, produced, or kept in any building belonging to another, the collector derives no authority under that act to enter the building at all, and even then his right to enter the same is strictly limited by the words so far as it may be necessary for the purpose of examining such articles or objects.

Where articles or objects subject to taxation are made, produced, or kept in any building, by whosoever owned, the provision is that the collector or other officer named may enter the same, so far as it may be necessary for the purpose of examining said articles or objects, but the act of Congress gives the officer no authority whatever to enter the building of another for any other purpose than that which the act specifically describes.

Strictly limited as the right conferred is, it is a privilege easily defined, and it is equally clear that the

of the place of business is explicitly confined to the refusal to suffer the officer to enter the building where the articles or objects subject to taxation are made, produced, or kept, for the special purpose particularly set forth in the section. Owners of such a building or persons having the agency or superintendence of the same are forbidden to refuse to admit the collector, deputy collector, or inspector to enter such building for the described special purpose, and the provision is that if they do so refuse and do not suffer the officer to examine such articles or objects, they shall for every such refusal forfeit five hundred dollars.

Persons other than the owner of the building or place of business cannot be held liable to the penalty prescribed in the section unless it be alleged and proved that he or they had at the time the agency or superintendence of the same, and that it was a building or place where articles or objects subject to taxation were made, produced, or kept, and that the person or persons accused of having violated the prohibition of the section, then and there refused to allow the officer to enter the building or place of business for the described purpose, or to suffer him to examine the articles or objects subject to taxation then and there kept in said building or place of business.

Informations for offenses or penalties created and defined by statute, like indictments, must follow the words of the statute, and where there is no substantial departure from that requirement, the information, like the indictment, is in general sufficient, except in cases where the statute is illiptical, or where, by necessary implication, other constituents are component parts of the offense. Offenses created by statute as well as offenses at common law consist, with rare exceptions, of more than one ingredient, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly expressed in the indictment or information, or the pleading will be held bad on demurrer. *U. S. v. Cook*, 17 Wall. 74; 1 Bishop's Cr. Pro. (2d ed.), § 81; Arch. Cr. Pl. & Ev. (18th ed.) 54.

Orders for the payment of money, including checks and drafts drawn upon any bank, banker, or trust company, are subject to a tax of two cents, and it is understood to be the opinion of the department that the exaction specified is a tax upon the instrument, to be paid by the person who makes, signs, or issues the same, or the person for whose use or benefit the order or check was made, signed, or issued. Rev. Stat., § 3418; 18 Stat. at Large, 310.

Suppose that is so, then it may perhaps be suggested that a bank check, though paid, if it was made, signed, and issued without being duly stamped with a stamp denoting the amount of the tax, is still an article or object subject to taxation within the meaning of the provision under consideration, unless it can be held that the tax is merged in the penalty prescribed for the violation of the requirement that the instrument shall be stamped at the time it is made, stamped, and issued. Id., § 3421.

Such a question may arise in a subsequent case, but it is wholly unnecessary to discuss it in the case before the court, as it is not alleged in the information that the paid bank checks therein described were not duly stamped at the time the same were made, signed, and issued, as required by the act of Congress. Instead of that the charge in the information is to the effect

the bank or place of business then and there under the charge and superintendence of the defendant; that the collector of the district then and there entered the said bank or place of business for the purpose of examining the said paid bank checks, and that he, the collector, then and there requested the defendant to suffer him to examine the said paid bank checks so kept by the said bank then and there in their said place of business, and that the defendant then and there refused the said request of the said collector. Matters not alleged in the information cannot be regarded as confessed by the defendant, as the demurrer only admits what is well pleaded.

Certain bank checks which had theretofore been drawn upon and paid by the bank, it is alleged in the information, were then and there kept in the rooms and vaults of the bank, and it is proper to say that the said checks are described in the preliminary part of the information as "articles subject to tax," but it is nowhere alleged in the information that the said paid bank checks were not duly stamped with stamps denoting the tax to which the same were subject at the time the checks were made, signed and issued.

Ingredients or elements not set forth in the information or other criminal accusation cannot be incorporated into the charge against the defendant after he is served with process, and it is equally clear that paid bank checks, which were duly and sufficiently stamped at the time they were made, signed, and issued, are not articles or objects subject to taxation within the meaning of the act of Congress on which the information in this case is founded, and if so, then it follows as a necessary conclusion that the defendant might lawfully refuse to suffer the collector to examine the paid bank checks described in the information.

Penal offenses created by statute, whether to be prosecuted by indictment or information, must be accurately and clearly described in the pleadings for the recovery of the penalty, and if the offense cannot be so described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the accusation must be expanded to that extent, as it is universally true that no pleading in such a case can be sufficient which does not accurately and clearly allege all the ingredients of which the charge is composed, so as to bring the accused within the true intent and meaning of the statute defining the accusation.

In general, says Marshall, Ch. J., it is sufficient in a libel of information to charge the offense in the very words which direct the forfeiture, but the proposition we think is not universally true. If the words which describe the subject-matter of the prohibition are general, including a whole class, * * * we think the charge in the libel ought to conform to the true sense and meaning of the words as used by the legislature. *The Mary Ann*, 8 Wheat. 389; *The Hoppet*, 7 Cr. 383; 2 Pars. on Ship. & Adm. 388.

Examples of the kind where it has been held that it is not sufficient to follow the words of the statute are quite numerous, and they show that many of the exceptions are as extensively recognized and as firmly settled as any other rule of pleading in such cases. Views of a corresponding character are expressed by this court in another case, where the opinion was delivered by Mr. Justice Story. Having stated the rule that it is in general sufficient to allege the offense in the very terms of the statute, he proceeds to re-

cases where more particularity is required either from the obvious intention of the legislature or from the known principles of law, both of which exceptional requirements are applicable in this case.

Known principles of law require greater particularity to be observed in order that all the ingredients which constitute a violation of the statutory offense may be accurately and clearly alleged, and it is equally clear that the intention of Congress requires the same thing, as it is obvious that Congress never could have intended that paid bank checks duly and sufficiently stamped at the time they were made, signed and issued should be regarded as articles or objects subject to taxation within the meaning of the provision in the act of Congress under consideration. *The Caroline*, 7 Cr. 500; *The Anne*, id. 571; Conkl. Treat. (5th ed.) 546.

Authorities other than those already referred to are not necessary to show that an information to recover a penalty created by statute must state all the material facts and circumstances which constitute the offense, so as to bring the party impleaded precisely within the provisions of the statute defining the offense; but should it be desired to consult other authorities, it will be found that the following fully support the propositions. 2 Colby's Cr. Law, 114; *People v. Wilbur*, 4 Park. C. C. 21; *Conn. v. Cook*, 18 B. Monr. 149; *Steel v. Smith*, 1 Barn. & Ald. 99; Conkl. Treat. (5th ed.), 548.

Viewed in the light of these suggestions it is clear that the right conferred upon the officer to enter the building or place of business of another in such a case is strictly limited to a building or place of business in which articles or objects subject to taxation are, at the time of the proposed entry and examination, made, produced, or kept, and that paid bank checks, unless it is alleged and proved that they were not duly and sufficiently stamped at the time they were made, signed and issued, are not articles or objects subject to taxation within the meaning of the act of Congress on which the information is founded. Nothing is admitted by the demurrer except what is well pleaded in the information, and inasmuch as the only charge of the information in that regard is that paid bank checks were then and there kept in the said building or place of business described, the court is of the opinion that the information does not set forth any legal offense against the defendant, as defined by the said act of Congress.

Judgment affirmed.

LEGAL NOTES FROM ABROAD.

LONDON, January 17, 1878.

THERE is a universal complaint throughout legal circles, and, in fact, among all classes in any way interested in litigation, of the delay to business in our law courts, especially on the common law side. The *Times* takes advantage of the opening of "Hilary Term" to publish a statement three columns long, compiled by its court reporter, from which it appears that the term opens with 750 *remains*, and that the arrangements of sittings at *nisi prius* are such that not more than 300 or 400 causes are likely to be heard, so that at the end of the term there will be over 300 old cases to be added to the new ones that may be set down for trial.

The Judicature Acts come in for a large share of the blame for this state of things, but the assignments of the blame for which the acts are not responsible

seem to be the principal cause of the block of business. So many are required to sit *in banc*, and so many at the Assizes, that the number and continuity of the *niel prius* hearings in London and Westminster are greatly interfered with. Of course the remedy for this is suggested by the mere statement of it; a different class of judges ought to sit in the appeal courts from that which sits in London and the counties, and the jurisdiction of the minor courts ought to be enlarged. In some respects, however, the Judicature Acts have not done what was expected of them. The judges of the common law division of the High Court hoped that, under the terms of the acts, they would get rid of the jury trials sent to them from chancery. But, whatever may be the proper construction of the statutes, the chancery judges have proved practically too strong for their common law brethren, and have made them do the chancery work. This, however, is no hardship to the general body of suitors, as the chancery business would have been proportionately delayed by putting the chancery judges to conducting jury cases. Again, the whole system of official referees has utterly collapsed. It seemed, when the creation of these authorities was first proposed, that a sort of special judges to try complicated cases would greatly lighten jury work. But the official referees are useless for that purpose, because no one need go to them who does not wish to do so; and very few suitors wish it; so that when their services are called in it is merely as a sort of clerks to the judges, for getting up and submitting statements of fact.

The result of this state of things is likely to be the appointment of two or three more common law judges, perhaps with special assignments to *niel prius* business.

An extraordinary case of fraud, resulting in an extraordinary sentence, has been concluded to-day. One Frederick Dimsdale, a solicitor, a man of mature years, and a resident in the fashionable district of Mayfair, was convicted of fraud and forgery, and sentenced to *penal servitude for life*. The following extract from a local report of the case gives a fair idea of the frauds perpetrated:

"It appeared that in the year 1867, a gentleman named Latham, holding an official position in the Borough of Margate, was possessed of a considerable quantity of land at Croydon, and he proposed to build a number of houses upon that land, and houses were erected under the title of Belmont-villas, South-villas, etc. In the course of his building operations Mr. Latham found it necessary to borrow money for the purpose of carrying on his building operations, and at various times large sums of money were raised from different parties by way of mortgage. In the course of the proceedings Mr. Latham got into difficulties, and he eventually was compelled to have his affairs put in liquidation, and a receiver was appointed to collect the rents, the whole of the different mortgages being at that time consolidated into one mortgage. Things continued in this way until the year 1876, when it appeared that the defendant Dimsdale entered into negotiations for the purchase of the equity of redemption on behalf of a person named Harriet Meredith, who was represented as living at Clifton, near Bristol, and whom he represented as his client. The purchase of the equity of redemption was completed on the 1st of January, 1876, and the effect of this proceeding was, that so long as the interest was regularly paid upon the consolidated mortgage, Dimsdale, who acted as the solicitor of the supposed purchaser, was entitled to receive the rents, and in fact had the entire control over the property; and as he was believed to be a man of large property, and to be carrying on an extensive and respectable business, this to a great extent tended

to do away with any suspicion that might possibly have been entertained with regard to the character of the transactions in which he was engaged of raising large sums of money upon the security of fictitious leases upon the property referred to. With reference to the specific lease that was the subject of inquiry, it appeared that a sum of £15,000 was obtained from the Credit Company, but, in order to show the guilty knowledge of the parties, evidence was proposed to be given that the same proceeding had been adopted in twenty-three other cases, and the result was that £300,000 was obtained by this enormous fraud."

It was contended for the crown, on the above state of facts, that though Dimsdale and his accomplices signed their own names to the fraudulent leases, yet their offense fell within the technical definition of forgery; and Mr. Justice Lopes so ruled; and he said that, having regard to Dimsdale's position, his knowledge of the whole moral and legal responsibility he was incurring, and the vast extent of his frauds, he felt bound to pass a very heavy sentence upon him—and he did.

Another remark of the judge is worth quoting. He said: "If crimes of this kind were not put a stop to, all these important business transactions would be 'placed in doubt and difficulty.'" It does not require any sympathy with Mr. Dimsdale, nor any particular refinement of reasoning, to bring us to the conclusion that transactions, which, in America, are fully protected by records, must here be protected by the imposition of excessive penalties.

Mr. William Cobbett, a son of the historian, fell dead last Saturday, in Westminster Hall, from an attack of heart disease. The telegraph says:

The name of this aged and eccentric gentleman, for many years past has been a kind of household word in Westminster Hall, owing to his persistency in bringing futile actions and pesterling the judges with trivial applications, and on Saturday he was making his way through the central lobby of the Houses of Parliament, toward one of the Lords' committee rooms, where he was bent on prosecuting an appeal before the Lords Justices in the phantom action of "*Cobbett v. Lopes*," when he was seen to stagger and fall. Assistance was promptly rendered, but it was in vain. He had died on the scene which for years had been his field of battle. In the Queen's Bench and the Common Pleas, in the Exchequer and the now defunct Bail court, the contentious William Cobbett's more contentious son, had, during more than a quarter of a century, waged fierce but fruitless war. He always conducted his own case—unless, indeed, Mrs. Cobbett was good enough to move the court for him—for bold would have been the barrister who consented to hold a brief for a plaintiff who habitually fought with shadows, and was accustomed to make his giants first before he tried to slay them. For some years Mr. Cobbett lay, mainly, through his own choice, in the Queen's Bench Prison; and his delight was then to bring action on all kinds of occult grounds, against the Governor and the Deputy-Governor. A writ of Habeas Corpus could in those days be obtained for the moderate sum of two pounds ten shillings; and it was rarely indeed, that, in the course of a term, Mr. Cobbett did not indulge himself with one or two of these little legal luxuries, for the purpose of being brought up to Westminster, and moving for something against somebody. We always return to our first loves; and in the evening of his life the litigious patriarch reverted to his earliest passion for the Palladium of our liberties. The case of "*Cobbett v. Lopes*," a record now withdrawn forever, was only one of a series of suits which this indefatigable plaintiff had brought against her Majesty's Judges in connection with an attempt on his part to obtain the release of the "unhappy nobleman," lately "languishing at Dartmoor," but now seemingly getting on very nicely at Portland (the Tichborne claimant) on a writ of Habeas Corpus. Mr. Cobbett was very well known to the judicial bench—as well known, indeed, as crazy Miss Flyte and the aggrieved

have been known to the Lord Chancellor. But poor Mr. Cobbett will tease the court no more; and the Great Hall of Pleas will lose one of its most constant visitors. Its analogue in the French Palais de Justice is called "La Salle des Pas Perdus." How many tens of thousands of footsteps must not old Mr. Cobbett have utterly squandered and wasted in Westminster Hall!

The Queen's speech, read in Parliament to-day, contains the following paragraph:

Among other measures for the amendment of the law, a bill will be laid before you to simplify and express in one act the whole law and procedure relating to indictable offenses.

This confirms what I wrote to you in the autumn, of the intention of the Lord Chancellor to bring in a bill for the codification of the criminal law.

THE HARVARD LAW SCHOOL.

THE annual reports of the president and treasurer of Harvard college, just issued, contain considerable of interest to the profession in relation to the Law school connected with the college. According to the report, "the condition and prospects of the Law school are in the highest degree satisfactory. It grows in numbers, improves as regards the quality of its students, earns a good surplus from year to year, adds steadily to its valuable library, and step by step enlarges its instruction and increases the significance of its degree." The reports criticize the rules of the Court of Appeals of this State, in relation to admission to the bar, in this respect, that they make no allowance to the candidate for admission for the time spent in attendance at law schools outside the State. The president says that the Law school does not desire to have its graduates admitted to practice without examination." But it feels justified in asking that its graduates who have spent two or three years in the study of law under the guidance of learned and faithful teachers, should not be placed, as regards admission to the bar, on a level with persons who have never opened a law-book, as is now the case under the rules of the New York Court of Appeals. In view of its own honorable history, as a national school of law, the school also thinks it a duty to protest against rules for admission to the bar which have a tendency to make legal education local in character, and to recruit each bar chiefly from its own locality. Rules which make discriminations in favor of the law schools of any particular State have this tendency. The result which such rules tend to produce, could it be completely brought about, would be a grave national misfortune. What the Harvard Law school, and every respectable law school, must desire at the hands of the States, or the courts, is, that time well spent in the school, as proved by passing its periodic examinations, should count toward admission to the bar in every State, like time spent in an attorney's or counselor's office in that State, except that one year of pupillage should have been passed in the State where the candidate applies for admission. The dean of the Law Faculty also presents some cogent arguments against the discrimination made by the New York rules. He says: "This school, therefore, has been excluded from the State of New York by legislation; and this has happened just as we had established an examination for admission to the school, and extended our course of study to three years. That the action is a

serious blow to this school there can be no doubt; for it makes it impracticable, as a rule, for two important classes of the graduates of Harvard college to remain here for their legal education; namely, those whose homes are in the State of New York, and who expect to remain there, and those who, not being residents of the State of New York, are ambitious to establish themselves in the city of New York. It is true, that any graduate of this school who has received the degree of Bachelor of Arts from a college (even from the meanest college in the United States) will be relieved from one year of clerkship; but it is not to be supposed that Harvard graduates, who intend to practice in New York, will go through a year's course in this school, passing severe examinations at the end of each year, if neither our degree nor the time spent here is to count for any thing in the State where they are to practice. Moreover, if the other States of the Union should follow the example of New York, in this respect (and this is a fair test to apply to the action of the latter State), it would seem that this school, or any other school of national scope, must cease to exist." The Court of Appeals is, however, not responsible for the discrimination in favor of New York law schools, that being the result of the legislative enactments in pursuance of which the rules were made. The report of the dean contains some valuable criticism on the general subject of admission to the bar that are worthy of the attention of the profession. He does not approve of the adoption in this country of the English ideas upon the subject. The States have, as a rule, adopted the English notion, and in measuring the standard of qualification, have insisted on a thorough training of the candidate as an attorney. They have thus been at cross-purposes with this law school which has endeavored to train its students to become counselors. Of course, a school cannot successfully teach the art of the attorney, which is in its nature local, while the science of the law, which is general, can be best taught there.

UNITED STATES SUPREME COURT ABSTRACT, OCTOBER TERM, 1877.

CONSTITUTIONAL LAW.

1. *State statute prohibiting transportation of cattle.*—A statute of a State, which prohibits driving or conveying any Texas, Mexican, or Indian cattle into the State between the first day of March and the first day of December in each year, is in conflict with the clause of the Constitution of the United States that ordains "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." (*State Freight Tax Cases*, 15 Wall. 281; *Weldon v. The State of Missouri*, 91 S. C. 275; *Ward v. Maryland*, 12 Wall. 418; *Henderson v. Mayor of New York*, 92 Sup. Ct. 259; and *Chy Lung v. Freeman*, id. 275; *Thorp v. R. & B. R. R. Co.*, 27 Vt. 149; *Passenger Cases*, 7 How. 283; *Gibbons v. Ogden*, 9 Wheat. 210.) Judgment of Supreme Court of Missouri reversed. *Hannibal & St. Jo. R. R. Co., plaintiff in error, v. Husen*. Opinion by Strong, J.

2. *Police power: quarantine regulations.*—Such a statute is not a legitimate exercise of the police power of the State. It is more than a quarantine regulation. Ib.

3. *Over what police power cannot be exercised.*—"The police power of a State cannot be exercised over a subject, such as interstate transportation of subjects of commerce, confided exclusively to Congress by the Federal Constitution. *Ib.*

4. *Limit of State power as to sanitary laws.*—While a State may enact sanitary laws, while, for the purpose of self-protection, it may establish quarantine and reasonable inspection regulations, while it may prevent persons and animals suffering under contagious or infectious diseases from entering the State, it cannot interfere with transportation into or through its borders, beyond what is absolutely necessary for its self-protection. *Ib.*

5. *State cannot interfere with power delegated to Congress.*—Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers conferred by the Constitution upon Congress. *Ib.*

6. *Duty of courts.*—Since the range of a State's police power comes very near to the field committed by the Constitution to Congress, it is the duty of courts to guard vigilantly against any needless intrusion. *Ib.*

CONTRACT.

Construction of contract dependent on rise and fall of gold.—A contract was made between Q. and the firm of A. & Sons, reading thus: "Q. agrees to furnish us and we take from him 15,000 dozen long shovel-handles, to be of the best quality of timber and workmanship, for the present year, the price to be (\$1.25) one dollar and twenty-five cents per dozen, basing the price on the present price of gold, \$2.25. "If the price of gold goes up or down, then the price of handles shall be advanced or reduced accordingly. But it is understood that no advance or reduction of the price of gold of 25 per cent shall change the price of handles unless it shall remain at the advanced or reduced rate sufficiently long to affect the general price of merchandise." *Held*, that the contract meant this: Gold being at the price of \$2.25, and having reference to that fact as giving their value, the one party agrees to deliver and the other to receive the goods at \$1.25 per dozen. This price named should not, however, be fixed and absolute. If the price of gold shall change, the price of the goods shall also change. But they do not propose to embarrass themselves about trifles, and the gold regulation shall be modified by the extent of the change in its price. If it varies more than twenty-five per cent, we agree that that shall be deemed an important change, and shall of itself work a change in the price of the goods. If the variation does not exceed twenty-five per cent, it will not necessarily be important, and we agree that that variation shall not affect the price of the goods, unless it continues so long as to affect the general price of merchandise. If it does so continue and does so affect general prices, then that variation shall also regulate this contract. In error to Circuit Court, W. D., Michigan. New trial granted. *Ames et al., plaintiffs in error, v. Quimby.* Opinion by Hunt, J.

JURISDICTION.

Judgment remitted in part so as to reduce to \$5,000: judgment payable in gold coin.—This was an action by Butler, the defendant in error, against Thompson, the plaintiff in error, to recover damages for not ac-

cepting a quantity of iron under an alleged contract of purchase. Upon the trial the jury rendered a verdict against Thompson of \$5,006.17 "in gold," but before judgment Butler remitted \$68.17, and judgment was entered for five thousand dollars "in coin." Thompson having brought the case here by writ of error, Butler moves to dismiss because the "matter in dispute" does "not exceed the sum or value of five thousand dollars." *Held*, that as the writ of error was sued out by the defendant below, the amount in controversy was fixed by the judgment. (*Gordon v. Ogden*, 8 Pet. 34; *Knapp v. Banks*, 2 How. 73; *Walker v. U. S.*, 4 Wall. 164; *Merrill v. Petty*, 18 id. 344.) *Held*, also, that the fact that the judgment was payable in coin, which was worth more than the same number of dollars in United States notes would be, did not render it a judgment for more than its face, and this court acquired no jurisdiction. Writ of error to Circuit Court, Massachusetts, dismissed. *Thompson plaintiff in error, v. Butler.* Opinion by Waite, C. J.

MUNICIPAL BONDS.

Bonds in aid of bridge: toll bridge, public highway.—Under a statute of [Nebraska] authorizing counties and cities, upon a vote by the people, to issue bonds in aid of "any railroads or other work of internal improvement," county commissioners issued bonds in aid of a bridge. In an action on the bonds it was set up as a defense that they were issued in aid of a toll and not a free bridge, and that the county commissioners were to regulate the tolls, which were to be applied toward paying the bonds. *Held*, (1) that the bridge was a work of internal improvement and the authority to aid it was not affected by the fact that tolls were to be levied for its use, nor (2) would the validity of the bonds be affected by any want of power on the part of the county commissioners to demand tolls for such use, and (3) that the answer was demurrable. All bridges intended and used as thoroughfares are public highways, whether subject to toll or not. Judgment of Circuit Court, Nebraska, affirmed. *County Commissioners of Dodge, plaintiff in error, v. Chandler.* Opinion by Bradley, J.

2. *Railroad aid bonds: construction of statute: limit of taxation.*—Railroad aid bonds were issued by a county under a statute of Missouri reading thus: "It shall be lawful for the corporate authorities of any city or town, or the County Court of any county desiring to do so, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same, not to exceed one-twentieth of one per cent upon the assessed value of taxable property for each year." The act imposed no limit upon the amount allowed to be subscribed, and there was no provision in the act that the proceeds of the special tax alone should be applied to the payment of the bonds. *Held*, that the holder of the bonds subscribed for under the act was not limited to the special tax of one-twentieth of one per cent for payment, but might look to the funds of the county raised by general taxation. (*Supervisors v. United States*, 18 Wall. 71; *State v. Shortridge*, 56 Mo. 128, distinguished.) Judgment of Circuit Court, E. D. Missouri, reversed. *United States ex rel. Johnson, plaintiff in error, v. County Court of Clark County.* Opinion by Strong, J. Waite, C. J., and Miller and Bradley, JJ., dissented.

NEGLIGENCE.

1. *Care required of traveler approaching a street railroad crossing: contributory negligence.*—The neglect of the engineer of a locomotive of a railroad train to sound its whistle or ring its bell on approaching a street crossing does not relieve a party from the necessity of taking ordinary precautions for his safety. He is bound to use his senses—to listen and to look—before attempting to cross the railroad track, in order to avoid any possible accident from an approaching train. If he omit to use them, and walk thoughtlessly upon the track, he is guilty of culpable negligence, and if he receive any injury, he so far contributes to it as to deprive him of any right to complain. If using them, he sees the train coming and undertakes to cross the track instead of waiting for the train to pass, and is injured, the consequences of his mistake and temerity cannot be cast upon the railroad company. If one chooses in such a position to take risks, he must bear the possible consequences of failure. Judgment of Circ. Ct., W. D. Missouri, reversed. *Chicago, R. I. & P. R. R. Co., plaintiff in error, v. Houston.* Opinion by Field, J.

2. *Instruction upon assumed facts, error.*—To instruct upon assumed facts to which no evidence applies is error. Such instructions tend to mislead the jury by withdrawing their attention from the proper points involved in the issue. *Ib.*

SHIPPING.

1. *Collision: vessels at anchor and moving vessels: negligence.*—Vessels in motion are required to keep out of the way of a vessel at anchor, if the latter is without fault, unless it appears that the collision was the result of inevitable accident, the rule being that the vessel in motion must exonerate herself from blame by showing that it was not in her power to prevent the collision by adopting any practicable precautions. (*The Batavia*, 40 Eng. L. & Eq. 25; *The Lochlubo*, 3 W. Rob. 318; *Strout v. Foster*, 1 How. 94; *Ure v. Coffman*, 19 id. 62; *The Granite State*, 3 Wall. 314; *The Bridgeport*, 14 id. 119; *The John Adams*, 1 Cliff. 413.) Accordingly, where a steam dredge was anchored on the edge of an excavated channel in the harbor of Baltimore, and a tug with a vessel in tow had plenty of sea-room to pass on either side of the dredge, and the dredge had proper lights and lookout, held that the tug and vessel were liable, if unskillfully navigated, for damages sustained by the dredge from a collision occurring by reason of such unskillful navigation. Decree of Circ. Ct., Maryland, modified and affirmed. *Steam tug Ehrman et al., appellants, v. Curtis et al.* Opinion by Clifford, J.

2. *Compensation of innocent parties.*—Innocent parties in a case of collision are entitled to full compensation for the injuries received by their vessel, unless it occurred by inevitable accident, provided the amount does not exceed the amount or value of the interest of the other party in the colliding ship and her freight then pending. (9 Stat. at Large, 635; *The Atlas*, 3 Otto, 317; *The Gamecock*, 2 id. 685; *The Gregory*, 9 Wall. 516.) *Ib.*

STATUTORY CONSTRUCTION.

Action upon several note: when plaintiff may elect as to parties defendant. By the Revised Statutes of the District of Columbia (§ 827) it is enacted as follows, viz.: "Where money is payable by two or more persons jointly or severally, as by joint obligors, covenantors, makers, drawers, or indorsers, one action may be sustained and judgment recovered against all

or any of the parties, by whom the money is payable, at the option of the plaintiff. But an action against one or some of the parties by whom the money is payable may, while the litigation therein continues, be pleaded in bar of another action, against another or others of the said parties." (14 Stat. at Large, 405, § 20.) In an action against two of several makers of a promissory note, and one of the indorsers thereof, there being other makers and indorsers, held, that the act of Congress was intended to produce the effect of the statutes of several of the States, to wit: "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange or promissory notes, may all or any of them be included in the same action, at the option of the plaintiff." (2 Edm. Stat. of N. Y., 32.) Judgment of Sup. Ct., Dist. Columbia, affirmed. *Burdette, plaintiff in error, v. Bartlett.* Opinion by Hunt, J.

RECENT AMERICAN DECISIONS.*

FORGERY.

1. *Alteration of power of attorney renders it void.*—A power of attorney to confess a judgment, which is materially altered whilst in the hands of the payee of the indebtedness, without any explanation of the alteration, is made void by such alteration, and a judgment entered by confession under it is also void. *Burwell v. Orr.*

2. *Alteration of promissory note.*—Where a promissory note, containing a promise to pay a certain sum as attorney's fee, is altered whilst in the hands of the payee, increasing the amount of such fee, the alteration will be presumed to have been made by him, and the note becomes thereby utterly void, and cannot be collected, even by a subsequent indorsee in good faith without notice. *Ib.*

3. *Alteration in date of promissory note, material.*—An alteration in the date of a note and cognovit, so as to make the note fall due one year later, is a material alteration, at least, as to a surety on the note. *Wyman v. Yeomans.*

INSANITY.

Presumption in regard to.—The legal presumption is, that all persons of mature age are of sane memory, and this presumption continues until inquest found, when, perhaps, the presumption is reversed until rebutted by evidence that sanity has returned. *Titcomb v. Van Tyle.*

MASTER AND SERVANT.

1. *Duty of employer to furnish safe machinery.*—It is the duty of railroad companies to furnish good, well-constructed machinery, adapted to the purposes of its use, of good material and of the kind that is found to be safest when applied to use; and whilst they are not required to seek and apply every new invention, they must adopt such as is found by experience to combine the greatest safety with practical use. *Toledo, Wab. & West. R'y Co. v. Asbury, Admrs.*

2. *Employee required to use care commensurate with danger of employment.*—Although machinery furnished by a railroad company for the use of its employees may be unsafe, yet if an employee, knowing the character of the machinery, continues to use it, he is bound to exercise care commensurate with the danger; and if he fails to do so, and is injured, his

* To appear in 94 Illinois Reports.

negligence will preclude a recovery against the company on account of such injury. *Ib.*

MUNICIPAL AID BONDS.

1. *Municipal subscription without vote of the people.*—A vote of the people of a town to subscribe to the capital stock of a railroad company, in the absence of any law authorizing such vote or subscription, is not binding upon the town. *Barnes v. Town of Lacon.*

2. *Legalisation of void subscription.*—Where an election for the purpose of voting upon a subscription to a railroad company is held without any authority of law, and in pursuance of a vote at such election a subscription is made by the supervisor of the town without any authority of law, the whole proceeding is void, and the legislature cannot, by any subsequent act, legalize the same. *Ib.*

3. *Limit of legislative power.*—The legislature has no power to authorize the supervisor and town clerk of a town to create a corporate debt, without the consent of the people, expressed at the polls. *Ib.*

4. *Municipal bonds in hands of purchaser for value.*—If municipal bonds are simply voidable, they may be enforced in the hands of an innocent purchaser for value, but if they are absolutely void, they cannot be enforced either by the original holder or a purchaser for value. *Ib.*

5. *When holder bound by recitals.*—Where a municipal bond contains a recital that it is issued in payment of a subscription made in pursuance of a vote of the people at an election therein specified, and there was no law authorizing such election and subscription, the holder has notice, by such recital, of the illegality of such subscription. *Ib.*

NEGLIGENCE.

1. *Care required in running railroad trains in proportion to the danger of injury at a given place.*—Where stock is permitted by law to run at large in a town or village through which a railroad runs, and the fact is known to the operators of the road, they will be held to a higher degree of care than where they have the road fenced and have no reason to expect stock will be found on their track. *Chic. & Alt. R. R. Co. v. Engle.*

2. *Permitting stock to run at large is not, unless prohibited by law.*—It is not negligence for the owner of stock to permit it to run at large in a village through which a railroad runs, if it is not prohibited by law. *Ib.*

3. *Running trains through towns at high rate of speed.*—It is the duty of a railroad company, whose road runs through a village, to run their trains, whilst in the village, at such a rate of speed as to have them under control, and be able to avoid injury to persons or property, though there is no ordinance of such village on the subject; and if they fail to do so they are guilty of negligence. *Ib.*

4. *Railroad running trains at rate prohibited by law.*—It is gross negligence on the part of a railroad company to run its trains through a town at a rate of speed prohibited by law, and if the company does so run its trains, and thereby causes the death of a person who is himself in the exercise of due care and caution, it is liable in an action by the representatives of the person so killed. *Chic. & Alt. R. R. Co. v. Becker.*

5. *Rule as to adult not applicable to infant.*—The general rule is, that a person approaching a railroad crossing is required to look up and down the track, in either direction, and watch for the approach of trains, before attempting to cross, and if such precaution is

neglected and injury to the party ensues, he cannot recover; but this rule cannot be applied to an infant of tender years. *Ib.*

6. *Parents permitting children to cross railroad track.*—It is not negligence in parents to send a child of six or seven years to Sabbath school, in company with and under the care of an older brother, in a village through which a railroad track runs, and which track the children have to cross in going to and returning from the Sabbath school; but it might be otherwise to permit such infant to go alone. *Ib.*

PARTNERSHIP.

1. *Partners liable for each other's torts committed as partners.*—Partners are liable *in solido* for the torts of one, if committed by him as a partner and in the course of the business of the partnership; but if a partner commit a tort, not as a partner, but as an individual, in respect to a matter entirely foreign to the business of the partnership, the other partners are not liable. *Schwabacker v. Riddle.*

2. *Partners selling their interest, not liable for false representations in relation thereto by other partners.*—Where one partner induces a stranger to purchase the interest of the other partners in a partnership business, by fraudulent representations, the parties selling are not liable for such false representations, unless they instigate or approve of them, or the partner making such representations is acting as their agent in making the same. The mere fact of their relation as partners will not make them liable. *Ib.*

SALE AND DELIVERY.

1. *Sale of growing crops: delivery.*—In case of the sale of standing crops the possession is in the vendee until it is time to harvest them, and until then he is not required to take manual possession of them. *Ticknor v. McClelland et al.*

2. *Sales: manual delivery of ponderous goods, not required.*—Where goods are ponderous and incapable of being handed over from one to another, there need not be a manual delivery, but it is different where the property is capable of being immediately removed. *Ib.*

3. *Sale: fraudulent, if possession retained by vendor.*—Any sale of personal property, where it remains with the vendor, if it is that character of property that is capable of being removed, is fraudulent in law as to creditors and subsequent purchasers, notwithstanding the sale may be in good faith, and for a valuable consideration. *Ib.*

STATUTE OF FRAUDS.

Parol gift of real estate, when enforced.—A father agreed, by parol, to convey a tract of land to his son, as a gift, and the son took possession of the land, and made lasting and valuable improvements thereon, and resided there with his family for four or five years, when he died, in possession of the land, leaving a widow and one child. The father brought ejectment, against the widow and child, for the land, and upon a bill filed by them to enjoin the prosecution of the ejectment suit, and to compel a conveyance to the child, subject to the dower of the widow, the relief sought was properly granted. *Worth v. Worth.*

2. *Evidence to take case out of the statute.*—In order to take a case out of the Statute of Frauds, upon the ground of part performance of a parol contract, it is not only indispensable that the acts done should be clear and definite, and referable exclusively to the contract, but the contract must also be established by

competent proofs to be clear, definite and unequivocal in all its terms. *Ib.*

3. *Relief where valuable improvements have been made under a contract.*—Where a son, by permission of his father, takes possession of land, and puts lasting and valuable improvements thereon, and continues such possession for a number of years, and dies in possession, claiming that the father, by parol, agreed to convey the land to him, although a court of equity may not decree a conveyance to the heirs of the deceased, it will require the father to pay for the improvements. *Ib.*

4. *Contract: by a child with parent, to release to other children all claim to parent's estate, is valid and binding.*—Where a father executes a deed for a tract of land to one child, who accepts and takes possession of the same, upon the express understanding and agreement that it is in lieu of all claim such child may have in and to the residue of the father's estate upon his death, and that such child will release to the other children all his claim in expectancy to the residue of the estate, such contract is legal and binding, and will be enforced in equity. *Galbraith v. McLain.*

5. *When not within Statute of Frauds, nor contrary to Statute of Wills.*—A contract made by a child with his father, in consideration of a conveyance of land to him by the father, that he will release to his brothers and sisters all claim in expectancy to the residue of the father's estate, is not within the Statute of Frauds, nor is it contrary to the provisions of the Statute of Wills. *Ib.*

TELEGRAPH.

Non-delivery of message: liability.—In an action by a father against a telegraph company, for negligence in failing to deliver a telegram sent by him to his son, summoning the son home to the death-bed of his mother, the plaintiff is entitled to recover at least nominal damages, including the price paid the company to send the dispatch. *Logan v. West. Un. Tel. Co.*

NOTES OF RECENT DECISIONS.

Infancy: liability of parent for maintenance by volunteer.—A brother, as a volunteer, undertook the maintenance and education of his sister, who had abandoned her father's home, and without his fault. *Held*, under such circumstances, no promise to pay by a mere volunteer for the maintenance of the child can be implied on the part of the parent. He who intervenes in such a case, to make the child independent of the parent, does but encourage its alienation from the line of filial duty, and stands in no relation to be favored by the law. Sup. Ct., Tennessee, Oct., 1877. *Toncray v. Toncray* (Tenn. L. J.)

Official bond: when sureties on, liable for damages resulting from neglect of principal to perform duty.—The statute requires the inspector's bond to be "conditional for the faithful performance of the duties imposed by the act," and such bond is "for the use of all persons aggrieved by the acts of neglect of such inspector." The petition averred that the inspector in default and breach of the conditions of his official bond, branded one hundred empty casks as "approved," that the casks belonged to Cobb & Co., who afterward filled them with oil below test; that the inspector refused to inspect the same; that Cobb & Co. sold one of these casks to O'Connell, a grocer, who sold a gallon of the oil to the relator's family, and that a lamp filled

therewith, exploded, causing the death of relator's wife, etc. To this petition a demurrer was sustained; we think it improper. The petition states a good cause of action against the inspector and the sureties on his official bond, which is not affected by the fact that the manufacturers, Cobb & Co., were also liable under section 4 of the same chapter, and the judgment is reversed and the cause remanded. Opinion by Sherwood, C. J. Sup. Ct., Missouri, Oct., 1877. *County Court of St. Louis, to use of Jenks, v. Fassett* (Cent. L. J.)

Principal and factor: pledge of chattels by factor: bankruptcy: rights of trustee and pledgee: order and disposition.—A. bought of J. Sillence and paid for two horses, which were returned as not being according to warranty. Sillence then supplied A. with two other horses, to be retained and used by her until the warranty was performed. The horses had been placed with Sillence to sell or job on commission, but of this A. was ignorant, she having considered throughout that the horses belonged to Sillence. Upon the bankruptcy of Sillence the County Court Judge decided that the horses so placed with him were, under the circumstances, in his order and disposition with the consent of the true owner. *Held*, that A., as against the trustee in bankruptcy, could not claim to retain the two horses in her possession either by way of set-off or as having a lien upon them for the purchase-money. English Court of Bankruptcy, Nov. 19, 1877. *Ex parte Roy, Re Sillence* (37 L. T. Rep. N. S. 508).

Nuisance: bawdy-house: damages.—A person renting a house to be used as a bawdy-house, or who knowingly allows it to be so used, is liable, at the suit of an adjoining owner, for the special damage caused by the depreciation in value of his property from the existence of a nuisance, over and above the wrong and injury done to the general public. St. Louis Ct. App., Nov. 1877. *Givens v. Van Studdiford* (6 Cent. L. J. 6).

Practice in Federal courts: application of statutes regulating.—The Act of Congress of June, 1872, § 914, U. S. Rev. Stat., which requires that the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts of the United States, shall conform as nearly as may be to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, has no application to the manner of taking depositions to be used in the Federal courts. The requirements which must be followed in taking depositions to be used as evidence in the Federal courts are prescribed by §§ 863, 864 and 865, U. S. Rev. Stat., which have not been repealed by § 914. U. S. Circ. Ct., S. D. Ohio, Dec. 1877. *Sage v. Taussky* (6 Cent. L. J. 7).

Stoppage in transitu: insufficient notice.—W. P., in Hamilton, bought from plaintiffs in England fifteen packages of goods, which were shipped at Liverpool, 8th November, 1876, by T. M. & Co., plaintiffs' shipping agents, in whose name as consignors the bills of lading were made, W. P. being the consignee. On the 23d November, the way-bill of the major part of the goods arrived at Hamilton, and on the same day M. P. & Co., creditors of W. P., obtained an indorsement to them of the bill of lading, and notified defendants on the 4th December. The plaintiffs' branch house at St. John, N. B., were telegraphed by W. P., who had become insolvent, to detain the goods. The branch

at St. John then immediately telegraphed to the defendants: "Do not deliver earthenware from our English house to W. P.; hold to our order. Clementson & Co." W. P. had a large number of other packages with defendants. *Held*, that the notice to stop was insufficient, as it did not specify or identify the goods in question, and the plaintiff's names did not appear in any bill of lading held by the defendants. Court of Q. B., Ontario, Dec. 28, 1877. *Clementson v. G. T. Ry. Co.* (Can. L. J.)

Usury: consolidation of usurious loans with those not usurious.—Where a loan of \$4,500 was made, on which a \$500 premium was paid, and included in the mortgage, and subsequent loans were made, and, finally, all the loans included in one mortgage of \$7,500. *Held*, that the first loan only was usurious, and to that the forfeiture of interest must be confined. N. J. Chancery, Dec. 18, 1877. *Mahn v. Hussey* (N. J. L. Jour.)

COURT OF APPEALS ABSTRACT. BANKRUPTCY.

1. *Surety on undertaking on appeal not exonerated from liability by discharge of principal.*—Under the provision of the statute (Old Code, §§ 334, 335), relating to stay of execution upon appeal, defendants undertook for the payment of all costs that might be awarded against their principal, the appellant in the action, on the appeal and the judgment appealed from, in case the same should be affirmed or the appeal should be dismissed. *Held*, that the discharge of the principal in bankruptcy pending, the appeal did not, under the provision of § 38 of the Bankrupt Act, release defendants from their liability upon the undertaking. (*Cornell v. Dakin*, 38 N. Y. 253; *Carpenter v. Turrill*, 100 Mass. 450; *Odell v. Wootten*, 38 Geo. 224.) Judgment below affirmed. *Knapp v. Anderson*. Opinion by Allen, J.

2. *Who may and may not be relieved by discharge in bankruptcy.*—Ball to the action may be released on motion if their principal is discharged from his debts before their liability is fixed as bail, but ball in error or sureties in an undertaking upon appeal for the performance of the judgment that may be given by the appellate court, are not discharged. *Ib.*
[Decided Dec. 18, 1877.]

NEW BOOKS AND NEW EDITIONS.

AMERICAN DECISIONS, VOL. I.

The American Decisions, containing all the cases of general value and authority decided in the courts of the several States, from the earliest issue of the State reports to the year 1869. Compiled and annotated by John Proffatt, LL. B., author of "A Treatise on Jury Trial," etc., Vol. I. San Francisco: A. L. Bancroft & Co., 1878.

THE time will very soon come when the valuable decisions of the courts will be within the reach of every practitioner of moderate means; not merely the leading cases, but all that he will be likely to want, or which will probably be referred to in the elementary treatise he consults, or in the latest delivered opinions of the courts. The current decisions of the American courts possessing general value have for some years been given to the profession in the "American Reports," but the vast body of cases scattered through the two thousand or so volumes of State and local reports in existence before that series was commenced, are yet inaccessible to most of those who have need to consult them. Therefore, the announce-

ment made some time since that a series designed to embrace all cases of general value appearing in the various reports of American courts of last resort or appeal up to the year 1869, was welcomed with pleasure by many of the profession. The initial volume of this series has now appeared, and the work of the reporter is so excellently done that we are confident the bench and bar will give it the same hearty support they have accorded to other enterprises of the same character, covering other ground. The plan of the work is best stated by the reporter. In his preface he says, "It is proposed to include in this series of reports, all the cases of any general value and authority from the earliest reported decisions of our several State courts up to the year 1869, after which period the ground is covered by the series known as the *American Reports*. It is not thought desirable to include therein the Federal decisions, of which a revision is being published. The decisions of courts of last resort will be mainly considered; but there are decisions of courts of less grade that have been so long trusted and followed, and cited in our courts and text-books, that they may be deemed of such established authority as to rank with the decisions of the highest courts, and these will, therefore, demand our attention. Such, for example, are the decisions of the Supreme Court, and the Court of Common Pleas in Pennsylvania, reported in *Dallas*, and those of the Supreme Court in New York."

The work of the reporter is conscientiously done. We have examined with care the various cases reported and the annotations, and find that where cases have been overruled or doubted, or the doctrines therein stated modified, the fact is mentioned and the case where it occurs cited. To refer to the more valuable decisions in a report like this, is somewhat difficult, nearly all the cases being such as to merit attention. We will notice only these: *Mack v. Parsons*, p. 17, an old Connecticut case, sets forth a rule of comfort to husbands, namely, that a son-in-law cannot be held liable for the support of his wife's parents; *Tuttle v. Bigelow*, p. 36, extending the time of performance is a good consideration to support a promise; *Kinsman v. Kinsman*, p. 37, grass growing does not pass by a description of personal property in a will; *Warner v. Warner*, p. 38, the determination of a verdict by dividing the aggregate of the sums found by each jurymen by twelve, held ground to arrest the judgment; *Leffingwell v. White*, p. 97, in bills and notes time is calculated by calendar, not lunar months; *Oakley v. Farrington*, p. 107, defendant said of plaintiff, a magistrate, "Squire Oakley is a damned rogue;" it did not appear that the words were spoken of plaintiff in his magisterial capacity. *Held*, that they were not actionable; *Morris v. Tartin*, p. 233, money voluntarily paid where there was no legal obligation, cannot be recovered back; *Respublica v. Oswald*, p. 246, publication of remarks in a newspaper having a tendency to prejudice the public as to the merits of the case, held a contempt of court; *Messier v. Amery*, p. 316, a foreign judgment of a court having jurisdiction of the subject-matter, held conclusive, and its merits not to be inquired into in a collateral action; *Moncrieff v. Goldsborough*, p. 407, it is a fraud for a vendor at auction to employ by-bidders; *State v. Brown*, p. 548, a horse stolen in one State, and carried into another, will not make a felony in the latter State; *Irwin v. Sherill*, p. 574, a stranger misrepresenting a horse to be sound, and inducing plaintiff to buy, is liable

to an action for deceit; *Frothingham v. Price's Executors*, p. 618, notice of protest is not necessary to charge drawer when he has no funds in drawee's hands; *James v. O'Driscoll*, p. 632, friendly services furnish no ground for an action for pecuniary compensation; *State v. Quarrel*, p. 637, the fact that an alien was on the jury unchallenged, held no ground for a new trial; *Collins v. Westbury*, p. 643, duress of goods held a good plea to an action on a bond given to procure their release. The decisions come down to no later date than 1802. The only insurance cases given are those upon marine policies and there are no cases relating to negligence or corporations showing that several now important branches of law were not then heard of. Several very elaborate notes are appended to cases, those in relation to "liquidated damages," etc., on page 631, and "trover," on page 333, examining the case law quite fully. The profession will find these reports just what they want, and when the series is completed, no lawyer in practice can afford to be without them. We would suggest one or two improvements in the way of condensation. In several instances the arguments of counsel are given quite fully. This is proper enough in an ordinary volume of reports, but one that undertakes to give only the cream of the case law has seldom room for much more than the names of the counsel and a brief summary of the arguments and citations made by the unsuccessful one. Quite a number of cases given relate to the construction of wills. While decisions upon this subject have a value, they are, as a rule, not worthy of being included in a selection such as this. We must also criticise the insertion of such a decision as *Russell v. Falls*, p. 380, where the question when a will is attested in the presence of the testator is discussed at length but no conclusion reached. A discussion of this kind is sometimes of interest, but it is out of place here. As a whole, however, the volume has so many excellent features, that the faults we have mentioned are excusable. It contains all the decisions of general value found in thirty volumes of the earlier reports, is well indexed, has a table of cases cited, and is well printed and bound.

ANDREWS' PRECEDENTS OF LEASES—SECOND EDITION.

Precedents of Leases, with Practical Notes; Second Edition. By John Andrews, B. A. Oxon, Solicitor of the Supreme Court of Judicature. London: Reeves & Turner, 1878.

A precedent is much more useful to the conveyancer than what is known as a form. The form is prepared in advance to cover all cases within a certain class, while the precedent only undertakes to show how certain cases actually existing were met. Both are designed as guides, but to one the ground is unknown while to the other it is to a certain extent familiar. We are glad, therefore, to welcome books which profess to aid the draftsman by furnishing him with the best examples of what has been done, and we esteem the volume before us as a book of that kind. It covers only a single subject, but one of growing importance in these days, when so large a proportion of the people either live or do business on leased premises. The work will be found chiefly useful in England, but it contains many hints that will be advantageous to American conveyancers. The precedents it gives are taken from those in constant use. They have all been carefully revised and many of them have been settled by counsel. The various clauses and provisions are

illustrated by notes referring to reported decisions, which embrace the leading points usually met in practice. The satisfaction which the work has given is indicated by the fact that a second edition has been called for—a somewhat unusual thing in books of this kind.

CORRESPONDENCE.

OATHS OF REFEREES TO COMPUTE AMOUNT DUE.

HUDSON, N. Y., January 26, 1878.

Editor Albany Law Journal:

GENTLEMEN.—In your issue of this date, you speak of "a point of considerable interest, passed upon in the case of *Exchange Fire Ins. Co. v. Early*, decided at special term of the N. Y. Court of Common Pleas on the 18th inst.," where a re-sale of mortgaged premises was ordered because the referee appointed to compute the amount due, had neglected to take the oath prescribed by § 1016 of the Code of Civil Procedure.

It seems to us that the court has entirely misapprehended the class of references to which this section is applicable. Its very terms show that it only applies to references when some issue is to be tried, or some question determined. It applies only to references "prescribed in either of the foregoing sections of this title." Title II, Chap. X.

The reference authorized by "the foregoing sections of this title" is in every case (except that authorized by § 1015, to try some issue or determine some question. Section 1015 authorizes a reference to take an account after interlocutory or final judgment, and to report on a question of fact on a motion. Clearly, none of these sections embrace such a reference as that under consideration. But another provision of the Code of Civil Procedure puts the matter entirely beyond controversy. Section 827 (art. 6th, tit. ch. 8th), in its last clause, provides as follows: "And when, according to the practice of the Court of Chancery, on the 31st day of December, 1846, a matter was referable to the Clerk, or to a Master in Chancery, a court having authority to act thereupon may direct a reference, to one or more persons designated in the order, with the powers which were possessed by the Clerk or the Master in Chancery, except when it is otherwise specially prescribed by law."

References to compute amount due and to sell mortgaged premises were always made by the old Court of Chancery to the Clerk or a Master, and hence such references are provided for by this section (827).

No oath of the Clerk or Master was required on such references, and none is now required of the referee, who, under the present practice, takes the place of those functionaries.

The language of § 1016 is utterly inapplicable to mere clerical computation, and by its terms the requirement of a preliminary oath is confined to references prescribed in the several sections of tit. 2, ch. 10. The Court will not be astute to disturb judgments entered upon the reports of referees appointed under authority derived from other provisions of the Code, and to unsettle titles acquired without this august ceremonial of a preliminary oath of the referee, "That he will faithfully and fairly compute the amount due upon the mortgage in suit, and make a just and true report, according to the best of his understanding."

Manifestly the attention of the Court of Common Pleas of the city and county of New York was not called to § 827 of the Code of Civil Procedure.

Very truly yours,
CORNELIUS ESSELSTYN.

COURT OF APPEALS DECISIONS.

THE following decisions were handed down on Tuesday, January 22, 1878:

Motion denied—*The People v. The Security Life Insurance Co.*—Judgment affirmed, with costs—*The Farmers and Mechanics' National Bank of Buffalo v. The Erie Railway Co.*—Order affirmed and judgment absolute for plaintiff on stipulation, with costs—*Wood v. The Erie Railway Co.*—Order of General and Special Term reversed and motion granted (on terms stated in opinion), with costs, payable out of the estate of the lunatic—Order to be settled by Chief Justice Church if parties do not agree.—In re Valentine.

The following decision was handed down Friday, January 26, 1878: In the matter of several applications to modify the rules and regulations in relation to the admission of attorneys, etc. "The court has had under consideration the several applications in behalf of students who were at the time of the adoption of the present rules in attendance upon the law schools of the State, as well as those who have pursued their studies at law schools out of the State, and also by and in behalf of gentlemen who have been admitted to the bar in other States, and have, without notice of any change of the rules of this court affecting their admission as attorneys, etc., removed to this State, for a modification of the rules, and feel the force of their several applications, but after deliberation it is deemed inexpedient to modify the rules or in any way to interfere with their operation and effect, and the applications are therefore denied."

The following decisions were handed down Tuesday, January 29, 1878:

Judgment affirmed, with costs—*First National Bank of Oxford v. Wheeler*; *Goodrich v. Wheeler*; *Mitchell v. Wheeler*; *Maydale v. Wheeler*; *Hall v. Wheeler*; *First National Bank of New Berlin v. Wheeler*; *Wheeler v. Wheeler*; *Bank of Chenango v. Wheeler*; *Baggerly v. Farmers' Joint Stock Insurance Co.*; *Hughes v. Copper Mining Co.*; *Hunt v. Hunt*; *Horn v. Pullman*; *Auburn City National Bank v. Hinsiker*; *Kraushaar v. Meyer*; *Kohler v. Matlage*; *Craighead v. Peterson*; *Holden v. New York and Erie Bank*; *Kettletas v. Kettletas*; *Sixth Avenue Railroad v. Kerr*.—Judgment reversed and new trial granted, costs to abide event—*Town of Pierpoint v. Loveless*; *Jordan v. Valkenning*.—Order affirmed, with costs—In re application of the Brooklyn and Coney Island Railroad Co.—Order of General Term reversed and judgment on verdict affirmed, with costs—*Dorrity v. Rapp*.—Judgment of Supreme Court, and so much of decree of Surrogate as is involved in this appeal, reversed without costs to either party as against the other—*Bevan v. Cooper*.

NOTES.

THE opening year brings with it quite a number of new adventures in the field of legal journalism. In addition to several which we have already noticed, we have received the initial numbers of *The Memphis Law Journal*, *The New Jersey Law Journal*, and *The Cleveland Law Reporter*. The first named is to be issued quarterly, and is to have, in addition to leading articles of local or general interest, reports of the de-

cisions of the Supreme Courts of Tennessee, Arkansas and Mississippi. The January number contains a thoughtful and exhaustive essay on "The Chancery System of Tennessee," by Hon. W. F. Cooper; an article on "The Judiciary—what it is and what it should be," by Hon. Henry Craft; one on "Tax Legislation in Tennessee," by Hon. J. B. Helskell; and a memorial sketch of Andrew Ewing, by Hon. T. W. Brown. Every article is well and carefully prepared and is worthy the attention and perusal of the bar everywhere. Very full abstracts of six decisions of the courts of Mississippi and Tennessee are given, and one case in the Supreme Court of Tennessee is published in full. We trust that this new quarterly will receive a hearty support from the profession of the section where it is published. The *New Jersey Law Journal* is to be published monthly at Somerville, N. J. The January number contains some very carefully written editorial notes on subjects of present interest, reports of cases recently decided in the United States District Court for New Jersey, the Chancery Court and the inferior court of that State contributed articles on matters of interest and under the head of "Our Miscellany." Notes of important decisions from other states and countries, personalities, court notes, and humorous items. The *Journal* well deserves the support of the New Jersey bar, and we hope it will receive it. The *Cleveland Law Reporter* is to be published weekly, and is to contain decisions of the courts of Ohio and such matters as are of interest to the profession in the locality where it is issued.

The *Pall Mall Gazette* says that the law recently promulgated by the German government establishing courts to inquire into accidents at sea happening in German waters will come into force on the 1st of January next. Two courts are created by the new regulations; the one for the Baltic, the other for the North Sea. The president of each is to be a lawyer, and he is to be assisted by four assessors, two of whom are to be captains of merchant vessels in actual employment, to be selected on each occasion by the president of the court from a list prepared every year by the Chambers of Commerce. In certain cases also, the president may nominate a naval officer as one of the four assessors. The court, thus composed, has power to suspend for any length of time the certificate of the captain or pilot of any vessel into the conduct of which inquiry is being made, or even to prohibit them altogether from following their profession at sea; but the Chancellor of the Empire, to whom appeal may be made from the decision of the court, may remit the sentence pronounced by it at the end of a year. The provisions of this law have been warmly discussed in the papers of the German seaport towns since it was promulgated. The prevailing opinion appears to be that the sentences to be awarded are much too severe, and that the fear of incurring the punishments prescribed will cause captains and pilots to adhere rigidly to the regulations, even in cases where the only chances of avoiding a disaster would be to maneuver boldly and promptly in opposition to the rules laid down. The admission of a naval officer as an assessor is also warmly protested against, even in cases in which a man-of-war is concerned—unless, indeed, the officer appointed shall have previously served as a captain in the merchant service.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, FEBRUARY 9, 1878.

CURRENT TOPICS.

THE frauds perpetrated by the Solicitor Dimsdale has brought forcibly to the minds of English land owners and money lenders the dangers to which they are constantly exposed by the want of a system of registry of instruments affecting real property. To an American, accustomed, when he wishes, to buy or sell a piece of land, or to raise or invest money on a mortgage, to only the trifling expense and trouble of procuring a "search" from the official in charge of the public records, an English transaction, relating to real property, is a somewhat formidable affair. There the vendor and purchaser, or whatever the two persons who are striving to make a bargain may be entitled, must each have his solicitor, and each solicitor must have his counsel before any step can be taken. Then, after a long time spent in making abstracts of title and perusing documents which convey or fortify title, and raising or explaining difficulties, the deeds of conveyance are drawn, and with them are transferred all the antecedent instruments that can be parted with, as muniments of title. A single instrument of conveyance answers, as a rule, with us, the vendee not caring for the possession of previous deeds so long as the title appears all right upon the record. The objection raised to the adoption of a registry system in England has been that it would afford to those desirous of ascertaining the pecuniary condition of others, from curiosity or some wise motive, an opportunity to do so, inasmuch as these persons would have free access to the public records. The principal opposition to the registry, however, comes from the solicitors, who imagine that a very important and lucrative business would be interfered with, and perhaps ruined, if the transfer of real estate should be rendered as easy and safe as it is with us. We imagine, however, that no great harm would be done to the solicitors by a general registry act. In Middlesex, which is an important county, we understand that a system of recording, which is nearly as convenient as the American, has been in existence for some years, and that it has not operated to the disadvantage of the profession. It was proposed by one Bulstrode, in the Rump Parliament, that there should be a register of deeds in every county, and the matter was

referred to a committee. But that Parliament was in advance of its time. It has taken two hundred years to bring the English land-owners and money lenders to a realization of the advantages of the plan suggested by Bulstrode.

The General Term of the Supreme Court for the First Department, in *The case of Gesner*, decided on the 31st ult., passes upon a somewhat important question in criminal practice, namely: whether a person charged with an indictable offense is entitled to an examination before a committing magistrate after an indictment has been found against him. The court holds that he has not such a right, reversing the decision below of Justice Westbrook. The opinion says: "It was not the intention of the Revised Statutes to require the magistrate to continue an examination under every and in despite of all circumstances, as, for instance, where he is satisfied the evidence fails to establish the charge. The intention was that no person should be held for trial by an arresting magistrate except on such examination; but there was no intention to continue such examination after its main object had been rendered nugatory by an indictment." The conclusion reached is the one generally held by the profession, though doubt had been thrown upon its correctness by the decision below in this case.

The members of the Louisiana Returning Board who have been indicted in the courts of that State for alleged criminal acts in connection with their official duties, made application to Mr. Justice Bradley, associate justice of the United States Supreme Court, for an order transferring the proceeding to the Federal courts, under the provisions of § 641, etc., of the Revised Statutes. The principal grounds of the application were that a jury law, passed by the legislature of Louisiana in 1877, operated in favor of white citizens and against those of African descent, of which descent two of the petitioners were, and that the State officers had so manipulated the law as to deprive petitioners of an impartial jury, and had organized a jury so prejudiced that petitioners could not have a fair trial; and also that a prejudice existed against petitioners among the authorities and court officials which would prevent a fair trial. The petition was denied. The court held that the law complained of, which provides for the appointment of commissioners who are to select impartially from those qualified to vote a large number of names of good and competent men to serve on juries, is substantially the same law in force in other States, and not open to any constitutional objection. In regard to the allegations of a manipulation of the law in such a manner as to secure a jury inimical to petitioners, and of the existence of a general prejudice against them in the minds of the court, jurors and

officials, the opinion says they "are not within the purview of the statute authorizing a removal. The Fourteenth Amendment to the Constitution, which guarantees the equal benefit of the laws on which the present application is based, only prohibits State legislation violative of said right. It is not directed against individual infringements thereof." The questions presented in the case are interesting, and the court suggests to the petitioners the propriety of going to the Supreme Court for a final determination of them.

A bill has been introduced in the Assembly by Mr. Bergen, designed to protect the purchasers of personal property to be paid for by installments. It provides that the failure of a purchaser to pay any installment, when due, shall not result in a greater forfeiture of the right or interest of the purchaser than one-half of the amount already paid, and prohibits the seller from recovering possession of the property, in case of failure, except on refunding one-half of the amount already received on the sale. This is designed to prevent the oppressive carrying out of a class of contracts that are usually made between the vendors of certain kinds of household articles, such as sewing machines, pianos, etc., and women of limited means. These contracts are usually induced by false hopes held out by the vendors of the articles, and are usually so framed as to give the purchaser hardly any right except that of possession, until the vendor shall reclaim the article. The courts have, in various cases, endeavored to so construe these contracts as to save the purchaser from heavy loss, but this is not always possible, and the bill mentioned is designed to secure equity in every instance.

NOTES OF CASES.

IN the case of *Welton v. State of Missouri*, 1 Otto, 275, a statute of Missouri which required the payment of a license tax from persons who should deal in the sale of goods which were not the growth, produce or manufacture of the State, by going from place to place to sell the same in the State, and which required no such license tax from persons selling in a similar way goods which were the growth, produce or manufacture of the State, was held unconstitutional as being in conflict with the power vested in Congress to regulate commerce with foreign nations and among the several States. The court held that the tax was not one upon a calling, but upon the goods designated, and that legislation, discriminating in favor of the products of the State and against those of other States, was invalid under the clause of the Federal Constitution giving to Congress the power mentioned. The Supreme Court considered a similar question in *Brown v. Maryland*, 12 Wheat. 425, where an act of

the legislature of Maryland required importers of foreign goods to pay the State a license tax before selling them in the form and condition in which they were imported. The statute was held to be unconstitutional, the court saying that a tax on the occupation of an importer was a tax on the goods imported. The decision is also supported by the case of *State Freight Tax*, 15 Wall. 232. In *Almy v. California*, 24 How. 169, a tax upon a bill of lading of goods transported on the high seas is held a regulation of commerce and invalid. In *Woodruff v. Parham*, 8 Wall. 123, a tax on railroad and stage companies for every passenger carried out of the State by them is held void, not as a regulation of commerce in the absence of conflicting legislation by Congress, but as opposed to the right of the government to transport troops and the right of citizens to approach the great departments of government, the ports of entry through which commerce is conducted, and the various Federal offices in the States. See, also, *Van Buren v. Downing*, 41 Wis. 122, where a statute of Wisconsin, similar to that of Missouri, is held unconstitutional upon the authority of the principal case.

In the case of *The Benton*, recently decided by the United States District Court for the Eastern District of Michigan, the question arose whether a firm of material men, composed of three members, could libel a vessel for supplies furnished, such vessel being owned by two members of the firm. The court held that the libel could not be sustained. That a material man has no lien upon his own property has been repeatedly decided, not only in admiralty, but in cases under the mechanics' lien laws of the several States. *Logan v. Steamboat Eolian*, 1 Bond, 267; *Babb v. Reed*, 5 Rawle, 551; *Stevenson v. Stonehill*, 5 Whart. 301; *Peck v. Brummagin*, 31 Cal. 440. It was decided in *Doddington v. Hallet*, 1 Ves., Sr., 497, that the part owner of a ship has a lien upon the shares of his co-owners, but this case was overruled in *Ex parte Young*, 2 V. & B. 242; *Patten v. Schooner Randolph*, Gilp. 457; *Hall v. Hudson*, 2 Sprague, 65; *The Larch*, 2 Curt. 427; *Macey v. De Wolf*, 3 W. & M. 205; *Mumford v. Nichol*, 20 Johns. 611; *Green v. Briggs*, 6 Hare, 395; *Lamb v. Durant*, 12 Mass. 54; *Merrill v. Bartlett*, 6 Pick. 46; *Braden v. Gardner*, 4 id. 456; *French v. Price*, 24 id. 14. In a case like the one at bar, the only remedy would be a personal one in a court of equity. See *Case of Steamboat Morton*, 22 Ohio St. 26, which was very similar to the one at bar. Plaintiffs, a firm, furnished materials to a vessel owned by one of their number, and it was held that they could not recover. In *The Druid*, 1 W. Robinson, 399, it is said: "In all causes of action which may arise during the ownership of the persons whose ship is proceeded against, I apprehend no suit could ever be main-

tained against a ship where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien upon the vessel. The liability of the ship and the responsibility of the owners in such cases are convertible terms; the ship is not liable if the owners are not responsible; and, *vice versa*, no responsibility can attach on the owners if the ship is exempt and not liable to be proceeded against." As an action could not be maintained at common law by the libelants in the principal case against the owners of the ship, the ship would not be liable. See, also, *The Marango*, 1 Low. 52; *Steamboat Orleans v. Phillips*, 11 Pet. 175; *Minturn v. Maynard*, 17 How. 477; *Grant v. Poillon*, 20 id. 162; *Kellum v. Emerson*, 2 Curt. 79; *Ward v. Thompson*, 22 How. 330; 1 Pars. on Ship. 116.

In *United States v. Wright*, 1 N. J. Law Jour. 4, recently decided by the United States District Court, New Jersey, it was held that the sureties of a defaulting postmaster were not discharged by an extension of time for payment over moneys due, granted to him by the special agent of the government without notice to them, nor were they discharged by the circumstance that he was continued in office after it was known that he was a defaulter. That mere forbearance on the part of the government officers, in such a case, in the absence of fraud, will not discharge the sureties, is well established. See *Locke v. United States*, 3 Mass. 446; *United States v. Kirkpatrick*, 9 Wheat. 720; *United States v. VanZandt*, 11 id. 184; *United States v. Simpson*, 13 Penn. St. 437. But the right of a surety to be informed of acts of dishonesty of his principal, and known to the employer, who is indemnified, seems to be well settled. A party taking a guaranty from a surety must not allow him to enter into the contract under false impressions. If he knows any thing in regard to the situation or character of the principal which increases the risk of the surety, and withholds his knowledge, it is a fraud which releases such surety. The reason is that the surety has the right to infer from the silence of the employer that he regards the principal as a trustworthy person. *Smith v. Bank of Scotland*, 1 Dow. 272; *Railter v. Matthews*, 10 Cl. & F. 934; *Insurance Co. v. Lloyd*, L. R., 10 Ex. 532. In the last case, however, the principle was qualified by holding that in cases of guaranty the concealment, in order to vitiate the contract, must be fraudulent. It is said, however, that while this is the doctrine in equity, it is an open question whether such a defense is available in a suit upon the bond. In *Locke v. United States*, 3 Mass. 453, Judge Story was inclined to doubt its validity as a legal defense, and the Supreme Court, in *Etting v. Bank of United States*, 11 Wheat. 59, seems to have

been equally divided upon the question. In *Phillips v. Foxall*, L. R., 7 Q. B. 666, it is said that in "a continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the course of the service, and, instead of dismissing the servant, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterward have recourse to the surety to make good any loss which may arise from his dishonesty during the subsequent service." See, also, *Sanderson v. Aston*, L. R., 8 Ex. 73; *Burgess v. Eve*, L. R., 13 Eq. 450. But see *Postmaster-Gen. v. Reeder*, 4 Wash. C. C. 678; *Dox v. Postmaster-Gen.*, 1 Pet. 318.

In *Moore v. Ulster Banking Co.*, 12 Ir. L. T. Rep. 2, decided by the Irish Court of Queen's Bench on the 10th of November last, the facts were these: Six weeks before his death one Moore indorsed a bank deposit receipt, which was not a negotiable instrument, and handed it to one McSweeney, saying it was for McSweeney's niece, who had performed certain services for Moore, and also saying that it was as little as the niece could have for her services. On the day after Moore's death McSweeney took the receipt to the bank which issued it, and was paid the interest and a new receipt was given him in his own name, for the benefit of his niece. The administratrix of Moore brought action against the bank for the amount secured by the receipt, and she was held entitled to recover, the court saying that the indorsement of the non-negotiable instrument did not operate as an equitable assignment, nor did it amount to a *donatio mortis causa*, being incomplete; and as it was without consideration, the court could not complete it. If the indorsement constituted McSweeney the agent of Moore, the agency was revoked by the death of the principal. The case of *Edwards v. Jones*, 1 My. and Cr. 226, is cited in support of the conclusion of the court. Here the obligee of a bond, five days before his death, signed a memorandum not under his seal, which was indorsed on the bond, and which purported to be an assignment of the bond without consideration to the person to whom the bond was delivered. This was held not a valid *donatio causa mortis*. See, also, *Ellison v. Ellison*, 1 White and Tud. L. Cas. Eq. 382; *Richards v. Delbridge*, L. R., 18 Eq. 11; *Lloyd v. Pughe*, L. R., 8 Ch. 88; *Veal v. Veal*, 27 Beav. 303. A more liberal rule seems to be adopted by the American courts. In *Grymes v. Hone*, 49 N. Y. 17; 10 Am. R. 313, an assignment of bank stock was made in writing by the owner, a man eighty years of age, who handed the assignment to his wife with directions to give the same to his daughter, the assignee, in case of his death. Five months afterward he died. The court held this to be a valid gift *causa mortis*, and that the court could enforce it notwithstanding the stock had not been transferred on the books of the bank. The gift of a savings bank book with the intention of transferring the deposits mentioned therein by one *in extremis* has repeatedly been held to be a valid gift of the deposits. *Camp's Appeal*, 36 Conn. 88; 4 Am. R. 170; *Tillinghast v. Wheaton*, 8 R. I. 526; 5 Am. R. 621. See, also, *Gardner v. Merritt*, 32 Md. 78; 3 Am. R. 115. See, however, *Curry v. Powers*, 16 Alb. L. J. 117, where a gift of a pass book of a bank, with a check upon the funds deposited, payable four days after donor's death, was held by the Court of Appeals of this State not to be a valid gift.

THE EXTRADITION REMEDY.

BY SAMUEL T. SPEAR, D. D.

BOUVIER, in his Law Dictionary, defines Extradition to mean "the surrender by one sovereign State to another, on its demand, of persons charged with the commission of crime within its jurisdiction, that they may be dealt with according to its laws." This surrender is not simply expulsion, leaving the person free to go wherever else he chooses, but arrest and transference to the government demanding him on the charge of crime. It, consequently, denies to the accused the right of asylum, and, by a summary process, removes him from the territory and protection of the laws of the surrendering government, and forcibly places him within the jurisdiction and operation of the laws of the government to which he is remanded. It gives the latter possession of his person for the purpose of trial and punishment, and is, hence, an auxiliary process through which one government contributes to the administration of justice by another. The necessity for extradition grows out of the fact that, except in cases specially provided for by treaty, the penal laws of one country cannot operate within the jurisdiction of another. The sovereignty of a nation within its own territory is exclusive and absolute. See *Schooner Exchange v. McFadden*, 7 Cranch, 116.

Governments, not choosing blindly to trust each other on this subject, require information as to the person to be delivered, as to the crime or crimes with which he is charged, and as to the evidence showing the commission of such crime or crimes. The demanding government must first make out a case; and whether it has done so or not, in any particular instance, the government upon which the demand is made will always judge for itself.

The nature of the transaction, as between the two governments, naturally raises the question whether the jurisdiction acquired by extradition is *general*, and may be extended to the trial and punishment of any crime, or *special*, and must, therefore, be limited to the avowed purpose for which it was granted on the one hand and acquired on the other. The demanding government specifies a case: and if a surrender be made on the basis of the specification, then it is made with reference to that case, and not to some other supposable case. The mere statement of the facts as to demand and delivery would seem to imply, as a matter of good faith, that the proceeding necessarily qualifies the jurisdiction which it secures, and limits it to the purpose for which it was secured. Hence arises the doctrine that the party accused can be tried and punished only for the crime or crimes named in the demand and delivery, and that, when this end has been gained, he should, unless he elects to remain, or

commits some other crime after his extradition, be permitted to return to the jurisdiction from which he was removed. The design of this article is to ascertain whether this is the true construction of the extradition remedy.

Mr. Wharton, in his Criminal Law, seventh edition, vol. 8, p. 34, section 2956 *a*, says: "The sole object of extradition is to secure the presence of the fugitive in the demanding state for the purpose of trying him for a specified crime. The process is not to be used for the purpose of subjecting him collaterally to criminal prosecutions other than that specified in the demand. Provisions guaranteeing to the fugitive the right to leave the demanding country after his trial for the offense for which he is surrendered, in case of acquittal, or in case of conviction, after his endurance of punishment, are incorporated in many treaties. When not, they should be made the subject of executive pledge. It is an abuse of this high process, and an infringement of those rights of asylum which the law of nations rightly sanctions, to permit the charge of an offense for which extradition lies to be used to cover an offense for which extradition does not lie, or which it is not considered politic to invoke."

Mr. David Dudley Field, in his International Code, has a chapter on extradition, the provisions of which, as he says, "are based mainly on those of existing treaties, particularly the numerous American treaties and the most recent French treaties." In section 237 he states the following rule: "No person surrendered * * * shall be prosecuted or punished in the nation to which he is surrendered, for any offense committed previous to that for which his surrender was demanded, nor for any offense which was not mentioned in the demand." This represents the law as derived from the provisions of "existing treaties," and as Mr. Field thinks it ought to be.

An article appeared in the American Law Review, vol. 10, p. 617, understood to have been written by Judge Lowell, of the United States District Court, in which the author says: "The question is a simple one; the answer, to an ordinary mind, seems equally so; and the writers on the general subject have expressed but one opinion upon it, so far as they have expressed any. It is, whether a person, surrendered by one government to another upon charge and proof of the commission of a certain crime, can lawfully, and against the objection of the surrendering government, be tried for a different crime committed before his surrender. That he cannot, seems at once the dictate of common sense and of ordinary justice; and so are the authorities. * * * We hold it to be clear, on grounds of reason and authority, that a person surrendered by one sovereign to another, under a treaty of extradition, is to be tried for that crime, and that only,

for which the surrender was asked and obtained." The article was prepared with reference to the controversy between the United States and Great Britain, then pending, in regard to the case of Winslow.

Mr. William Beach Lawrence, in an article published in the *Albany Law Journal*, vol. 14, p. 96, writes as follows: "All the right which a power asking an extradition can possibly derive from the surrender must be what is expressed in the treaty, and all rules of interpretation require the treaty to be strictly construed; and, consequently, when the treaty prescribes the offenses for which extradition can be made and the particular testimony to be required, the sufficiency of which must be certified to the executive authority of the extraditing country, the State receiving the fugitive has no jurisdiction whatever over him, except for the specified crime to which the testimony applies." Mr. Lawrence supports this general position by referring to Billot, MM. Faustin-Hélié, Legraverend, Trébutien, Bertauld, Le Sellyer, Morin, Foelix et Demangeat, Brouchoud, Ducrocq, Duverdy, Bonafos, Morel, Dalloz, and Mangin.

Mr. Frederick W. Gibbs published a pamphlet on *Extradition Treaties*, in London in 1868, in which he says that political offenses are not grounds of extradition, and then adds: "In close connection with the foregoing principle, and designed undoubtedly to support it, follows another, to which our attention has been much directed, but which is treated by foreign writers as well established,—that a person surrendered is liable only for the offense on account of which his extradition was obtained." This doctrine he sustained by citing several authorities.

The Lord Chancellor of England, in his speech on the Winslow case in the House of Lords, published in *The Foreign Relations of the United States* for 1876, pp. 286-296, presents an array of European authorities to show "that, apart altogether from the wording of treaties, there is a silent and implied condition in extradition that the crime for which the surrender of a man is asked must be specified, and that it is for that crime alone that he must be tried." One of these authorities is Foelix, who, in his treatise on *Private International Law*, devotes an entire chapter to the subject of extradition, and, among others, lays down the following general rule in regard to it: "The person who is surrendered cannot be prosecuted or condemned except for the crime in respect to which his extradition has been obtained."

A second authority is Kluit, an eminent jurist of Holland, who, in answer to the question whether it is "lawful to punish the fugitive for any other crime than that for which he has been surrendered," says: "The request for the surrender of a criminal is generally accompanied by a statement of the

grounds on which it is made. The State in which he has taken refuge ought not to surrender him until those grounds have been made clear to it; in other words, it should ascertain whether the crime committed is of a character to justify his surrender. In truth, the criminal by his flight to another State becomes (although but for a time) the subject of the supreme power of that State, and immediately enjoys the protection and guardianship of that State. From that guardianship he cannot be forcibly taken except under a special agreement, the terms of which, we presume, certainly do not extend further than to those very grounds on which the surrender was demanded and granted. * * * * The surrendering State gave up the criminal on consideration of the grounds stated, not of any different grounds." Kluit's idea is that an extension of the jurisdiction beyond the grounds stated would be a violation of the faith involved in the transaction.

A third authority is Heffter, the German writer, who says: "The individual whose extradition has been granted cannot be prosecuted nor tried for any crime except that for which the extradition has been obtained. To act in any other way, and to cause him to be tried for other crimes or misdemeanors, would be to violate the mutual principle of asylum and the silent clause contained by implication in every extradition."

The circular of the French Minister of Justice, issued April 15th, 1841, is also quoted. In this circular the Minister says: "The extradition declares the offense which leads to it, and this offense alone ought to be inquired into. So that if during the prosecution for the crime which has led to the extradition there should arise the evidence of a new crime, a new demand of extradition ought to be made."

The case of Dermenon, as reported in Dalloz's *Jurisprudence*, is mentioned by the Lord Chancellor. Dermenon had been surrendered by the Canton of Geneva to France on the charge of fraudulent bankruptcy. On that charge he was acquitted, but there was another charge against him for which he had not been surrendered. The question arose whether he should be tried on this other charge, or sent back to the Canton of Geneva. The answer given by the Minister of the Interior was as follows: "It is only as accused of the crime of fraudulent bankruptcy that Dermenon has been delivered up to France by the Canton of Geneva. He is now purged of that charge by the decree of acquittal. Dermenon is therefore in the same position as if only a misdemeanor had been laid to his charge. It is clear that in that case his extradition could not have been obtained. It follows that we cannot take advantage of his having been given up to the French authorities upon a different ground to try him for acts which have not and could never have been the grounds of his extradition. The Minister of Justice

has consequently directed the procureur-général to place Dermenon at your disposal, and I hasten, for my part, to request you to have him immediately conducted to the frontier, where he should be placed once more in the hands of the Genevese authorities."

Turning from these authorities, we come now to consider a much higher authority, and this we find in the extradition treaties of the United States. All these treaties specify certain crimes which, with proper proceedings, may be the ground of extradition. In none of them is it expressly said that the crime charged in the demand, and which was the basis of the delivery, is the only crime for which the surrendered person may be tried under the jurisdiction thus acquired. Is this principle, though not formally stated, necessarily implied in the express provisions of these treaties? We take, for the purpose of answering this question, the tenth article of the treaty of 1842 with Great Britain, the construction of which was the matter of controversy in the Winslow case, remarking that, as to the points in this stipulation to which we shall refer, it is an example of every extradition treaty of the United States, without a solitary exception. The argument will, therefore, apply to the whole.

This treaty, in the first place, contains the general stipulation that the two governments will, "upon mutual requisitions" made in a certain way, "deliver up to justice" a specified class of persons, indicated by the crimes laid to their charge, by the *locus delicti* or place where these crimes were committed, and by the place where they have sought asylum and are found. The "justice" here referred to relates to the offenses specified as extradition crimes. It is not the general justice of either country, but justice in relation to these crimes, and embraces only so much of the penal code as refers to them. It is hence limited as to the persons to whom and the offenses to which it applies. Judge Benedict, in *The United States v. Lawrence*, 13 Blatchf. C. C. R. 295, said that the delivering up to justice, as provided for in the treaty, is "a significant and comprehensive expression, plainly importing that the delivery is for the purposes of public justice, without qualification." This idea, with all due respect to the learned judge, is inconsistent with the specification of particular crimes for which the delivery is to be made. Why upon this theory specify at all? Why not, according to the view advocated by Mr. Westlake, dismiss all enumeration of offenses, and deliver up for any crime, except that of treason or sedition? Such a treaty would be in harmony with the doctrine of Judge Benedict; but it so happens that the extradition treaties of the United States are not constructed on this principle.

A second element in the treaty is the enumeration of seven specific crimes as the only ones in respect to which either party shall have the right of demand, or be subject to the obligation of delivery. Both parties restrict themselves to this list of crimes; and this by necessary implication excludes the remedy from all other crimes preceding the extradition, as effectually as if such exclusion had been stated in express words. The treaty is the only ground of the remedy in respect to any crime; and hence the remedy cannot go beyond the offenses enumerated, without exceeding and in this sense violating the express provision of the treaty. To assume that extradition may be demanded for any one or more of the crimes named, and that the person, being surrendered, may then be tried and punished for any other crime at the pleasure of the demanding government, is to render alike meaningless and useless the specific enumeration of crimes. This manifestly is not consistent with the fact of enumeration, and in practical effect changes the treaty itself. Extradition is a means to promote the administration of justice in respect to a certain class of particularly designated crimes; and, in omitting all other classes, the parties virtually stipulate that the remedy shall operate only within the limits of the crimes enumerated. To carry the jurisdiction beyond these limits is to make the treaty serve an end for which it contains no provision, and which, moreover, the contracting governments disclaim by the most obvious implication. The enumeration is the boundary which they have chosen to fix, and they cannot, after jurisdiction has been acquired, exceed this boundary in the application of the remedy, without violating their own agreement.

A third element in the treaty is the fact that the person, claimed by the demanding government, must be "charged" with having committed within its jurisdiction some one or more of the crimes enumerated. The delivering government is entitled to know what the offense is for which the surrender is demanded. In no other way can it determine whether it comes within the treaty or not. No offense outside of the treaty is a ground of extradition; and no offense within the treaty is such a ground until it has been distinctly stated to the government asked to make the delivery. The statement of the particular offense, as the ground of the right claimed, limits the demanding government to that offense, since, if a delivery be made, it is made for that offense and for no other. It was for the crime "charged" that the surrendering government withdrew from the accused the right of asylum within its own territory, and the receiving government cannot extend its penal jurisdiction to some other crime, whether within the extradition list or not, without going beyond the terms of its own demand

when made, and beyond those of the surrender when made. The necessity of making a specific charge as the basis of demand under the treaty, and the surrender of the alleged fugitive upon that basis, constitute a just and proper limitation of the jurisdiction to the purpose for which it was asked on one hand, and granted on the other.

A fourth element in the treaty provides that the "criminality" charged in the demand shall be sustained by such evidence "as, according to the laws of the place where the fugitive or prisoner so charged shall be found, would justify his apprehension and commitment for trial, if the offense had there been committed." This is a most important provision in relation to the point under consideration.

The "criminality" referred to is a particular criminality, and the express words of the stipulation require that the proof of its existence shall show a *prima facie* case of guilt, according to the laws of the country asked to make the delivery. The delivering government, under this rule, decides for itself upon this question of fact. To change the case after jurisdiction has been acquired and put the party on trial for a different crime, upon evidence entirely different in its relations and in what it proves, and in respect to which the surrendering government has never judged whether it did or did not make out a *prima facie* case, is manifestly to violate the rule in regard to evidence, which is an express part of the stipulation. Suppose the crime charged to be murder, that the accused was surrendered upon evidence relating to murder, that being tried on this charge, he was acquitted, and that he was then tried and convicted on the charge of forgery. The evidence upon which he was delivered referred to murder, and on this the delivering government passed judgment; but the evidence upon which he was convicted referred to forgery, and on this the delivering government passed no judgment. And yet the right of such preliminary judgment, as to the question whether the criminality charged is shown by sufficient evidence, is one of the express provisions of the treaty. Can that right be violated without violating the treaty?

Crimes so differ in the acts which constitute them that they are not all provable by the same evidence. The felonious killing of a human being is in its acts essentially different from the crime of forgery, and hence the evidence that may be sufficient to prove the one is not at all relevant as proof of the other. If the crime charged, and for which a delivery is demanded, be forgery, then the evidence, whether consisting in "depositions, warrants, or other papers," or in the oral testimony of witnesses, or in both, must show the necessary facts in respect to forgery, and, this being done, the government asked to make the delivery is bound by express stipulation to withdraw from the accused the right of asylum, and

hand him over to the jurisdiction of the demanding government, for the purpose specified, and on the basis of the facts shown by the evidence. The surrender, if made, is made for that purpose, and for no other, and upon the evidence offered and considered sufficient to make out a *prima facie* case of forgery, and upon no other evidence. Now, unless we adopt the absurd proposition that the same evidence is equally pertinent to prove a case of murder, or some other crime, in its facts essentially different from forgery, then the jurisdiction acquired by the delivery is, by the very terms of the rule in respect to evidence, limited to the crime for which the delivery was made. If not so limited by the receiving government, then one of the fundamental stipulations of the treaty is completely ignored and rendered a nullity. The surrendering government, in every such case, would have no opportunity to pass judgment upon the evidence with reference to the question of its duty to make a surrender. It would, as to the purpose for which it did make the surrender, be cheated by what would be equivalent to an act of bad faith; and whether the cheat was deliberately planned or was simply an after-thought, would make no difference in the fact itself.

The manifest intention of these stipulations is to maintain the right of asylum and exclude the extradition remedy in respect to all cases not enumerated. In no other way can this end be gained. If governments, upon receiving from each other fugitives from justice, may in their discretion exceed the limit thus established when they come to deal with these fugitives, then they may exceed it to any extent. The provision that there shall be no extradition for political offenses becomes a nullity if the demanding government, having obtained the custody of the fugitive, chooses to treat it as such. All the barriers against a perversion and abuse of the remedy are swept away. The specification of extradition crimes, the charge of a particular crime as the ground of the demand, and the rule of evidence in regard to that crime, impose no restraint whatever upon the jurisdiction when once acquired. No nation, having any respect for itself, especially one that, like the United States, recognizes the *prima facie* right of unmolested asylum in respect to all persons coming under its jurisdiction, and committing no offense against its laws, would, with this construction, consent to make an extradition treaty with any other nation. Let this construction prevail, and that, so far at least as the United States are concerned, would speedily be the end of all such treaties.

The conclusion that we derive from this examination of the treaties themselves is, that their express provisions necessarily imply a limitation of the extradition remedy, in its judicial and penal action, to the specific crime or crimes for which it was invoked, and in respect to which the delivering gov-

ernment made the surrender and granted the jurisdiction gained thereby. What is thus implied is as obligatory as if it had been formally and positively stated. The remedy, without this implication, may, in its completion and final stage, entirely change the characteristics which marked its incipency.

A very strong confirmation is given to this view by the law enacted by the British Parliament immediately after the negotiation of the treaty of 1842, for the purpose of carrying it into effect, and also by the law of Congress enacted in 1848, and applicable to all the extradition treaties of the United States. The third section of the English law provided for the surrender of the person charged with crime within the limits of the treaty, after certain preliminary proceedings had been taken, "to such person or persons as shall be authorized in the name of the United States to receive the person so committed, and to convey such person to the territories of the United States, *to be tried for the crime of which such person shall be so accused.*" This reference to the crime for which the person was to be tried, not only has its basis in the express provisions of the treaty, but, like the treaty itself, is clearly an implied negative as to trial for any other crime. According to the construction claimed by Secretary Fish in the Winslow controversy, the words "or any other crime of which such person may be accused," should have been added. These words would express his understanding of the treaty; yet the understanding of the British Parliament, as shown by the wording of the law, was that the trial secured by the delivery was to be *only* for the offense of which the person had been "so accused." The phrase "so accused" clearly refers to the proceedings by which the fact of accusation in respect to a particular crime had been ascertained: and it was for this offense, and not for some other offense of which the party had not been "so accused," that he was to be delivered up to be tried.

The Congress of the United States in the law of 1848 expressed the same understanding of the treaty. The second section of that law provided that, after the proceedings named in the first section had been completed, it shall be lawful for the Secretary of State "to order the person so committed to be delivered up to such person or persons as shall be authorized, in the name and on behalf of such foreign government, *to be tried for the crime of which such person shall be so accused.*" The words in italics correspond exactly with those of the English law, and differ only in being meant to apply to all the extradition treaties of the United States. They go upon the supposition, provided for in all these treaties, that the person to be delivered up has been accused of a specific crime, and his surrender, after the necessary preliminary proceedings, is directed to

be made that he may be tried upon that accusation. Nothing can be more foreign to the plain meaning of the language than the idea that the person, thus delivered up on a specific accusation that had been judicially considered as to its *prima facie* character, may, being delivered up, then be tried on another and wholly different accusation, and that, too, whether he is first tried for the offense charged, and then tried for another not charged, or tried only for the latter. Congress did not contemplate, as among the legal possibilities of the case, that the party delivered up could be tried for any other offense than the one of which he had been "so accused." This particular question had not then become a subject of controversy, any more than it is now a matter of controversy whether a man shall be tried on the indictment regularly found against him, or upon some other charge trumped up for the occasion; and, hence, it was enough for Congress, as it was for the British Parliament, to specify the crime of which the party "shall be so accused." No other crime was contemplated by the law, and no other contemplated by the treaty.

The addition to the law made by Congress in the Act of March 3rd, 1869, and reproduced in section 5275 of the Revised Statutes of the United States, provides that, in respect to any person delivered up and "brought within the United States" for the purpose of being "tried for any crime of which he is *duly accused*," the President shall have power to take all necessary measures for the transportation and safe keeping of *such accused* person, and for his security against lawless violence, until the final conclusion of his trial for *the crimes or offenses specified in the warrant of extradition*, and until his final discharge from custody or imprisonment for or on account of *such crimes or offenses*, and for a reasonable time thereafter." The words in italics show that Congress, when passing this law, had not the remotest idea of any other crimes for which the party might be tried, than those "specified in the warrant of extradition;" and in this respect the Congress of 1869 had precisely the view held by the Congress of 1848.

We give, as follows, a specimen of an extradition warrant made out by the Secretary of State under the authority of law:

"Now, therefore, pursuant to the provisions of Section 5273 of the Revised Statutes of the United States, these presents are to require the United States Marshal for the Eastern District of New York, or any other public officer or person having charge or custody of the aforesaid James Bowen, *alias* William Miller, to surrender and deliver him up to Adam Bligh, a constable of the United Counties of Stormont, Dundas and Glengary, Canada, who has been authorized, in the name and on behalf of the British Government, by His Majesty's Minister at this capital, to receive him, or to any other person or persons who may in like manner be authorized, in the name

or on behalf of the said government, to receive the said James Bowen, *alias* William Miller, to be tried for the crime of which he is accused."

This extradition warrant was issued against James Bowen in execution of the treaty and the law to carry it into effect. It names the man to be delivered up, and just as distinctly points to the crime for which he is to be tried. That crime is the one mentioned in the previous recital, and which is here referred to as "the crime of which he is accused." To specify that crime and at the same time assume that he may also be tried for any other crime, is to make the specification utterly meaningless, except to grant a jurisdiction of which it does not give the slightest hint. The assumption changes the character of the extradition warrant.

President Tyler, when communicating the treaty of 1842 with Great Britain to the Senate, accompanied it with an explanatory paper prepared by Daniel Webster, in which the President thus refers to the extradition article of the treaty:—

"The article on the subject in the proposed treaty is carefully confined to such offenses as all mankind agree to regard as heinous and destructive of the security of life and property. In this careful and specific enumeration of crimes the object has been to exclude all political offenses or criminal charges arising from wars or intestine commotions. Treason, misprision of treason, libels, desertion from military service, and other offenses of similar character are excluded." Webster's works, vol. 6, p. 355.

How are these offenses, not meant to be included, excluded? Certainly not expressly, but by obvious implication; and this implication arises from the fact that they are not placed in the extradition list. Yet this exclusion is the merest farce, if it be true that either government, having obtained possession of the fugitive on the charge of some one of the crimes named, may proceed to try him for any one of these other offenses not named, or for any offense other than the one charged as the basis of the demand and specified in the warrant of delivery. The moment the demanding and receiving government, in the exercise of its penal jurisdiction, passes the limit fixed by the enumeration of extradition offenses, and fixed by its own charge of a specific offense or offenses within the enumeration as the ground of the demand, and fixed by the surrender, it passes all limits, and may try and punish for just what it pleases, without any reference to the circumstances under which it acquired the power to try and punish at all. A single step in this direction completely sweeps away all the security which Mr. Webster supposed to have been gained by a careful enumeration of the offenses for which extradition might be claimed.

We have, then, the authority of writers on the subject of extradition, the authority of the extradition treaties of the United States, and the authority of

the laws of the United States for the execution of these treaties, all uniting in the general proposition of an implied obligation to confine the extradition remedy to the specific purpose for which it was sought by one government, and granted by the other. This implication rests not only upon the reason of the thing, but upon the treaties themselves, and is in fact a part of these treaties. Considered in its relation to the United States, and as operative within the territory thereof, it is a part of the local, municipal, and "supreme law" of this country, and, as such, binding upon courts, both State and Federal, so far as these treaties are self-executing, or as Congress has provided for their execution. If the implication be real, then the Constitution makes it a part of the law of the land; and that it is real it has been the object of the preceding argument to show.

VALIDITY OF STATE LEGISLATION ALTERING CORPORATE CHARTERS.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

SHIELDS, PLAINTIFF IN ERROR, v. STATE OF OHIO.

By a general act of the legislature of Ohio passed in 1851, provision was made for the consolidation of railroad companies and it was declared that "such new corporation shall possess all the powers, rights and franchises" conferred upon the corporations of which it was made up. Subsequently a Constitution of the State went into effect which declared that "no special privileges shall ever be granted, that may not be altered, revoked or repealed," and that corporations could only be formed under general laws which might be altered or repealed. Thereafter two railroad companies which were formed previous to 1851, consolidated themselves and formed a new corporation. *Held*, that the consolidation destroyed the old corporation, and the new corporation was subject to the provisions of the Constitution, and the law under which it was formed might be altered so as to abridge the powers of such corporation.

IN error to the Supreme Court of the State of Ohio. The facts appear in the opinion.

Mr. Justice SWAYNE delivered the opinion of the Court.

The plaintiff in error was the conductor of a train of cars upon the Lake Shore and Michigan Southern Railway, between Elyria and Cleveland. Ulrich was a passenger intending to go from the former to the latter place. The intermediate distance was twenty-five miles. The fare fixed by the company was ninety cents. Ulrich offered to pay seventy-five cents, which was at the rate of three cents per mile, and refused to pay more. The conductor ejected him from the train and was thereupon indicted in the proper local court for assault and battery. The court instructed the jury that Ulrich had tendered the proper sum, and that Shields had no legal right to demand more. The case turned upon this point. It was not claimed that the defendant was guilty if Ulrich was in the wrong. A verdict and judgment were given against Shields. The case was removed by a writ of error to the Supreme Court of the State. The judgment of the court below was affirmed. The defendant sued out this writ of error and has brought the case here for review. The only question presented for our determination is the legal right of Shields to demand more than Ulrich offered to pay.

A brief chronological statement with respect to the provision in the Constitution, and those in the laws of the State bearing upon the subject is necessary to a clear presentation of the point to be decided.

1. An act passed March 2d, 1848, incorporated the Junction Railroad Company and authorized it to build a railroad from Cleveland to Elyria, and thence west. The 11th section empowered the company to charge such tolls for the transportation of freight and passengers as it might deem "reasonable." The 22d section declared that after the lapse of ten years from the completion of the road the State might reduce the tolls "should they be unreasonably high," and might "exercise the same power at intervals of every ten years thereafter." It was upon the road built under this act that the present controversy arose.

2. The act of March 7, 1850, incorporated the Toledo, Norwalk and Cleveland Company, and the charter was amended by the act of January 20, 1851.

The 12th section of the latter act declared that in case the Junction Company should become consolidated with the Toledo, Norwalk and Cleveland Company the consolidated company might assume the name of the Cleveland and Toledo Railroad Company, and in that event should be governed by sections 9, 10, 11, 15, and 17 of the act incorporating the Junction Company and in other respects by the act incorporating the Toledo, Norwalk and Cleveland Company, and the acts amendatory thereof. The 22d section of the act first named, which allowed the State, after the lapse of ten years, to regulate the tolls of the Junction Company in the event specified, is not one of the sections enumerated.

3. The act of March 3, 1851, was a general act authorizing the consolidation of railroad companies coming within its provisions. The process was prescribed with great fullness of details. Section 8 declared: "And such new corporation shall possess all the powers, rights, and franchises conferred upon such two or more corporations by the several acts incorporating the same or relating thereto respectively, and shall be subject to all the duties imposed by such acts, so far as the same may be consistent with the provisions of this act."

4. The Constitution of Ohio of 1851 took effect on the first of September in that year. It declared that "no special privileges shall ever be granted that may not be altered, revoked, or repealed by the general assembly." Art. 1, sec. 2. "The general assembly shall pass no special act conferring corporate powers." Art. 13, sec. 1. "Corporations may be formed under general laws, but such general laws may from time to time be altered or repealed." Art. 13, sec. 2.

5. On the 15th of June, 1853, the Junction Company became consolidated with the Toledo, Norwalk and Cleveland Company, pursuant to the provisions before mentioned of the acts of January 20, 1851, and March 3, 1851.

6. The act of April 10, 1856, authorizes railroad companies of Ohio to consolidate with such companies of other States. The 3d section declares that such consolidated companies respectively "shall be deemed and taken to be one corporation, possessing within the State all the rights, privileges, and franchises, and subject to all the restrictions, liabilities, and duties of such corporations of this State so consolidated." It was provided that the old stock should be extinguished, that a board of directors of the consolidated

company should be elected, and that new stock should be created and issued to the parties entitled to it. Those refusing to receive it were to be paid the highest market price for the old stock.

The 7th section enacts "that suits may be brought and maintained against such new corporation in the courts of this State for all causes of action, in the same manner as against other railroad companies of this State."

7. On the 11th of February, 1869, by an agreement of that date, the Cleveland and Toledo, and the Lake Shore Railroad Company became consolidated under the name of the Lake Shore Railway Company.

On the 6th of April, 1869, the Lake Shore and the Michigan Southern and Northern Indiana Railroad Companies were duly consolidated under the name of the Lake Shore and Michigan Southern Railway Company.

Shields, the defendant in error, was an employee of this company when he ejected Ulrich.

8. The act of April 25th, 1873, provides that "any corporation operating a railroad in whole or in part in this State may demand and receive for the transportation of passengers over said road *not exceeding* three cents per mile for a distance of more than eight miles."

The defendant in error insists that the power of the company in the case in hand was fixed and limited by this act. The plaintiff in error denies this and maintains that the 11th section of the first-named act of 1848 is the governing authority.

In support of this view it is further maintained that this section was a contract, and that it was simply transferred to each successive consolidated corporation, including finally the Lake Shore and Michigan Southern Company, and that at the time of the occurrence here in question it was in full force.

This renders it necessary to consider the legal status and character of the new corporation. In the present state of the law a few remarks upon the subject will be sufficient.

The legislature had provided for the consolidation. In each case before it took place the original companies existed and were independent of each other. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All—the old and the new—could not co-exist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution. That being done, *eo instanti* the new corporation came into existence. But the franchise alone to be a corporation would have been unavailing for the purposes in view.

There is a material difference between such an artificial creation and a natural person. The latter can do any thing not forbidden by law. The former can do only what is authorized by its charter. *B. & O. R. R. Co. v. Harris*, 12 Wall. 81. It was, therefore, indispensable that other powers and franchises should be given. This was carefully provided for. The new organization took the powers and faculties designated in advance in the acts authorizing the consolidation—no more and no less. It did not acquire any thing by mere transmission. It took every thing by creation and grant. The language was brief, and it was made operative by reference. But this did not affect the legal result. A deed *inter partes* may be made as effec-

tual by referring to a description elsewhere as by reciting it in full in the present instrument. The consequence is the same in both cases.

If the argument of the learned counsel for the plaintiff in error be correct, the constitutional restrictions can be readily evaded. Laws may be passed at any time enacting that all the valuable franchises of designated corporations antedating the Constitution shall, upon their dissolution, voluntary or otherwise, pass to and vest in certain newly created institutions of the like kind. The claim of the inviolability of such franchises would rest on the same foundation as the affirmation in the present case. The language of the Constitution is broad and clear and forbids a construction which would permit such a result.

When the consolidation was completed, the old corporations were destroyed, a new one was created, and its powers were "granted" to it, in all respects, in the view of the law, as if the old companies had never existed and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. It did one as much as the other. In this respect there is no ground for any distinction.

These views are sustained by several well-considered cases, exactly in point. One of them embodies the unanimous judgment of this court. *Clearwater v. Meredith*, 1 Wall. 40; *McMahan v. Morrison*, 16 Ind. 172; *The State of Ohio v. Sherman*, 22 Ohio, 628; *Shields v. The State of Ohio*, 26 Ohio St. 86.

The constitutional provision that "no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the general assembly," entered into the acts under which the consolidations were made, and rendered the corporations created and the franchises conferred subject to repeal and alteration, just as if they had been expressly declared to be so by the act. The act of 1873, in the particular in question, was a legitimate exercise of the reserved power of alteration, and was, therefore, valid. *Parker v. The Metropolitan Railroad Co.*, 109 Mass. 509.

Another branch of the argument of the counsel for the plaintiff in error calls for some further remarks.

It is urged that the franchise here in question was property held by a vested right, and that its sanctity, as such, could not be thus invaded. The answer is *consensus facti juri*. It was according to the agreement of the parties. The company took the franchise subject expressly to the power of alteration or repeal by the general assembly. There is, therefore, no ground for just complaint against the State.

Where an act of incorporation is repealed, few questions of difficulty can arise. Equity takes charge of all the property and effects which survive the dissolution and administers them as a trust fund primarily for the benefit of the creditors. If any thing is left, it goes to the stockholders. Even the executory contracts of the defunct corporation are not extinguished. *Curran v. Arkansas*, 15 How. 808, 811.

The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and they must be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases. Toward authoritative adjudica-

tions throw a strong light from opposite directions upon this subject. We cite them only for the purpose of illustration. In *Miller v. The N. Y. & E. R. R. Co.*, 21 Barb. 575, the legislature, under the reserved power of alteration, required the company which had been previously incorporated to construct a highway across their road. The work was expensive, and of no benefit to the company. The act imposing the burden was held to be void.

In *The Mayor and Aldermen of Worcester v. The Norwich and Worcester R. R. Co., and others*, the legislature had passed an act requiring the railroad companies therein named to unite in a passenger station in the city of Worcester (the place to be fixed as provided)—to extend their tracks in the city to the Union station, and after the extension to discontinue parts of their existing locations. The act was held to be constitutional and valid, being a reasonable exercise of the right reserved to the legislature to amend, alter, or repeal the charters of those companies. See, also, *The Commonwealth v. The Essex Co.*, 13 Gray, 239, and *Crease v. Babcock*, 23 Pick. 334.

It is unnecessary to pursue the subject further in this case.

The judgment of the Supreme Court of Ohio is affirmed.

STRONG, J., dissented.

UNITED STATES SUPREME COURT ABSTRACT, OCTOBER TERM, 1877.

CONSTITUTIONAL LAW.

Act impairing obligation of a contract: provision in bank charter limiting rate of taxation.—The charter of a bank granted by the State of Tennessee contained this: "The said company shall pay to the State an annual tax of one-half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes." Subsequently, under the State revenue law the State and the county, where a stockholder resided, assessed his stock and imposed a tax of one and six-tenths per cent thereon. Held, that the provision as to taxation, contained in the charter, was a contract between the State and the corporation, limiting the amount of taxation, and that the revenue law authorizing a greater taxation was in contravention of the contract and invalid under the Federal Constitution. Judgment of Supreme Court of Tennessee reversed. *Farrington, plaintiff in error, v. State of Tennessee*. Opinion by Swayne, J.

Cases cited.—*Trist v. Child*, 21 Wall. 441; *Dartmouth College v. Woodward*, 4 Wheat. 682, 683; *Pillans v. Van Miotop*, 3 Burr. 1663; *Forth v. Stanton*, 2 Saund. 211; *Von Hoffman v. City of Quincy*, 4 Wall. 551; *Dash v. Vankleek*, 7 Johns. 477; *Society v. Wheeler*, 2 Gall. 104; *Rex v. Passmore*, 3 T. R. 290; *Morris & Essex R. Co. v. Yard Comm'r; Farmers and Mechanics' Bank v. Deering*, 1 Otto, 29; *West Wisconsin R. R. Co. v. Supervisors*, 98 U. S. R. 596; *Tucker v. Ferguson*, 22 Wall. 527; *Wood v. Dummer*, 3 Mason, 308; *Curran v. Arkansas*, 15 How. 804; *Gordon v. Appeal Tax Court*, 8 How. 123; *People v. Commrs*, 4 Wall. 258; *Van Allen v. Assessors*, 3 id. 584; *Queen v. Arnaud*, 9 Ad. and E. (N. S.) 806; *Bank Tax Cases*, 2 Wall. 209; *Union Bank v. State*, 9 Yerg. 49; *Bradley v. People*, 4 Wall. 462; *Nat. Bank v. Com.*, 9 id. 353; *State v. Branin*, 3 Zabriskie, 484; *McCulloch v. Maryland*, 4 Wheat. 430; *Hamilton v. Massachusetts*, 6 Wall. 638;

Wilmington R. R. v. Read, 13 Wall. 264; *State v. Utter*, 34 N.J. Law, 493; *St. Louis Mutual Ins. Co. v. Charles*, 47 Mo. 462; *Atty.-General v. Bank, etc.*, 4 Jones' Eq. (N. C.) 289; *Bank of Cape Fear v. Edwards*, 5 Ired. 516; *Providence Bank v. Billings*, 4 Pet. 514; *Binghamton Bridge case*, 3 Wall. 78; *Gordon v. Appeal Tax Court*; *State Bank v. Knoop*, 16 How. 369; *Dodge v. Woolsey*, 18 id. 331; *Home of the Friendless v. Rouse*, 8 Wall. 430. *Ib.*

CONTRACT.

When time is of the essence of an executory contract.—Time is usually of the essence of an executory contract for the sale and subsequent delivery of goods, where no right of property in the same passes by the bargain from the vendor to the purchaser, and the rule in such a case is that the purchaser is not bound to accept and pay for the goods unless the same are delivered or tendered on the day specified in the contract. *Addison on Cont.* (6th ed.) 185; *Guth v. Lees*, 3 Hurlst. & Colt. 558; *Coddington v. Paleologo*, Law Rep., 2 Exch. 196. Judgment of Court of Claims affirmed. *Jones, appellant, v. United States*. Opinion by Clifford, J.

2. *Contract for the delivery of goods to be performed within a specified time.*—Plaintiff made a contract to deliver to the United States a certain quantity of cloths by a specified time. Being unable to fully complete his contract by the time agreed, because the mill in which the cloths were manufactured was burned, he applied to the government authorities for a release from the unfinished part of the contract. He was told by the head of the Bureau of Clothing, to whom the Assistant Quartermaster-General referred him that there was no power out of Congress which could release him from his contract, but that, upon application to the Assistant Quartermaster-General, sufficient time would be given him to deliver the goods. He thereupon procured the cloth required to complete his contract to be manufactured, and applied to the Quartermaster-General for permission to complete the contract, but such permission was refused. He thereupon tendered the cloth, which was refused on the ground that the time for delivery was past. *Held*, that time was of the essence of the contract, and plaintiff was not entitled to recover the damages resulting from the refusal to receive the cloth tendered. *Graves v. Legg*, 9 Exch. 716; *Morton v. Lamb*, 7 Term, 125; *Slate v. Emerson*, 19 How. 224; *Gouverneur v. Tillotson*, 3 Edw. Ch. 848; *Jervis v. Tompkinson*, 1 Hurlst. & Norm. 208; *Packard v. Sears*, 8 Ad. & Ell. 474; *Freeman v. Cook*, 3 Exch. 654; *Foster v. Dawber*, 6 id. 854; *Edwards v. Chapman*, 1 Mees. & Wels. 281; *Swan v. Seamons*, 9 Wall. 274; *U. S. v. Shaw*, 1 Cliff. 310. *Ib.*

CORPORATION.

Construction of charter: act impairing obligation of contract.—The original charter of a turnpike company gave it the right, in consideration of building the turnpike authorized thereby, and of keeping it in repair, to erect certain toll-gates, and to exact certain tolls for the use of the turnpike, until the expiration of twenty-five years from the date of the charter and as much longer as the State should fail to redeem the franchises so granted by paying the cost of the work. When the term of the charter had more than half expired, the State gave the company a new and additional privilege—namely, the privilege of using a bridge

and dyke, and of erecting a toll-gate thereon. The only consideration required was that the company should keep them in repair; but should not even be responsible for any destruction of the dyke by high floods. The consideration was continuous, and correlative to the continued use. No term was expressed for the enjoyment of this privilege; and no conditions were imposed for resuming or revoking it on the part of the State. *Held*, that the provisions of the charter related only to the turnpike then authorized to be constructed. Any donations or franchises which the State might subsequently grant to the company would stand upon their own considerations, and could not fairly be claimed as parcel of the consideration of the original contract. Therefore, the State might, when the corporate life of the company ceased, revoke the right to maintain a toll-gate on the bridge and dyke, and was not bound before doing so to pay the cost of the turnpike, and a law providing for the public resuming the possession of the dyke and bridge would not impair the obligation of a contract. Judgment of Supreme Court of Illinois affirmed. *St. Clair County Turnp. Co., plaintiff in error, v. People of Illinois ex rel. Bowman*. Opinion by Bradley, J.

JUROR.

Challenge for cause: when not justified.—A juror who was challenged for cause in a civil action had previously conversed with another party in relation to the facts of the case, and had received from him an impression in relation to them, but he expressed an entire willingness as well as an ability to accept the facts as they should be developed by the evidence and render a verdict in accordance with them. *Held*, that a challenge for cause was not justified. *Rogers v. Rogers*, 14 Wend. 131; *Jackson v. Commonwealth*, 23 Gratt. 919; *Freeman v. People*, 4 Denio, 9; *Lombey v. People*, 6 Park. Cr. 414; *Sanchez v. People*, 22 N. Y. 147. Judgment of Supreme Court of Colorado affirmed. *Union Gold Mining Co., plaintiff in error, v. Rocky Mountain Nat. Bank*. Opinion by Hunt, J.

COURT OF APPEALS ABSTRACT.

CONTRACT.

1. *Agreement to purchase stock not a gaming contract: sale of stock to be delivered.*—Defendant made and delivered to plaintiff this memorandum, "For value received the bearer may call on the undersigned for one hundred shares of the capital stock of the Western Union Telegraph Company, at 77½ per cent, any time in thirty days from date. Or the bearer may, at his option, deliver the same to the undersigned at 77½ per cent, any time within the period named, one day's notice being required," etc. Subsequently, within the thirty days the parties settled at market 72½, which was the price of the stock at the time of settlement, and it was agreed that if liable at all defendant should be liable to plaintiff for the difference between the settled price and the price stated in the memorandum. *Held*, that in the absence of evidence showing it to be intended as such the contract was not a gaming one, and was valid. Judgment below affirmed. *Story v. Solomon*. Opinion by Earl, J.

2. *Under what circumstances the contract would be void as a gaming one.*—If it had been shown that neither party intended to deliver or accept the shares but merely to pay differences according to the rise or

fall of the market, the contract would have been illegal. *Id.*

[Decided Dec. 11, 1877.]

3. *Agreement to exchange farms: fraudulent misdescription in deeds.*—Plaintiff and defendant by parol agreed to exchange farms, plaintiff agreeing to convey to defendant his farm, and defendant to convey to plaintiff 183 acres of land, measuring from the south end of his farm. Plaintiff performed the agreement on his part. Defendant executed and delivered to plaintiff a deed which conveyed 183 acres of land from the north end of his farm, and which he knew did not describe the land he agreed to convey. *Held*, that plaintiff, on discovering the error, was entitled, upon defendant's refusing to convey the land he had agreed, to a judgment that he perform his agreement. Judgment below affirmed. *Wilson v. Van Pelt*. Opinion by Earl, J.

[Decided Dec. 21, 1877.]

EVIDENCE.

1. *Meaning of words "port risk" must be explained by experts.*—The words "port risk," used in a marine insurance policy, held not to convey to the public generally, unacquainted with the business of insurance, any definite meaning, and to require the testimony of experts to explain their signification. Such testimony would not be to explain a usage, but for the purpose of finding out the meaning of a technical phrase. Judgment below affirmed. *Nelson v. Sun Mutual Insurance Co.* Opinion by Folger, J.

[Decided Dec. 18, 1877.]

2. *Who may not be entitled to be sworn as expert.*—A witness testified that he was more or less familiar with getting policies from underwriters and attending to marine matters, and that he knew of the term "port risk in the port of New York," but on cross-examination he said he had never seen the words "port risk" in a policy, and did not declare that he had ever known it to be used in the business of insurance save in a general way. He had never known it to be used in a policy. *Held*, that he was properly excluded from testifying as an expert as to the meaning of the words. *Id.*

JUDGMENT.

When satisfied judgment against one of several persons liable a bar to action against others.—Where a purchaser at an auction sale has made a deposit with the auctioneer, and has become entitled to a return of the deposit, he may maintain an action for such deposit against the auctioneer or his principal, and prosecute the same to judgment, but a judgment against one which has been satisfied is a bar to a further prosecution against the other. He is also entitled to interest, both in the action against the principal and that against the auctioneer. But where, in the action against the principal, interest was refused on the ground that no demand had been made for the return of the money, and the judgment in that action had been satisfied, an action against the auctioneer is entirely barred, even though in the last-named action plaintiff might be entitled to interest. Judgment below affirmed. *Cockroft v. Muller*. Opinion by Allen, J.

[Decided Dec. 4, 1877.]

NEGLIGENCE.

1. *Train overshooting station and backing up without notice: contributory negligence.*—Plaintiff, a passenger in defendant's train, reached a station where she intended to alight. It was in the night time and dark,

and plaintiff was not familiar with the locality. Before the station was reached the brakeman on the train announced it. The train, however, went by the station a short distance, and plaintiff, supposing that it was the place to get off, went out on the platform of the car, and was stepping down, when the train, without notice being given to the passengers, was suddenly backed up, and plaintiff was thereby suddenly thrown down and injured. There was no depot building at the station, or any other external indication of where was the proper place for the train to stop. *Held*, that a jury were warranted in finding that defendant was negligent in backing up without notice, and that plaintiff was not negligent in attempting to leave the train as she did. Judgment below affirmed. *Taber v. Delaware, etc., Railroad Company*. Opinion by Andrews, J.

[Decided Dec. 18, 1877.]

STATUTE OF LIMITATION.

Action begun within a year after reversal of former suit for same cause.—Under the provision of sec. 104 of the old Code, that, "If an action shall be commenced within the time prescribed therefor, and a judgment thereon be reversed on appeal, the plaintiff may commence a new action within one year after the reversal," in a case where from a judgment of reversal by the lower appellate court an appeal is taken to the Court of Appeals and the judgment of reversal is affirmed, the plaintiff is entitled to bring the action within one year after the final judgment of the Court of Appeals, and is not limited to one year after the judgment of the lower appellate court. Judgment below affirmed. *Wooster v. Forty-second St., etc., Railroad Company*. Opinion by Andrews, J.

[Decided Dec. 18, 1877.]

CIVIL RIGHTS LAWS AND INTERSTATE COMMERCE.

SUPREME COURT OF THE UNITED STATES—JANUARY, 1878.

HALL V. DE CUIR.

A State statute which provides that all persons without distinction on account of race or color shall have equal rights and privileges in all parts of public conveyances is invalid so far as relates to conveyances running between different States.

By a statute of Louisiana carriers of passengers within the State were required to give all persons traveling in their conveyances equal rights and privileges in all parts thereof without distinction or discrimination on account of race or color. The plaintiff, a person of color, took passage at New Orleans for a point in Louisiana, on defendant's steamboat running between New Orleans and Vicksburg, and was, on account of her color, refused admission into the cabin, set aside for white ladies. In an action under the statute to recover damages, *held*, that the act so far as it applied to conveyances running from Louisiana into other States was an encroachment upon the right of Congress to regulate commerce among the States, and that the action could not be maintained.

IN error to the Supreme Court of the State of Louisiana.

Mr. Chief Justice WAITE delivered the opinion of the Court.

By the Constitution of Louisiana (art. 13) it is provided that "all persons shall enjoy equal rights and privileges upon any conveyance of a public character," and by an act of the general assembly, approved February 23, 1869, to enforce this article, it was enacted as follows.

"Section 1. All persons engaged within this State, in the business of common carriers of passengers, shall have the right to refuse to admit any person to their railroad cars, street cars, steamboats or other water crafts, stage coaches, omnibuses, or other vehicles, or to expel any person therefrom after admission, when such person shall, on demand, refuse or neglect to pay the customary fare, or when such person shall be of infamous character, or shall be guilty, after admission to the conveyance of the carrier, of gross, vulgar or disorderly conduct, or who shall commit any act tending to injure the business of the carrier, prescribed for the management of his business, after such rules and regulations shall have been made known; *provided*, said rules and regulations make no discrimination on account of race or color; and shall have the right to refuse any person admission to such conveyance where there is not room or suitable accommodations; and, except in cases above enumerated, all persons engaged in the business of common carriers of passengers are forbidden to refuse admission to their conveyance, or to expel therefrom any person whomsoever.

"Section 4. For a violation of any of the provisions of the first and second sections of this act, the party injured shall have a right of action to recover any damage, exemplary as well as actual, which he may sustain, before any court of competent jurisdiction." (Acts of 1869, p. 37; Revised Statutes of 1870, p. 93.)

Benson (the defendant below) was the master and owner of the "Governor Allen," a steamboat enrolled and licensed under the laws of the United States for the coasting trade, and plying as a regular packet for the transportation of freight and passengers between New Orleans, in the State of Louisiana, and Vicksburg, in the State of Mississippi, touching at the intermediate landings both within and without Louisiana as occasion required. The defendant in error (plaintiff below), a person of color, took passage upon the boat, on her trip up the river from New Orleans, for Hermitage, a landing place within Louisiana, and being refused accommodations, on account of her color, in the cabin specially set apart for white persons, brought this action in the Eighth District Court for the Parish of New Orleans, under the provisions of the act above recited, to recover damages for her mental and physical suffering on that account. Benson, by way of defense, insisted among other things, that the statute was inoperative and void as to him, in respect to the matter complained of, because as to his business it was an attempt to "regulate commerce among the States," and, therefore, in conflict with article 1, section 8, paragraph 3, of the Constitution of the United States. The District Court of the parish held that the statute made it imperative upon Benson to admit Mrs. DeCuir to the privileges of the cabin for white persons, and that it was not a regulation of commerce among the States, and, therefore, not void. After trial judgment was given against Benson for \$1,000, from which he appealed to the Supreme Court of the State, where the rulings of the District Court were sustained.

This decision of the Supreme Court is here for re-examination under section 709, Rev. Stats.

For the purposes of this case, we must treat the statute as requiring those engaged in interstate commerce to give all persons traveling in Louisiana, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of

race or color. Such was the construction given to the statute in the courts below, and it is conclusive upon us as the construction of a State law by the State courts. It is with this provision of the statute alone that we have to deal. We have nothing whatever to do with it as a regulation of internal commerce or as affecting anything else than commerce among the States.

There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States. The difficulty has never been as to existence of this power, but as to what is to be deemed an encroachment upon it, for, as has been often said, "legislation may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution." *Sherlock v. Alling*, 93 U. S. 108; *State Tax on Railway Gross Receipts*, 15 Wall. 293. Thus, in *Munn v. Illinois*, 94 U. S. 135, it was decided that a State might regulate the charges of public warehouses, and in *C. B. & Q. R. R. v. Iowa*, id. 155, of railroads situate entirely within the State, even though those engaged in commerce among the States might sometimes use the warehouses or the railroads in the prosecution of their business. So, too, it has been held that States may authorize the construction of dams and bridges across navigable streams situate entirely within their respective jurisdictions. *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 252; *Pound v. Turck*, not yet reported; *Gilman v. Philadelphia*, 3 Wall. 713. The same is true of turnpikes and ferries. By such statutes the States regulate as a matter of domestic concern the instruments of commerce situated wholly within their own jurisdictions, and over which they have exclusive governmental control, except when employed in foreign or interstate commerce. As they can only be used in the State, their regulation for all purposes may properly be assumed by the State until Congress acts in reference to their foreign or interstate relations. When Congress does act, the State laws are superseded only to the extent that they affect commerce outside the State as it comes within the State. It has also been held that health and inspection laws may be passed by the States, *Gibbons v. Ogden*, 9 Wheat. 205, and that Congress may permit the States to regulate pilots and pilotage until it shall itself legislate upon the subject. *Cooley v. Board of Wardens, etc.*, 12 How. 319. The line which separates the powers of the States from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved.

But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce or to interfere directly with its freedom does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. While it pur-

ports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up within and put down without.

A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterward, if the law is enforced.

It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it, Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may as well against those engaged in foreign, and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river or be subject to an action for damages, "exemplary as well as actual," by any one who felt himself aggrieved because he had been excluded on account of his color.

This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice FIELD, speaking for the court in *Welton v. Missouri*, 91 U. S. 282, "inaction [by Congress] * *

* is equivalent to a declaration that interstate commerce shall remain free and untrammelled."

Applying that principle to the circumstances of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the State court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the States to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation it must come from Congress and not from the States.

We confine our decision to the statute in its effect upon foreign and interstate commerce, expressing no opinion as to its validity in any other respect.

The judgment of the Supreme Court of Louisiana is reversed and the cause remanded, with instructions to reverse the judgment of the District Court and direct such further proceedings in conformity with this opinion as may appear to be necessary.

REMOVAL OF CAUSES TO FEDERAL COURTS, UNDER THE CIVIL RIGHTS LAW.

UNITED STATES CIRCUIT COURT, LOUISIANA—FEBRUARY 1, 1878.

IN RE PETITION OF WELLS ET AL.

A law of Louisiana providing for the appointment, by the judges of the principal courts of New Orleans, of commissioners, whose duty it should be to select impartially from the citizens of the parish qualified to vote, the names of not less than one thousand good and competent men to serve on juries, from whom jurors in actions to be tried should be drawn by lot, held not open to any objection under the Federal Constitution; and the fact that such law might be manipulated so as to produce a jury prejudiced against petitioner, held not to furnish ground for removal of a criminal proceeding to the Federal court under section 641 of the Revised Statutes.

The fourteenth amendment to the Federal Constitution, which guarantees the equal benefit of the laws to all, only prohibits State legislation violative of that right. It is not directed against individual infringements thereof.

THIS was a petition made to Mr. Justice BRADLEY, Associate Justice of the United States Supreme Court, by J. Madison Wells, Thomas C. Anderson, Louis M. Kenner and Gordon Casanave for a writ of certiorari to the Superior Criminal Court of the parish of Orleans, etc. The facts fully appear in the opinion.

BRADLEY, J. This petition states that the Attorney-General of Louisiana has filed in said criminal court an information against the petitioners, charging them with "falsely and feloniously uttering and publishing as true a certain altered, forged and counterfeited public record—to wit, the returns from the parish of Vernon of an election held for Presidential electors in the State of Louisiana on the 7th of November, 1876, knowing the same to be false, altered and counterfeited; that the petitioners were arrested and gave bail, and that their trial is fixed for an early day."

It further states that on the 23d day of January, 1878, pursuant to the laws of the United States and particularly section 641 of the Revised Statutes, they filed a petition in the said Superior Criminal Court

for the removal of the said information and proceedings to the next Circuit Court of the United States of this circuit and district for trial, and that the facts on which such application was made were fully stated and set out in said petition, duly verified by oath, in accordance with said section 641.

The petitioners claim that by the presentation of said petition to the criminal court the cause stood removed, and that the said court had no authority to proceed further in the case. But they state that the court and its officers and the Attorney-General disregarded said petition, and are proceeding with the cause in contempt of the authority of the United States court. A copy of the petition presented to the criminal court is appended to the present application.

The principal facts stated in said petition as a ground for removing the cause, are, that by reason of the prejudice existing against the petitioners in the court, in the jury and in the public mind in the parish of New Orleans, and throughout the State, on account of their having been the returning officers of the election held in November, 1876, and Republicans in politics, and acting in the canvass and compilation of the returns of the said election, out of which the present prosecution originates, in consequence of all which the most vindictive prejudice exists in the law making and law administering authorities of the State against them; they believe that they will be denied their rights as citizens in the said court and before any jury that may be impaneled therein, under the existing jury law of the State, and that they will not be enabled to enforce their rights in said court in consequence of the inadequate remedies to that end provided. They further allege that the Jury Law was passed March 13, 1877, and that, in so far as it provides for the appointment of Jury Commissioners, and the method of selecting the jury, it was intended for and operates in favor of white citizens, and against those of African descent; and that under it a jury has been drawn for the trial of the petitioners, the effect and intention of the law being to exclude persons of African descent, and other unprejudiced persons from the jury, and to substitute in their place prejudiced white men, and thereby deprive two of the petitioners, Kenner and Casanave (who are colored men), of a trial by their peers, and to bring them to trial by a white and prejudiced jury to the exclusion of men of their own color; and all the petitioners aver that through and by the machinery of said jury law, artfully contrived for the purpose, the State officers and the court and its officers can and have so manipulated said law (as it is capable of) as to deprive the petitioners of an impartial jury, and have organized a jury so prejudiced that defendants cannot have a fair and impartial trial thereby, or by that court, and would be deprived of the full and equal benefits of the laws and proceedings for the security of their persons in this case. They contend that the Jury Law is in violation of the Constitution of the United States, and of the equal civil rights of the petitioners.

The application now made to the Circuit Court and presented to me raises these questions:—

First—Was the mere presentation of the petition for removal sufficient to arrest the jurisdiction of the State court, or had that court the right to examine into its sufficiency?

Second—If the court had the right to examine into the sufficiency of the application, has the Circuit

Court the right to re-examine the same, and, if found sufficient, to issue a writ of certiorari or other writ for the removal of the proceedings from the State court?

Third—If the Circuit Court has the right, did the petition in this case present sufficient grounds for removing the case?

I think the first and second questions must be answered in the affirmative. The State court surely is not bound to shut its eyes and yield to every application that comes to it.

Though removal (when authorized) is a matter of right and not of favor, yet the court must have the right to see whether the application to remove comes within the meaning of the law. I have no doubt, however, that the Circuit Court, by virtue of its superior right to try the cause (if subject to removal) is entitled to assert its jurisdiction by proper process directed to the State court. This view is corroborated by certain express provisions of the statute. Section 716 of the Revised Statutes declares that the United States courts may issue all writs which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law; and in the very case under consideration it is provided by section 642 of the Revised Statutes that if the defendant be in actual custody on process issued by the State court, and have performed all the acts necessary to a removal of his cause, the clerk of the Circuit Court is authorized to issue a *habeas corpus cum causa*, which the Marshal of the United States is authorized to serve, by taking the body of the defendant into his custody, to be dealt with in the Circuit Court according to law and the orders of said court or at invitation of any judge thereof. This is the proper writ for removing both the cause and the person in such a case. Of course the writ should not be issued by the clerk without being allowed by a judge of the court, which is the regular course in issuing writs of *habeas corpus* and *certiorari*. I think, therefore, that the Circuit Court may issue either a *habeas corpus cum causa* or a *certiorari*, according as the defendant is in custody, for the purpose of removing the cause into that court. When this is done it will be the duty of the State court and its officers to yield obedience to such writs, and it will be presumed that they will do so without any further inhibition, either by writ or otherwise. The course pointed out in section 641 for the defendant to docket the case in the Circuit Court if the clerk of the State court refuses to furnish copies of the proceedings is an additional and summary method of proceeding, when only the clerk is delinquent. But it does not meet the exigency of a refusal on the part of the State court itself to recognize the defendant's right to remove the cause. These require the more formal and orderly process of the court as above specified. The removal of causes from one court to another is a form of quasi appellate jurisdiction, well known in the English system of proceedings to which our own has constant reference. The forms of protest necessary to be used for the purpose, and the principles upon which they are framed are familiar to every student of the common law. The only peculiarity in the present case is that the causes of removal are special and limited, and application therefor must be first made to the court *a qua*, the reason for which is undoubtedly to be found in the anxiety of the legislative department to avoid every possible cause of jealousy and

complaint. I should have no hesitation, therefore, to allow the writ of certiorari in this case if I were satisfied with the sufficiency of the application.

This brings us to that question as regards the law complained of, passed March 13, 1877, prescribing the mode of selecting and drawing jurors. I have carefully examined its provisions and am unable to see any thing in it open to any Constitutional objection. It provides for the appointment, by the judges of the principal courts in New Orleans, of the commissioners, whose duty it is made to select impartially from the citizens of the parish qualified to vote, the names of not less than one thousand good and competent men to serve on juries. These names are to be placed in a box and from them is to be drawn the general panel for each term. This is the principal feature of the law. Substantially the same method is in use in several other States. The commissioners, it is true, may abuse their trust, but no system can be devised that will not be liable to abuse.

The allegations with regard to the manipulation of the law in such manner as to secure a jury inimical to the petitioners and with regard to the existence of a general prejudice against them in the hands of the court, the jurors, the officials, and the people are not within the purview of the statute authorizing a removal. The fourteenth amendment to the Constitution which guarantees the equal benefit of the laws, on which the present application is based, only prohibits State legislation violative of said right. It is not directed against individual infringements thereof.

The Civil Rights bill of 1866 was broader in its scope, undertaking to vindicate those rights against individual aggression, but still only when committed under color of some law, statute, ordinance, regulation or custom. And when that provision in this law, which is transferred to section 641 of the Revised Statutes, gave the right to remove to the United States courts a cause commenced in a State court against a person who is denied or cannot enforce any of the rights secured by the act, it has reference to a denial of those rights or impediments to their enforcement arising from some State law, statute, regulation or custom. It is only when some such hostile State legislation can be shown to exist, interfering with the party's right of defense, that he can have his cause removed to the Federal court. This being my view of the act it follows that I cannot grant the application. If I am wrong the petitioners, having claimed the right of removal, and it being denied by the State court, may carry the case, after final judgment of the highest court in the State, to the Supreme Court of the United States and obtain its judgment on the question.

The application is refused.

NEW BOOKS AND NEW EDITIONS.

IOWA REPORTS, VOLUME 44.

Reports of cases in Law and Equity determined in the Supreme Court of the State of Iowa. By John S. Runnells, Reporter. Vol. VII, being Vol. XLIV of the series. Des Moines: Mills & Company, 1877.

AMONG the cases of value in the present volume, we notice these: *Gokey v. Krapp*, p. 32. When an agent for the loaning of money takes usury, he will not be presumed to have the authority of his principal therefor. *Van Buskerk v. Dougherty*, p. 42. The drinking of two glasses of beer by a juror pending trial after the adjournment of court and eleven hours before another session, held not to vitiate the verdict. *Neilson v. Iowa East-*

ern Ry. Co., p. 71. A mechanics' lien attaches from the commencement of the building and takes precedence over a mortgage executed after that time, though the particular work for which the lien is claimed was not commenced until after the execution of the mortgage. *Williamson v. City of Keokuk*, p. 88. Municipal bonds issued by corporations not having the power to issue are absolutely void, even in the hands of an innocent holder for value. *Thompson v. Lambert*, p. 239. The doctrine of *ultra vires* will be applied to contracts of corporations only when such contracts remain wholly executory. *Bosch v. B. & M. R. R. Co.*, p. 402. Defendant cut off access to the river from plaintiff's house by constructing its railroad and buildings; plaintiff's house took fire, and the fire department not being able to reach the river and obtain water to put on the house, the same was burned. Held, that the damages were too remote and defendant was not liable for the destruction of the house. *Fell v. Cook*, p. 485. After his discharge in bankruptcy the bankrupt executed his note for a debt previously existing, upon condition that the payee would dismiss a proceeding instituted by him to set aside the discharge. Held, that the note was void. *Huff v. Cook*, p. 639. There is no constitutional inhibition upon the right of a woman to hold the office of county superintendent. *Leighton v. Orr*, p. 679. The influence possessed by a woman pretending to be a spiritualistic medium over one who was given to drink and with whom she was living in adulterous intercourse, held undue, and a voluntary deed from him to her set aside. The reporting as usual in this series is well done and the mechanical execution of the book is good.

NOTES OF RECENT DECISIONS.

Alteration of notes.—A note payable to the order of G. and indorsed first by G. and then by H. was thereafter altered by the maker so as to make it payable to G. and H. Thereafter it was discounted by plaintiff. Held, that the alteration discharged the indorsers. Sup. Ct., Michigan, October, 1877. *Aldrich v. Hackley*.

Bill of exchange: insolvency of acceptor: bills drawn in foreign country: claim by drawer for charges incurred for re-exchange.—The drawer of a bill is entitled to recover from the acceptor all proper and reasonable expenses which he has incurred in consequence of the bill being dishonored by the latter, including re-exchange or charges in lieu of re-exchange. *Woolsey v. Crawford*, 2 Camp. 445, and *Napier v. Schneider*, 12 East. 420, treated as overruled. Eng. High Ct. of Just., Ch. Div., Nov. 24, 1877. *Re General So. Amer. Co., Claim of Bk. of Lima*, 37 L. T. Rep. (N. S.) 599.

Contributory negligence: killing in self-defense: evidence: reasonable doubt.—Where, under such a statute, the killing is in self-defense no damages can be recovered. And the law of self-defense is the same as in a criminal prosecution, except as to the rule of evidence which, in a criminal prosecution, gives a defendant the benefit of a reasonable doubt. Sup. Ct., Texas, Dec. 8, 1877. *March v. Walker*, Texas L. J.

Contributory negligence: death by wrongful act: misconduct of deceased.—Where in an action under the statute for the death of plaintiff's intestate the death was caused by the wrongful act of the defendant, it is no defense that the death was the result of the misconduct or neglect of the deceased; but that

circumstance may affect the *quantum* of damages. Sup. Ct. of Appeals, Virginia, Nov., 1877. *Matthews v. Warner's Administrator*, Va. L. J.

Mistake of fact: cutting and carrying away timber from another's lands: trespasser not entitled to compensation for work done.—Plaintiff by mistake trespassed upon defendant's land, cut wood and piled it by the lake. The wood uncut was worth \$1 per cord, when cut and piled \$2.87 per cord. *Held*, that the disparity between the value of the wood uncut and cut and piled was not so great as to entitle plaintiff to compensation for cutting, if defendant should claim and take the wood. Sup. Ct., Michigan, October, 1877. *Isle Royal Mining Co. v. Hertin*.

Municipal corporation: defective sidewalk constructed by land-owner.—Where the duty of putting down and keeping a sidewalk rests not on a city, but on the owner of adjoining premises, and the owner, without any action on the part of the city, puts down a sidewalk which becomes defective, *held*, that the city is not liable for personal injury resulting from such defect. Sup. Ct., Michigan, October, 1877. *City of Marquette v. Cleary*.

Statute of frauds: promise to indemnify sheriff.—A promise made by an attorney for himself and his clients to indemnify a deputy sheriff for making a levy and sale of property under execution is not within the statute of frauds and need not be in writing. Ct. Appeals, Texas, Jan. 12, 1878. *Heidenheimer v. Johnston*, Tex. L. J.

RECENT BANKRUPTCY DECISIONS.

FIDUCIARY DEBT.

What does not amount to, so as to bar discharge.—A. J. the surety of M. who was the guardian of R. paid R. \$4,000 of the indebtedness due from M. to R. as guardian. J. dies and his administrators sue M. in *assumpsit* for the amount so paid, and M. pleads his discharge in bankruptcy in bar to the recovery. The administrators of J. reply that the debt due by M. to their intestate is a *fiduciary* debt from which he is not discharged under section 32 of the Bankrupt Act. *Held* the debt due by M. to the estate of J. is not a *fiduciary* debt, and his discharge in bankruptcy is a bar to the recovery of the same. The debt due by M. to J.'s estate was a simple contract debt, provable under the Bankrupt Act and discharged by it. Sup. Ct. Appeals, Virginia, Nov. 1877. *Cromer v. Cromer*, Va. L. J.

PLEADING.

Statements in petition: what facts need not be set forth.—Petition in bankruptcy held defective in not setting out the special authority of the president of a bank, who is one of the petitioning creditors, to sign and verify the same on behalf of the bank, his general authority as an officer not being sufficient. The petition alleges that the creditors joining in the petition constitute one-fourth in number of all the creditors whose provable debts amount to two hundred and fifty dollars. In setting out the names and amounts of each, however, it appears that the debts of several of them are less than that sum. *Held*, on a motion to dismiss the petition, that the same is insufficient and demurrable in this respect, but that the court has jurisdiction to allow an amendment to remedy the

defect. U. S. Dist. Ct., W. D. Wisconsin. *In re Roche v. Fox*, 16 Nat. Bankr. Reg. 461.

SURETYSHIP.

1. **Debt partly paid by surety.**—The holder of a note or bill may prove it in full against the party primarily liable upon it, notwithstanding he may have received a part or all of it from a surety or *quasi* surety. U. S. Dist. Ct., Massachusetts. *Ex parte Harris v. In re Cochrane*, 16 Nat. Bankr. Reg. 432.

2. **Composition by surety: credit for amount received.**—C., a manufacturer, consigned goods to his factors, who advanced their notes to an amount much beyond what was ultimately realized on the goods. Both parties failed, and the factors, employing the goods then in their possession, made a composition of forty per cent with their creditors, including the holders of the notes who reserved the right to prove in full against all other parties to them. *Held*, that these creditors, proving against C., need not give credit for the full amount received by them on the composition, but must abate their proof by giving credit for the property of C. so employed by the factors. *Ib.*

3. **Exchanged notes.**—Where notes were exchanged, and the holder has received a payment from the maker, he can only prove for the balance against the indorser. *Ib.*

4. **When debts proved.**—Debts are to be considered proved when they are duly authenticated and sent to the assignee or register. *Ib.*

TITLE.

Construction of contract: whom title to goods furnished to be sold, vests in.—Where one party agrees to furnish goods to another at a fixed price, the latter to pay all freight, storage and charges, and to pay at the end of every three months for the goods sold by him within that time, and to pay at the end of the year for all goods remaining unsold, the proceeds of the goods sold by the latter cannot be recovered from his assignee in bankruptcy. Such arrangement does not create the relation of principal and agent or factor, but that of buyer and seller. U. S. Dist. Ct., California. *In re Linforth, Kellogg & Co.*, 16 Nat. Bankr. Reg. 435.

HOMESTEAD.

1. **Sum allowed by statute for.**—Where a certain sum is allowed by statute to be invested in a homestead, each sum may be put into an undivided part interest in the homestead and into premises to which others hold a legal title. U. S. Cir. Ct., Vt. *Johnson, assignee, v. May*, 16 Nat. Bankr. Reg. 425.

2. **Money fraudulently put into homestead.**—An insolvent, more than four months before the commencement of proceedings in bankruptcy against him, furnished from his own property, toward building a homestead upon premises which his wife had contracted to purchase, and which were subsequently conveyed to her, the sum of fourteen hundred dollars. *Held*, that such transaction was a fraud upon his creditors, and that the assignee was entitled to a conveyance of the husband's interest in such homestead, less the amount he was authorized by law to invest in a homestead, and also to a conveyance of the balance of his interest for the benefit of creditors existing at the time of the investment. *Ib.*

APPEALS TO THE COURT OF APPEALS.

IN the case of *Samuels v. The Evening Mail Association*, presented to the Court of Appeals on Friday last, the unsuccessful party, on a trial by jury, moved for a new trial upon a case on the judge's minutes, upon the ground that the verdict was contrary to, or against the weight of the evidence. The motion was denied and an appeal taken to the General Term from the order, and also from the judgment. The General Term reversed the judgment and ordered a new trial, the order of reversal expressly stating that it was reversed upon questions of law only, and not showing any decision of the appeal from the order. An appeal was taken to the Court of Appeals, from the order of the General Term, directing a new trial.

The Court of Appeals dismissed the appeal, orally holding that no appeal would lie in such a case, for the reason that the party appealing to the General Term had a right, if the judgment had not been there reversed upon questions of law, to a review of the facts by the General Term and to its determination thereon; that if an appeal were allowed from the reversal on questions of law, without a review of the facts, the appellant to the General Term would lose the benefit of his appeal from the order and his right to a review of the facts thereby.

The court, therefore, dismissed the appeal. The rule would have been otherwise, had there been no appeal to the General Term from the order of the Special Term on the motion for a new trial, on the ground that the verdict was against the weight of evidence; for in such case the party appealing to the General Term would have had no right to call upon the General Term to pass upon the weight of evidence.

So the rule would have been otherwise if the General Term had expressly affirmed the order at Special Term, denying a new trial on the ground that the verdict was against the weight of evidence, for in such case the appellant to the General Term would have had the benefit of his appeal from the order and would then lose no right by an appeal to the Court of Appeals.

The court were understood to say that the rule would have been different in the case of *Samuels v. The Evening Mail Association*, had the trial been by the court or a referee.

It is apparent that this must be so, for in such case the appeal is from the judgment only, and there cannot on such a trial be an appeal from an order on a motion similar to that made on a trial by jury. See upon this subject, *Potter v. Carpenter*, abstracted, 16 Alb. L. J. 333.

INDEX YOUR CASES.

RULE 5 of the Court of Appeals and rule 5 of the Supreme Court requires cases to be indexed. The Court of Appeals last week announced to counsel, that in view of the almost general disregard of this requirement of the rules, the court would soon be compelled to insist upon an observance of its provisions or refuse to hear the case.

The rule is just and its provisions should be observed by counsel. The labors of the Court of Appeals are onerous enough, let the profession lighten them as much as they may. Counsel who furnish a carefully prepared index do much to facilitate an easy understanding of the case. They owe it to the court and to their clients to observe the rule.

CORRESPONDENCE.

PINKNEY AND WEBSTER.

To the Editor of the Albany Law Journal:

SIR—Your issue of Dec. 22 has added to the circulation of a canard taken from "Harvey's Reminiscences of Webster," concerning the latter gentleman and Mr. Pinkney. The story is disagreeable, and to us of this latitude, incredible. It has a measure of littleness for Daniel Webster into which he could not have contracted himself. Was he not a man of chivalric honor? not so, if he gave rumor to such a story after William Pinkney was dead. Was he not infinitely above small and spiteful things? not so, had he preserved and transmitted such a reminiscence to be published after his death. Was not his courage above suspicion? had he thus played the bully toward a man twenty years his senior, he would have been a braggart and a coward. He was absolutely fearless and defiant in an intellectual contest; was he the one to cower beneath the sarcasm or insolence of any man, waiting for revenge by violence? Such things may be possible with some men (so at least "Harvey" thinks), but how unlike Daniel Webster to publish a man as a coward after his hands were folded in the grave. These two great names are the pride of the American Bar. Webster's fame is as colossal as his intellect was and adorns the Union which cherishes it. Of William Pinkney, Ch. Justice Marshall said he was the greatest lawyer he had ever seen. Each had his weaknesses, well known during his life. But these weaknesses are hidden by the clouds only to be discovered by jackals, while the joint fame of Pinkney and Webster shoots up to heaven and spreads its twin branches over the republic in the sight of all the people. Imagine if you can the blistering rebuke with which Daniel Webster would smite the author of the reminiscence. "You must die, said some one in warning, knowing you are at the mercy of whoever can hold a pen."

HAGERSTOWN, MD., Jan. 10.

H. K. D.

COTHRAN'S "REVISED STATUTES."

To the Editor of the Albany Law Journal:

SIR—The first part of chapter 611 of the Laws of 1875, being "An act to provide for the organization and regulation of certain business corporations," reads as follows:

"Every such corporation shall annually, within twenty days after the first day of January, make a report, which shall state the amount of capital, and the proportion actually paid in, the amount, and in general terms the nature of its existing assets and debts, and the names of its then stockholders, and the dividends, if any, declared since the last report, which report," etc., etc.

In the sixth edition of the Revised Statutes, edited by Mr. Cothran, and published by Messrs. Banks & Brother, this section is erroneously quoted, the words "and the names of its then stockholders" being wholly omitted. (See vol. 2, p. 793.)

I do not write this for the purpose of detracting from the value of Mr. Cothran's important and valuable work, but simply to warn others against being seriously misled, as I was a few days since, by this error.

Very truly, etc.,

VICTIM.

BUFFALO, N. Y.

COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, Feb. 5, 1878:

Judgment affirmed—*Phelps v. People* (two cases larceny); *Phelps v. People* (forgery); *Casey v. People*. — Judgment affirmed with costs—*Moore v. Hegeman*; *Stillwell v. Mutual Life Insurance Co.*; *Merwin v. Star Fire Insurance Co.*; *Van Allen v. Farmers' Joint Stock Insurance Co.*; *Jaquiss v. Hagner*; *Hayes v. Ball*; *Southard v. Pinckney*; *People ex rel. Munday v. Fire Commissioners*. — Judgment affirmed without costs to either party—*Brewer v. Noyes*; *Brewer v. Penniman* (one case.) — Order affirmed with costs—*People ex rel. Miller v. Cumming*; *Griffin v. Helmbold*. — Judgment affirmed with costs of all parties payable out of estate—*Shakespeare v. Markham*. — Appeal dismissed with costs—*Monson v. Littell*; *National Bank of Fort Edward v. Washington County National Bank*; *Spears v. The Mayor, etc.* — Appeal dismissed without costs—*Latham v. Richards*. — Judgment reversed and new trial granted, costs to abide event—*Young v. Hunt*. — Motion for reargument denied, with \$10 costs—*Madge v. Ping*; *Sheridan v. Jackson*. — Remittitur amended by reversing so much of the judgment as gives plaintiff the costs of the General Term of the Supreme Court, and reducing the extra allowance to \$250, without costs to either party upon this motion—*Lattimer v. Livermore*. — Judgment modified by declaring that Alice L. Harmony is entitled to share in the portions of A. T. and E. T. Law, if they die without issue, and as modified affirmed, with costs of all parties in this court to be paid out of the estate—*Law v. Law*. — Judgment of Supreme Court, and conviction and dismissal of relator by the Board of Police Commissioners of the city of New York reversed—*People ex rel. Clapp v. Mayor, etc.*

BENCH AND BAR.

ALEXANDER S. JOHNSON, U. S. Circuit Judge for the Second Judicial District, comprising the States of New York, Vermont and Connecticut, died on January 28, at Nassau, Bahama Islands, of water on the chest. He was born in Utica, N. Y., July 30, 1817. He went through a course of study at Yale College, and was admitted to the bar when just 21 years of age. He practiced first in Utica and then in New York. He was elected Justice of the Supreme Court, at the first election under the Constitution of 1846. In 1851 he was elected to the Court of Appeals. This position he held for nine years. In 1860 he returned to his old home in Utica, and resumed there the practice of law. President Lincoln, in July, 1864, appointed him United States Commissioner for the settlement, under the treaty with Great Britain, of the Hudson Bay and Puget Sound Companies' claims. The duties of this position employed Judge Johnson for about three years. In January, 1873, he was appointed to the bench of the Commission of Appeals, and in December of the same year, he was appointed Judge of the Court of Appeals. Subsequently, he was appointed commissioner to revise the statutes of this State, which position he resigned when he was appointed to the judicial office he held at the time of his death. He was also one of the Regents of the University of this State. His rank as a jurist and a man of learning was high. The opinions delivered by him are esteemed among the ablest appearing in the reports.

In speaking of the election of Sir Henry Maine, to the office of Master of Trinity Hall, Cambridge, the *London Law Journal* says: In the present day, the career in the world of great mathematicians and classical scholars does not, as a rule, correspond with the expectations formed in the Senate House or

the Sheldonian Theatre. The 'Honour men' do not shine as brightly as they ought to do in the real battle of life. But Sir Henry Maine affords a remarkable instance of persistent success. As an under graduate he won the Craven Scholarship, and he graduated as Senior Classic and Chancellor's Medallist. He was Rogius Professor of Law at Cambridge for some years, and after that he was Reader in Jurisprudence and Civil Law at the Middle Temple; while he won acquaintance with the practical part of a lawyer's learning as an equity draughtsman and conveyancer, and even as a revising barrister. For seven years he served on the Council of the Governor-General of India, and for seven years he has sat at the council board at the India Office. He has also held the appointment of Corpus Professor of Jurisprudence at Oxford, with a fellowship at Corpus College. His works on 'Ancient Law' and 'Village Communities' are perhaps the most notable, and certainly the most readable of modern law books. The degree of Doctor of Laws, and the dignity of a Knight Commander of the Order of the Star of India, are rightly borne by this distinguished man. Trinity Hall has for many years maintained its reputation as the cradle of lawyers, and under Sir Henry Maine it ought to flourish with renewed vigour. His appointment reflects the highest credit on the Fellows of the College, and we doubt not that results will justify their selection.

NOTES.

THE *Solicitors' Journal* says that some curious reasons seem to have been given for rejecting the proposal, which has been recently revived at Washington, that measures should be taken for the recovery by the United States from the Bank of England of balances remaining to the credit of the Southern Confederacy at the time of its collapse. The grounds of objection are stated to be, first, that the United States Minister is not willing to ask any favor of the British Government, such as the right to sue in the English courts, and next, that when inquiries were made into the matter during the administration of General Grant the "representatives of the British Government" expressed themselves as perfectly willing to recognize the United States as the successor of the defunct Confederacy, and to turn over to it all balances formerly belonging to the Confederacy held in Great Britain, provided the United States would assume its liabilities to British subjects. The first objection seems absurd. No "favour" of the British Government is needed to enable the United States to sue in our courts. As a matter of fact, the United States itself has been more than once admitted to sue as a matter of right; and in numerous cases, such as *The King of the Two Sicilies v. Wilcox*, 1 Sim. (N. S.) 301, where the plaintiff recovered ships bought by a revolutionary government out of his own despoiled treasury; and *Emperor of Austria v. Day*, 9 W. R. 712, where the plaintiff prevented the issue of bank notes by M. Kossuth, foreign states have had justice done them in our courts without fear or favor. As to the second objection we do not see what our Government has to do with the matter; and we imagine the reference intended must be not to any declaration of the "representatives of the British Government," but to the doctrine laid down in the case of *United States of America v. McRae*, 17 W. R. 764, L. R., 8 Eq. 69, in which Lord Justice James, then Vice-Chancellor, expressly distinguished between property coming to the restored Government of the United States as successor of the Confederacy, and property coming to it by virtue of its right as a restored Government. It was there held, dismissing a bill for an account against an agent for the Confederate Government, that money voluntarily contributed to the Confederate Government could only be recovered from an agent of that Government to the same extent, and subject to the same rights and obligations, as if the Confederate Government had not been displaced, and was itself proceeding against the agent.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, FEBRUARY 16, 1878.

CURRENT TOPICS.

A SHORT time ago a bill was introduced in the English Parliament, the object of which is to permit the questioning, on oath, of persons accused of crime, and the motion for its second reading gave rise to an extended discussion. The arguments advanced for and against the bill were exceedingly able, and show that those members who took part in the debate have made themselves familiar with the subject. The advocates of the measure contended that the result following its adoption would be the surer conviction of the guilty and the greater chance of escape of the innocent. That an innocent prisoner of intelligence would be benefited was admitted, but it was claimed that the proposed law would change the onus of proof from the prosecution, where it now is, to the defense. The bill provides that a refusal of the accused to testify shall not create a presumption against him, but as the inference to be drawn from the prisoner's action must be drawn by a jury, it was alleged that this provision would amount to nothing. The opinion of the chief judge of the New York Court of Appeals that "the change has not given very great satisfaction" here, and that of the chief justice of New Jersey, that, while the "system, with respect to the elucidation of truth, has worked well," it has led to a great amount of perjury, were quoted in opposition to the measure. The prospects of the success of the bill seem remarkably good, as it was passed to a second reading by a majority of 109. The result of an experiment of similar character, made here, has proved satisfactory, and we are confident that very few would wish to have the old rule restored. The law may, indeed, sometimes work harshly in this way. When a prisoner is put upon the stand to testify, the prosecution is able, under the pretense of impeaching him as a witness, to introduce testimony in relation to his character. Thus it is dangerous for a person whose reputation has been bad to testify in his own behalf. But if he does not testify, the jury, in a doubtful case, are inclined to infer guilt, though the statute contains a provision that refusal to testify shall raise no presumption. This, however, is considered a minor evil, as it affects only those who have by their course of life deprived

themselves of public sympathy. To an innocent person of previous good character, accused of crime, it is a very great advantage and undoubtedly reduces to almost nothing the chances of conviction in such cases. That the guilty are much more frequently convicted than in former times is also very certain.

A bill embodying a like provision in relation to persons charged with crimes, in the United States courts, has been passed by the House of Representatives, and we suppose will also pass the Senate and receive the executive approval; and if it does, all or most of the States which have not done so, will doubtless adopt a similar law.

The case of *Johnson, receiver, v. Laflin*, decided on the 8th inst., in the United States Circuit Court for the Eastern District of Missouri, involves a question of considerable importance to those interested in banks or bank stock. The suit was brought by the receiver of the National Bank of the State of Missouri to recover from defendant the value of eighty-five shares of stock in the bank, sold by defendant to the president of the bank a short time previous to its suspension. The sale was made through a broker, who sold the same without defendant's knowledge, at the time, to the president individually, and took his individual check therefor. Subsequently the president, under the power of attorney which had been indorsed by defendant on the certificates of stock sold, caused the stock to be transferred to him as trustee, and he also directed the sum he paid therefor to be credited to his individual account on the books of the bank. The court held that though the bank or its officers were prohibited under section 5201 of the Revised Statutes from purchasing its own shares, yet that, defendant having sold without notice of the illegal purpose of the president in buying the stock, or his intended misappropriation of the funds of the bank in paying therefor, was not liable to pay back to the receiver the money received in payment for the shares. The opinion, which was delivered by Judge Dillon, contains a clear and able exposition of the rights of shareholders in national banks, in respect to the sale and transfer of their shares, and establishes the general principle that a shareholder has the right to make an actual and *bona fide* sale and transfer of his shares to any person capable in law of taking and holding the same, and of assuming the transferor's liabilities in respect thereto, and in the absence of fraud this right is not subject to a veto by the directors or the other shareholders. The opinion will appear in full in our next issue.

A question has arisen as to whether the provision of section 18 of the judiciary article of the State Constitution, that "no person shall hold the office of

justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age," reaches the New York Court of Sessions, so as to disqualify a judicial officer from acting in that court after he has passed the age mentioned. Judge Sutherland, who sits in that court, was over seventy on the 31st of December last, and as he gives such general satisfaction many are anxious to have him retain the place, and claim that, as the Court of Sessions is not named in the section mentioned, or in the one immediately preceding it, the provision of section 12 of article 14 of the Constitution applies to and regulates the time of the office. That section mentions the various courts, including the Sessions, and prescribes that they shall remain until otherwise directed by the legislature, with their present powers and jurisdictions. In section 12 of the amendment several of the courts named in section 12 of article 14 are mentioned, but the Sessions is omitted. As it seems to us, the provision limiting the age of judicial officers applies to all officers of that kind, and not merely to such as may be described in article 6. The words are as general and comprehensive as could well be selected, and the provision, if a proper one, is as much needed in one case as in another. There are many who condemn the provision, and point to instances where the public have been deprived of the services of able and experienced judges by its operation. Yet, it is probable that the rule is a salutary one, and while we may in some cases, such as that of Judge Sutherland, regret its application, we would not have it changed.

A bill is now pending in the legislature designed to aid a very worthy institution, but which will, if passed, do much to nullify the effect of the efforts recently made to elevate the standard of legal education by requiring a three years' course of study and clerkship as a condition for admission to the Bar. The bill mentioned provides for the appointment by the General Term of the Supreme Court of a special board of examiners to examine for admission to the Bar students of the Albany Law School who are about to graduate. The examinations are to be "on the same subjects and in the same manner as required in the case of examinations for admission as attorneys and counselors of the Supreme Court." The examiners are to take proof of moral character, etc., and if they find any candidate qualified for admission to practice law, they are to indorse upon the diploma of the law school issued to such person a certificate to that effect. This indorsed diploma will entitle the person to whom it is granted to admission to practice as attorney and counselor. The law as regards admission to the Bar will if this bill passes stand thus. Students at the Albany Law School can be admitted to

the degree of attorney and counselor by simply passing the prescribed examination. All other candidates must serve or study five years and pass two examinations to reach the same point. We trust the legislature will not make such a discrimination. The time spent in a law school should be allowed in the same manner as that spent in an office, but there should be no favoritism to the students of the law schools. Three years is none too long a time to devote to preparation for the Bar, and that term of preparation should be required of every one.

A bill prohibiting the use of incendiary language at public meetings was introduced in the legislature during the past week. The purpose of this bill is commendable, but we question whether such a law as is proposed would not do more harm than good. Laws trenching upon liberty of speech are unpopular, and unpopular laws are as a rule unenforceable in this country; and a statute that cannot be put in force ought not to exist.

The Federal statute permitting the transfer of causes from State to Federal courts, where the parties reside in different States, has been much made use of by non-resident insurance companies to delay and defeat just claims against them. In some States liberty to such companies to do business therein has been made dependent upon a non-exercise of the right of removal. A bill designed to accomplish the same result here has just been introduced. By its provisions foreign companies are, as a condition of doing business, to be compelled to file with the insurance department a stipulation not to transfer actions commenced in the State courts, and in case of a violation of such stipulation their license to do business here is to be revoked. The measure is a proper one, and we trust it will be passed.

NOTES OF CASES.

In *Hunt v. Gardner*, 39 N. J. Law, 530, it is held that a plea setting up that a lessee assigned his lease, and that the lessor accepted the assignee as his tenant, does not show a bar to an action of covenant for rent on the lease against the original tenant. The rule is probably well established that a surrender by act of law destroys the privity of contract between the lessor and lessee, as well as the privity of estate. In *Smith v. Niver*, 2 Barb. 180, a lessor consented to a change of tenancy and permitted a change of occupation, and received rent from the new tenant as an original, and not as a sub-tenant, and it was held that the landlord could not afterward charge the first tenant for rent accruing during the occupation of the second one. See, also, *Mines Royal Societies v. Magnay*, 18 Jur. 1028. But there must be an assent of the landlord to the as-

signment, and the acceptance of the sub-tenant by the landlord with the intent to substitute him in the place of the original lessee. The case of *Thomas v. Cook*, 2 B. & Ald. 119, sanctions the rule that a surrender in law will be implied or raised up from the facts that a tenant has put a third person in possession of the demised premises, and that such third person has been accepted as tenant with the assent of the original tenant; but this case was criticised strongly in *Lyon v. Reed*, 18 M. & W. 285. The court, in the principal case, says: "To ascribe the effect of a surrender to the mere act of the landlord accepting the assignee as his tenant, and receiving rent from him, would be going beyond the precedents. To warrant the inference that the original lease has been annulled the facts ought to be of an entirely conclusive character." See, also, *Mills v. Auriol*, 1 Smith's L. C. (Phil. ed. Hare & Wallace's notes) 1239, where it is said by Lord Kenyon that "It is extremely clear that a person who enters into an express covenant in a lease continues liable on his covenant notwithstanding the lease be assigned over. If the lessee assign over his lease and the lessor accept the assignee as his lessee, either tacitly or expressly, it appears from the authorities that the action of debt will not lie against the original lessee, but all those cases with one voice declare that if there be an express covenant, the obligation on such covenant still continues." See, also, *Griffith v. Hodges*, 1 C. & P. 419; *Talbot v. Whipple*, 14 Allen, 180; *Stobie v. Dilla*, 62 Ill. 482; *Baker v. Pratt*, 15 id. 568; *Hegeman v. McArthur*, 1 E. D. Smith, 147; *Dodd v. Acklom*, 6 Mann. & Gr. 678; *Grimman v. Legge*, 8 B. & C. 324.

In *Stanley v. Chamberlin*, 39 N. J. Law, 565, the agent of plaintiff, who was the owner of real estate, rented the premises to the defendant, knowing that he intended to use them for gaming purposes. Plaintiff had no actual knowledge of the intended use. In an action for the rent the defense set up was that the renting was for an unlawful purpose. The court held that the knowledge of the agent was not to be imputed in this case to the principal, and that plaintiff was entitled to disown the agent's contract and to recover on a *quantum valebat* for the use of the premises. The general rule is well established, that knowledge of the agent is knowledge of the principal, and that the principal must be charged with a notice of such facts as are communicated to the agent in the particular employment which has been committed to him. *Cornfoot v. Fowler*, 6 M. & W. 358; *Cooper v. Slade*, 6 H. of L. Cas. 798. And in *Dresser v. Norwood*, 10 Jur. (N. S.), it is held that the principal is affected by the knowledge of his agent acquired in transactions other than those belonging to his agency. See, also, *Hern v. Nichols*, 1 Salk. 289, where a merchant employed a factor to sell silk for him, and the factor sold one sort of silk for another, and the doubt was whether this deceit could charge the merchant. Holt, C. J., was of the opinion "that the merchant was answerable for the deceit of his factor, though not *criminaliter* yet *civilliter*, for,

seeing that somebody must lose by this deceit, it is more reasonable that he who employs the deceiver should be a loser than a stranger." But in every case where the doctrine of constructive notice is maintained, the knowledge of the agent has been imputed to the principal for the benefit of a third party, who has dealt with the agent in good faith. The court, in the case at bar, says that it can have no application here. "The plaintiff would not be responsible to the public by way of indictment, without showing an actual knowledge of the intended wrongful use of his premises, and, surely, the law will not impute turpitude to him, by charging him with a knowledge which he did not actually have, for the benefit of a defendant who sets up his own execution of such criminal design in his defense. See, also, on the general subject, *Hill v. North*, 34 Vt. 604; *Lawrence v. Tucker*, 7 Greenl. 795; *Bracken v. Miller*, 4 Watts & S. 102.

In *Gokey v. Knapp*, 44 Iowa, 32, it is held that where an agent for lending money lent it at usurious rates, he would not be presumed to have had the authority to make the loan upon such conditions, and that his act would not affect his principal. The rule in this case is supported by numerous authorities. In *Dagnell v. Wigley*, 11 East, 43, a bill of exchange was held not to be usurious, upon the ground that the person advancing the money received no more than legal interest. The person receiving more was a broker, who acted as agent between the parties. In *Condit v. Baldwin*, 21 N. Y. 219, an agent intrusted with money to invest at legal interest exacted a bonus for himself as a condition of making the loan, without the knowledge or authority of his principal, and the court held that this did not constitute usury in the principal, nor affect the security in his hands. The court says (following Bacon's Abr., title Mast. & Serv.): "If a master command his servant to do what is lawful and he do an unlawful act, the master shall not answer, but the servant for his own misbehavior, otherwise it would be within the power of every servant to subject his master to what penalties he pleased." See, also, *Middleton v. Fowler*, 1 Salk. 282; *Commonwealth v. Frost*, 5 Mass. 53. In *Baxter v. Buck*, 10 Vt. 548, an administratrix gave to her son to present to defendant for payment a note of \$250. The son and defendant, without the knowledge of the administratrix, made an agreement whereby the time of payment was to be extended one year, at the usurious rate of twelve per cent. A new note was given for the principal sum, and another note to the son for the interest. The court held that the note for the principal was valid as between the administratrix and defendant. See, also, *North v. Sergeant*, 33 Barb. 350; *Bell v. Day*, 32 N. Y. 165. In the latter case only the dissenting opinions are given, but the court sustained the rule in *Condit v. Baldwin*. The Court of Errors and Appeals of New Jersey acknowledged the same rule in *Muir v. Newark Soc. Inst.*, 16 N. J. Eq. 537, 539. See, also, *Conover v. Van Muter*, 3 Green, 481; *Rogers v. Buckingham*, 33 Conn. 81; *Hopkins v. Baker*, 2 P. & H. 110. See, however, as favoring a different rule, *Wilson v. Truman*, 6 Mann. & Gr. 238; *Bush v. Buckingham*, 2 Ventris, 83; *Buckley v. Guildbank*, Cro. J.; *Austin v. Harrington*, 28 Vt. 130. But the current of authority is so strongly in favor of the doctrine of the principal case that it may be deemed established. Any other doctrine would open the door to numerous frauds.

RECOVERING MONEY PAID FOR TAXES UNLAWFULLY ASSESSED.

THAT most violent of all presumptions: that "every man knows the law," and the resulting maxim, that "ignorance of the law excuses no one," have led to many apparent hardships, not least of which is the rule that money paid for taxes illegally assessed cannot be recovered unless paid under compulsion.

An excellent illustration of this rule was afforded in *Detroit v. Martin*, 34 Mich. 170, wherein it appeared that a tax was assessed on land under a statute afterward decided to be unconstitutional. Prior to such decision the owner paid the tax, under protest, to prevent a threatened sale. It was held that the payment was voluntary, and that the money could not be recovered back; and this conclusion was reached on the ground that a sale, under the circumstances, would not have constituted a cloud upon the title.

The Court of Appeals of New York have recently examined the question when money paid for taxes illegally assessed may be recovered back. *Peyser v. Mayor*, 16 Alb. L. J. 283. The court held that money paid upon an erroneous judgment, or tax levy which has been reversed after payment, may be recovered back provided the payment was involuntary, or under compulsion from coercion, either in fact or law. Among the instances of coercion in law the court included the levy of a tax, regular upon its face, which may be demanded and enforced in due course of law, by sale of the property of the one assessed. The levy or assessment must, however, be *prima facie* regular so as to furnish evidence of its own validity, for if the validity must be shown *aliunde* the action is maintainable. Folger, J., who delivered the opinion of the court, said:

"Coercion by law is where a court having jurisdiction of the person and the subject-matter has rendered a judgment which is collectible in due course. There the party cast in judgment may not resist the execution of it. His only remedy is to obtain a reversal, if he may, for error in it. As he cannot resist the execution of it when execution is attempted he may as well pay the amount at one time as at another and save the expense of delay. It may be well to say, that if the judgment is not afterward reversed, but is invalid for any collateral reason, or the process issued upon it is illegal, payment with knowledge of the fact would perhaps be voluntary, which seems a sound distinction taken by Emott, J., in *Lott v. Sweeney*, 29 Barb. 87-92."

In *Wabounsee Co. v. Walker*, 8 Kana. 481, the plaintiff redeemed lands which had been sold for taxes, and was charged by the county treasurer interest on said taxes at the rate of fifty per cent per annum. Plaintiff paid the same under a written protest, claiming that the interest should have been only at the rate of twenty-five per cent. The court held that he could not recover the money so paid. Val-

entine, J., delivering the opinion of the court, said: "A correct statement of the rule governing such cases as this would probably be as follows: Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, unless to release his person or property from detention, or to prevent an immediate seizure of the same, such payment must be deemed to be voluntary, and cannot be recovered back; and the fact that the party, at the time of making the payment, files a written protest, does not make the payment involuntary."

But in a subsequent case the same court, while affirming the foregoing rule, held that taxes paid under protest could be recovered back where the tax had been assessed, the time for its correction passed, and nothing remained to be done but to issue the warrant for its collection, which the statute required to be done. *Kansas Pacific R. R. Co. v. Commissioners of Wyandotte Co.*, 16 Kana. 587.

In Massachusetts, in *Boston Glass Co. v. Boston*, 4 Metc. 181, it is held that "payment of taxes to a collector, who has a tax-bill and warrant in the form prescribed by law, is to be regarded as compulsory payment, and if such taxes were assessed without authority, they may be recovered back in an action for money had and received, although the party made no protest before payment." This case follows *Preston v. Boston*, 12 Pick. 7, where it is held, "if a person pay an illegal tax in order to prevent the issuing of a warrant of distress with which he is threatened, and which must issue, of course, unless the tax is paid, the payment is to be deemed compulsory, and not voluntary."

In *Grim v. School District*, 57 Penn. St. 434, it is said to be settled law, that "a party who, when threatened with a distress, pays an illegal tax under protest and notice of suit, may maintain an action to recover it back." See, also, *Henry v. Horstick*, 9 Watts, 412. In *Allen v. Burlington*, 45 Vt. 202, the court says: "If the plaintiff was constrained to pay the tax to save his property from distress, and to avoid a penalty and costs, it was not a voluntary payment." *Babcock v. Granville*, 44 Vt. 326; *Henry v. Chester*, 15 id. 460.

In *Fellows v. School District*, 39 Me. 559, a party was arrested for non-payment of a tax, promised to pay if released, was released and about a week after paid the tax and costs; this payment was held not to be voluntary; so in *Gachet v. McCall*, 50 Ala. 807, the owner of land which was advertised for sale for non-payment of taxes, promised the tax-collector that, if he would postpone the sale, he would pay the tax. The sale was postponed and the tax paid according to agreement, but under protest. Held, that the payment was voluntary and could not be recovered.

In *Meek v. McClure*, 49 Cal. 628, which was an action against a tax-collector to recover back money paid under protest for taxes alleged to have been not duly assessed—in this that the assessment made by the assessor had been irregularly and unlawfully increased by the board of equalization—the court held that the money could not be recovered, because *the protest was not sufficient* to indicate to the defendant the grounds upon which the plaintiff claimed the demand to be illegal. Rhodes, J., delivering the opinion of the court, said: "It was held in *Hayes v. Hogan*, 5 Cal. 243; *McMillan v. Richards*, 9 id. 417; *Falkner v. Hunt*, 16 id. 167, and other cases in this court, that if money which is not legally due is exacted by means of duress or coercion, it may, if paid under protest, be recovered back. The purpose and effect of the protest is not satisfactorily defined in any of those cases. In one of them it is said that one purpose of the protest is to take from the payment its voluntary character; but it is manifest that it is involuntary only because of the coercion, the duress, or the undue advantage exercised or possessed by the party to whom the payment is made. If money is paid, under these circumstances, to a party for his own use, no protest is necessary in order to lay the foundation of an action. In most of the cases in which the effect of a protest is considered, the payment was made to a public officer; and the only purpose of the protest was to give the officer notice that the money was not legally due, and thus to enable the officer to protect himself against the consequences of an action to recover the money back from him. The officer is thereby put on inquiry as to whether the money is legally due; and if he finds that the demand is illegal, he may protect himself by refusing to receive the money; or, if he finds that it is of doubtful legality, he may take the proper steps to avoid, or protect himself against responsibility. If the officer has notice of the matter which renders the demand illegal, another notice in the form of a protest would be useless; but if he has no knowledge of such matter, he ought not to be subjected to the costs and consequences of an action to recover money from him—and that, too, perhaps, after he has paid over the money in the usual course of official business—without notice from the party paying the money of the grounds upon which he claims that the demand is not legally due. Whenever a protest is essential, it is, therefore, necessary to state the grounds upon which the party paying the money claims that the demand is illegal. The statement of the precise amount which is claimed to be illegal, when a part of the demand is legal, is of but little moment, for that, as in this case, can readily be ascertained by the official to whom the money is paid, upon being informed of the ground upon which payment would be refused, except for

the coercion or duress. In this case the defendant was not informed by the protest that the plaintiff claimed that the action of the board of equalization was void; and there was nothing in the assessment roll or other document which came to the hands of the defendant, as the tax-collector, which would impart notice to him that the action of the board of equalization in increasing the valuation of the plaintiff's property was void, because the order was made without any complaint having been filed before the board, stating that the valuation was too low. The protest, in our opinion, was not sufficient to entitle the plaintiff to maintain an action to recover back the amount paid on account of the increase of the valuation of the property."

In *Hendy v. Soule*, Deady, 400, it was decided that when taxes are paid on the demand of an officer having authority to collect them by distraint, there is sufficient duress of the property to make payment involuntary.

In *Jersey City v. Ricker*, 20 Am. Rep. 386; 9 Vroom, 225, it was decided that when an assessment has been set aside by a court, one who has paid it, though voluntarily, may recover the money back.

As to when money, voluntarily paid, may be recovered back, see *Town of Ligonier v. Ackerman*, 15 Am. Rep. 323; S. C., 46 Ind. 552, and note to *Black v. Ward*, 15 Am. Rep. 171; *Chandler v. Sanger*, 19 id. 367.

COMMISSIONS OF LUNACY.*

UNDER the feudal system, the common law of England made no provision for pauper lunatics. Whether they happened to belong to the class of *villeins regardant*, or *villeins in gross*, they appear to have been equally uncared for by the sovereign authority of the realm. Inasmuch, also, as they were simply base tenants, a people living in servitude to the lord of the soil, like the cattle upon it, the loss of mind in any one of them produced as little effect upon the legal status of things in the manor, as would the death or incapacity of any beast of burthen. Neither justice nor humanity toward men could be expected to spring from a system of predial servitude, which, reflecting its influences upon jurisprudence, left charity to flourish only in the bosom of the church. Laws were then made only for free men and freeholders, and paupers, whether sane or insane, had to find protection and sustenance whenever they could at the hands of private benevolence. See History of Lunacy Legislation, ante.

We seek in vain, therefore, for any general laws designating the duties of the State toward them as charitable objects. And it is perhaps as much from this cause as from the teachings of the church that sprang up the abundance of gifts to charitable uses in England.

* The following is from advance sheets of Prof. Ordronaux's Commentaries on the Lunacy Laws of New York, and on the Judicial Aspects of Insanity at Common Law and in Equity, including Procedure, as expounded in England and the United States, now in the press of Mr. John D. Parsons, Jr.

But as soon as the element of property asserts its presence in the history of a class, we perceive the sensitiveness of the law to immediately secure it against waste or spoliation. Hence, in England, the king, as the sovereign lord of the domain, and assumed protector of all his subjects, as soon as he was judicially informed that any one possessed of lands and tenements was an idiot, claimed the right of a beneficial use therein to himself, in return for the protection afforded by him. "And, therefore," says Fitzherbert (*de Nat. Brev.* 232), "when the king is informed that one who hath lands or tenements is an idiot, and is a natural from his birth, the king may award his writ to the escheator or sheriff of the county where such idiot is to inquire thereof." The whole transaction seemed to turn as much upon the opportunity to increase the revenues of the crown, being in fact *regium munus*, as it did upon humanity to the idiot. For Lord Hardwicke, in *Ex parte Southcote*, Ambl. 111, observed that he could not find a single writ directed to the escheator to inquire of lunacy, because the escheator, being an officer of the crown, in cases of lunacy where no profits go to the crown, the writ was never directed to him.

Previous to the passage of the statute "de prerogativa regis" (17 Edw. 2, ch. 10) the custody of an idiot and of his lands was vested in the lord of the fee. Fleta, Lib. 1, ch. 11, § 10. And it is probable that the number of these persons may have been great enough to give rise to the necessity of extending a more disinterested supervision over them, and their estates, than would be likely to happen at the hands of their immediate lord. The writer above cited says, in fact, that these trusts were much abused, an evident reason, therefore, for removing them from the grasp of private cupidity, and placing them under the immediate care of the crown. These would seem to be the causes in which originated the necessity for an intervention of the king's prerogative over lunatics, through his chancery, in the form of writs of inquiry in cases of alleged mental incapacity.

Commissions of lunacy are proceedings of comparatively modern times. Originally they consisted of writs issued in chancery, of which only two forms were known, viz.: the writ "*de idiota inquirendo et examinando*," and the writ "*dum fuit non compos mentis*." Fitzherbert N. B. 202 and 232. The writ "*de lunatico inquirendo*" is of recent date, not being mentioned by Fitzherbert. It will be remembered that Lord Coke did not consider the word "lunatic" material as a term of definition, but included it in the general class of "*non compos*," of which he made four varieties. The term "lunatic" as a designation does not appear in any of the old writs, and Lord Hardwicke condemned its use as founded in error and superstition. *Ex parte Barnsley*, 3 Atk. 168. Even as late as his day, there were in England but two forms of writ for inquiring into the mental capacity of an alleged *non compos*, viz.: the writ *de idiota inquirendo* and the writ *de lunatico inquirendo*, and if the jury could not find that the party came within either of these classes, no committee could be appointed.

The manifest injustice of thus leaving many weak-minded persons without the protection of a court of equity led to a relaxation of the former rule, and in Lord Eldon's day commissions began to be issued in cases where they would not previously have been granted. These were not technical commissions of lunacy, but commissions in the nature of writs *de lunatico*, where-

in it was not necessary to establish lunacy, but simply that the party was of unsound mind and incapable of managing his affairs. Thus in *Gibson v. Jeyes*, 6 Vesey, 272, which was a case of imbecility, Lord Eldon observed that it was a question "whether this case might not support a commission, not of lunacy, but in the nature of a writ *de lunatico*, in which, it must be remembered, it is not necessary to establish lunacy, but it is sufficient that the party is incapable of managing his own affairs." And in another similar case this same high authority said that "a commission of lunacy" is not confined to strict insanity, but is applied to cases of imbecility of mind, to the extent of incapacity from any cause, as disease, age or habitual intoxication. *Ridgway v. Darwin*, 8 Ves. 64.

Lord Erskine in *Ex parte Cranmer*, 12 Vesey, 445, reiterated the views expressed by Lord Eldon, and held that a commission of lunacy was applicable to incapacity from causes distinct from lunacy. It will be evident from these rulings how strongly the tide had turned since Lord Hardwicke in *Ex parte Barnsley*, 3 Atk. 169, A. D. 1744, decided that, although there might be mental incapacity in a party, still no return to the inquisition would be good which did not find the party of unsound mind. And the ground upon which he rested this ruling was, that while he was desirous of maintaining the prerogative of the crown in its just and proper limits, yet, at the same time, he must take care not to make a precedent of extending the authority of the crown, so as to restrain the liberty of the subject and his power over his own person and estate, further than the law would allow.

In our own State, Chancellor Kent gave an early assent to the doctrine announced in the English decisions. And on a similar question coming before him, in the case of *Barker*, 2 Johns. Ch. 233, gave his entire approbation to the course pursued by Lords Eldon and Erskine. *Barker* was not a lunatic, nor yet an idiot, but a feeble-minded old man, incapacitated by advanced age for the management of his own affairs. A commission was accordingly issued and a finding of unsound mind returned. In referring to the duty of courts of equity to issue commissions in the nature of writs *de lunatico*, wherever there was a reasonable doubt of a party's capacity to manage his own affairs, the chancellor, while reviewing the English authorities, said:

"Lord Hardwicke disclaimed any jurisdiction over the case of mere weakness of mind, yet it is certain that when a person becomes mentally disabled from whatever cause the disability may arise, whether from sickness, vice, casualty, or old age, he is equally a fit and necessary object of guardianship and protection. The Court of Chancery is the constitutional and appropriate tribunal to take care of those who are incompetent to take care of themselves. There would be a deplorable failure of justice without such a power. The object is protection to the helpless, and the imbecility of extreme old age, when the powers of memory and judgment have become extinct, seems, as much as the helplessness of infancy, to be within the reason and necessity of the trust."

And proceeding further to justify the issuing of commissions in cases of general mental incapacity without the presence of actual insanity, he observed: "It is evident that *Barker* is not a lunatic, within the legal meaning of the term. He is not a person who sometimes has understanding and sometimes not. He is,

rather, of that class described by Lord Coke as *non compos mentis*." Co. Litt. 243, b.

An inquisition may, therefore, be awarded for any cause which substantially incapacitates a party to manage his affairs. It matters not, therefore, whether the party be reduced to this condition by disease, or old age, or habitual intoxication. *Ex parte Tracy*, 1 Paige, 580.

Any thing which reduces the mental capacity of an individual to such a degree as to permanently unfit him to comprehend the nature and necessities of his own affairs; to take in the position which those affairs occupy to others, and the provision necessary to be made to secure himself against the ordinary risks and contingencies of business, may be said to render him, in contemplation of law, unfit to manage his affairs. Although not properly a lunatic, he is still in the eye of the law *non compos mentis*, and a proper subject for an inquisition of lunacy.

However probable may be the existence of the fact of lunacy, it must still be sufficiently well substantiated to satisfy the judgment of the court to which application for a commission is made, since the court cannot act on conjecture alone. Therefore, in *Sherwood v. Sanderson*, 19 Ves. 236, Lord Eldon observed that "before a commission issues, the duty of that person who has authority to issue it requires him to have evidence that the object of the commission is of unsound mind and incapable of managing his affairs, and for that purpose the evidence of medical men is generally produced."

But it is not every case of mental weakness or imbecility which will authorize a court of equity to exercise the power of appointing a committee of the person and estate. In order to justify the exercise of such a power, it has been held that the mind of the individual must be so far impaired as to be reduced to a state which, as an original incapacity, would have constituted a case of idiocy. *Matter of Morgan*, 7 Paige, 236; *Matter of Shaul*, 40 How. Pr. 204. Although there certainly are degrees in idiocy, it is doubtful whether the standard thus selected, as popularly understood, is not a lower one than courts could generally or even safely adopt in exercising guardianship over the feeble-minded. Every day furnishes evidence of the existence of certain minds which, far above idiocy in intensity and extensity of power, are yet shown by experience to be incapable of governing themselves or managing their affairs. Without being idiots, they are still capable of being included among the *non compos* class. It was to this feeble class that Lord Hardwicke referred, when he observed that it might be well if a curator or tutor should be set over prodigal and weak persons, as in the civil law. *Ex parte Barnsley*, 3 Atk. 169.

ISSUING THE COMMISSION.

When a case appears *prima facie* to be one of idiocy, lunacy, unsoundness of mind, or habitual drunkenness, the court will, in general, grant the application for a commission, though it is not by law compelled to do so. 2 Barb. Ch. Pr. 229. In *Ex parte Tomlinson*, 1 Ves. & Bea. 57, Lord Eldon observed that the court was not bound to issue a commission of lunacy merely because the fact of lunacy was established. That matter was in the discretion of the court, and to be regulated alone by the benefit to the lunatic, with reference to the care of his person and property, but not of course. In saying this he evidently meant that there were cases

of well-established lunacy, where the expense of a commission was not warranted by the value of the estate to be protected.

If the alleged lunatic be a non-resident of the State, having property here, the petitioner must establish this fact by proof, since it will not be sufficient to allege it in affidavits annexed to the petition. Without such proof, there is nothing on which a court can found its jurisdiction. *Matter of Neally*, 26 How. Pr. 402.

Upon an order being granted and filed with the clerk of the court, the commission will then issue. The commission should be previously prepared, according to the required form, and handed to the clerk to be indorsed and sealed. Three persons are usually named in it, of whom one should be a counselor of the court, and one a physician. The technical inquiries as to the lunacy, the value of the real and personal estate of the lunatic, and the annual rents and profits of the same, and who are his relatives, are legal questions to be passed upon by the jury, and none of them, consequently, must be omitted in the commission.

The execution of the commission must be public and openly, as in case of any issue tried by jury. Hence, it has been held that a person proceeded against as a lunatic, except in cases of confirmed and dangerous madness, is entitled to reasonable notice of the time and place of executing the commission, and a reasonable time within which to produce his witnesses. And in order to compel their attendance he is entitled to *subpoenas* from the commissioners, as any other defendant. A neglect or refusal on their part to issue them will invalidate their proceedings. *Ex parte Plank*, 3 Am. L. J. 518; *Ex parte Lincoln*, 1 Brewst. 592. Nor is this rule suspended in the case of non-residents. *Matter of Pettit*, 2 Paige, 174. But it is not necessary that notice should be served on him personally, when it is evident that he keeps out of the way to avoid service. And should any circumstances be present which afford a satisfactory reason for not serving such notice upon him, they should be stated in the petition, so that the court may authorize a suspension of the rule in the commission itself. *Matter of Tracy*, 1 Paige, 580.

PLACE OF EXECUTING COMMISSION.

The fact of lunacy may be ascertained wherever most convenient to the parties concerned. And it is immaterial for this purpose whether the alleged lunatic be an actual resident or not of the State. Provided only he have property within the jurisdiction of the court, its process may issue. *Ex parte Southcott*, 2 Ves., Sr., 401; *Ex parte Baker*, 19 Ves. 340. Where, therefore, a lunatic having property in this State was domiciled in an adjoining one, the court authorized the commission to be executed in the neighboring county which was most convenient and nearest the lunatic's residence. *Matter of Pettit*, 2 Paige, 174; *Matter of Perkins*, 2 Johns. Ch. 124.

POWERS AND DUTIES OF COMMISSIONERS.

The commissioners are empowered to issue *subpoenas*, and may, in case of necessity, obtain attachments to compel the attendance of witnesses. They may also issue a precept to the sheriff requiring him to summon a jury of not less than twelve, nor more than twenty-four good and lawful men of the county, to come before them at a certain time and place mentioned therein, for the purposes named in the commission. They may also compel the production of the

lunatic before them for their inspection and that of the jury, if deemed desirable, and this, in all cases wherever possible, should be done. 2 Barb. Ch. Pr. 233; *Matter of Russell*, 1 Barb. Ch. 38. Should any custodian of the lunatic or other person interpose to prevent this inspection he may be punished. Thus, in Lord Wenman's case, his wife, who was an Irish peeress, and had charge of his person, was committed for contempt for not producing him when required (1 P. Wms. 701), or if the persons having charge of the lunatic carry him out of the State, the commission may still be executed in his absence. *Ex parte Halse*, 2 Ves., Sr., 405.

So, also, the commissioners must act with judicial impartiality, and in no way interfere with the course of procedure in selecting a jury. Hence upon the execution of a commission *de lunatico*, it is the duty of the sheriff alone to select and to summon the jurors, and it is both improper and irregular for the commissioners to dictate what persons are to be summoned. *Matter of Wager*, 6 Paige, 11.

No statute requires that the commissioners should be sworn, the order granting the commission giving them plenary authority to act without taking any preliminary oath of office.

In conducting the trial it is usual for the person first named upon the commission to act as president; to administer the oath to the jury; to read and explain the commission to them; to swear and examine the witnesses, who must testify both as to the lunacy of the party, his next of kin, and the value of his real and personal property. And some one of the commissioners should also charge and instruct the jury as to the matters to be found by them in their verdict. 2 Barb. Ch. Pr. 233.

In the case cited below, Chancellor Walworth, in directing the manner in which the jury should be charged, says, "but without argument of counsel on either side." Now since it was always a settled rule of practice in our Court of Chancery, that any party against whom a commission of lunacy was awarded could be represented by counsel (1 Moulton's Ch. Pr. 110), we know of no principle of law which would authorize the commissioners to refuse permission to such counsel to address the jury. For it might become a very essential part of his duty to enlighten the jury upon the value or significance of the evidence introduced, and we do not well see, how, without great injustice to the parties interested, any counsel could legally be restricted to the examination of witnesses alone. Such a restriction has certainly never existed in England, and the question, therefore, has never called for special adjudication. Nor if raised before any of our courts do we believe it would receive any countenance.

In the *Matter of Arnhout*, 1 Paige, 497, Chancellor Walworth laid down the following as the rules to be observed by the commissioners in charging the jury, viz.: The jury are to be instructed that, if twelve or more of them find that the party is not incompetent, they are to deliver their verdict accordingly, or if the same number decide against his competency, that they then find and determine the other facts directed to be inquired of, and that if twelve of them cannot agree either way, they report the fact to the commissioners in order that their return be made accordingly. And in relation to every legal question arising in the execution of the commission, a majority of the commissioners must decide.

DUTY OF SHERIFF.

The duty of the sheriff in executing the precept of the commissioners is to select and summon the jurors to attend at the time and place named therein, and without suggestions from any one, not even the commissioners, as to the persons to be selected; to attend the inquisition in person, yet not to remain in the room with the jury during their deliberations. *Matter of Wager*, 6 Paige, 11.

When once the jury are sworn, although the number may be larger than is necessary for a legal inquisition, no one can be withdrawn without impairing the validity of the proceedings. *Tebout's Case*, 9 Abb. 211.

And if any challenges to jurors are made, it is for the commissioners to decide upon their validity. *Matter of Wager*, 6 Paige, 11.

INQUISITION.

An inquisition or inquest of office at common law was an inquiry made by the king's officer, being either a sheriff, coroner, or escheator *virtute officii*, or by commissioners specially appointed, concerning any matter relating to the king's revenues. It was in the nature of a suit brought by the king to establish his title by proof of the facts upon which his title depends. The object of an office was to provide a remedy for enforcing the right. Tomlyn's Dict., Inquest; Co. Litt. 310, b. Under the statute 32 Henry VIII, ch. 46, the court of wards and liveries was established to superintend and regulate these inquiries. The abolition of this court at the restoration and the substitution of commissions in the nature of writs of inquiry long ago changed the whole significance of this method of procedure in England. In our own country the old doctrine of inquest of office in relation to real property has only come up for adjudication in a few cases of alienage, but has been so modified by treaties, acts of Congress and statutes, as to be seldom alluded to now. *Fairfax v. Hunter's Lessee*, 7 Cranch; *United States v. Repentigny*, 5 Wall. 211. The subject is now generally merged in that of Escheats, as provided for by statute. *Johnson v. Hart*, 3 Johns. Cas. 322.

In the execution, however, of commissions of lunacy, the inquisition or inquest of office retains its usual significance. It is still a proceeding tending to the forfeiture of civil rights over one's person and property, dependent upon the degree of mental incapacity established. Its effects are legally tantamount to an office found for the State, with this condition, that, upon a restoration to reason, of the party once insane, he may have a supersedeas, and resume the control of his property. The forfeiture although continuous with the insanity is not, therefore, an absolute one. No change in this respect has been made in the trust assumed by the State, through its courts, in the estate of a lunatic, since the statute 17 Edw. 2. Its spirit still animates *mutatis mutandis*, our jurisprudence.

The usual manner of holding an inquisition of lunacy is this:

The commissioners, sheriff and jurors, together with the witnesses, being assembled at the place and time appointed, counsel in behalf of the commission and of the lunatic may also be present. The trial thereupon proceeds, with or without the presence of the lunatic, as the case may be. But the commissioners and the jury may demand a view of and question the lunatic, and as before shown may compel the person having him in custody to produce him. If a previous order for this purpose has not been issued, and if, on the order so

given, the lunatic, if able to be removed (if not, the jury or some of them may visit the lunatic and report to the rest), is not produced, the commissioners should return the fact to the court, whereupon an attachment will issue against such parties as for a contempt, with costs. 1 Moulton's Ch. Pr. 110; 1 Grant, 204; *Ex parte Southcole*, 2 Ves., Sr., 401; S. C., Ambl. 111; *Lord Wenman's case*, 1 P. Wms. 701; *Matter of Russell*, 1 Barb. Ch. 38.

The alleged lunatic may always be present if he pleases. It is a privilege, from which he cannot be excluded without invalidating the proceedings. *Ex parte Cranmer*, 12 Ves. 445; *Ex parte Russell*, 1 Barb. Ch. 38; *Hinchman v. Richer*, Bright. 181; *Ex parte Lincoln*, 1 Brewst. 392. The witnesses are then examined first as to the lunatic; next as to the value of the real and personal property of the lunatic, and lastly as to who are his next of kin. Counsel may then be heard on either side, and the jury having been duly charged by one of the commissioners as to the matters to be determined by their finding, thereupon retire to deliberate by themselves. It is illegal for any one, even the sheriff, to be present at such time. *Matter of Arnhout*, 1 Paige, 498. The jury having deliberated upon the matter of inquiry, the inquisition which has previously been prepared with blanks is read to them, and they direct in what way these blanks are to be filled. The commissioners and jury then sign and seal the inquisition, which, when executed, should be a full response and return to the commission, in relation to all matters therein to be inquired of. The inquisition is thereupon annexed to the commission, with the following return, viz.: "The execution of this commission appears in the schedule hereunto annexed," and the whole should be filed in the office of the county clerk. 1 Moulton's Ch. Pr. 111; 2 Barb. Ch. Pr. 233.

It is the usual practice on the return of a commission to move for an order confirming the same, upon reading the commission, return, and inquisition. But the commission may be quashed and a new one directed, in case of misconduct, or apparent insufficiency of the return; or a motion may be made for leave to traverse the same by any party aggrieved. And whenever any finding is to be contested, the court will direct notice to be given to the other party, so that as many of these applications as can, may be heard together. *Matter of Christie*, 5 Paige, 242. Under such circumstances the first order granted may be one directing that the lunatic be brought into court for inspection, and if the court be not satisfied, the next order may award an issue at law to be made up under the direction of the court and conducted as directed; and a provisional order may, meanwhile, be made for the care of the lunatic's estate, until the fact of the lunacy be decided by a verdict. The proceedings on the feigned issue and on return of verdict being as above directed, if no new trial or appeal interpose any further obstacles, the petition for the appointment of a committee which had been prepared and presented on the return of the commission and inquisition may then be acted upon. 1 Moulton's Ch. Pr. 111.

NEW COMMISSION.

It being entirely within the discretion of the court to confirm or not the finding of an inquisition, it follows that such a proceeding may be set aside whenever it is found to have been either irregular in its execution, in violation of the statute, or whenever again the verdict is plainly against evidence.

Thus an inquisition has been set aside because the alleged lunatic had no notice given him of its occurrence (*Matter of Tracy*, 1 Paige, 581); because a stranger was appointed committee without the assent of the relatives of the lunatic and without a reference (*Lamorce's case*, 11 Abb. 274; S. C., 32 Barb. 122, and 19 How. Pr. 375); because the commissioners directed the sheriff to summon certain persons as jurors (*Matter of Wager*, 6 Paige, 11); because the sheriff entered the room where the jury were deliberating upon their verdict and conversed with them (*Matter of Arnhout*, 1 Paige, 498); because the inquisition did not, in its return, conform to the statute, and find the party an idiot, lunatic, or person of unsound mind (*Matter of Morgan*, 7 Paige, 236; but see *Matter of Mason*, 1 Barb. S. C. 436); or because the commissioners refused to issue subpoenas in behalf of the alleged lunatic (*Ex parte Plank*, 3 Am. L. J. 518). An inquisition may also be set aside upon the personal examination of the lunatic by the court, and of the evidence adduced upon the trial, showing that the jury erred in finding their verdict. But in such case the introduction of new evidence, where no valid reason can be shown why the same was not produced upon the trial, will not be permitted *ex parte* to contradict the verdict, unless there has been gross error or undue prejudice exhibited on the part of the jury. *Matter of Russell*, 1 Barb. Ch. 38; *Matter of Tebout*, 9 Abb. 211.

But a misnomer merely of the lunatic in the inquisition and other proceedings will not, of itself, invalidate them. For it may be corrected by an order, entering such correction into future documents in which such lunatic's name is mentioned, the only point to be considered being the establishment of his identity. *In re Crawford*, 1 Myl. & Cr. 240.

The death or incapacity of one of the commissioners will render it necessary to suspend the execution of the commission, and to issue a new one. Shelford, p. 83, 1st ed.

Where the inquisition and proceedings have been set aside, for any cause, a second commission cannot be issued on the original petition, because the continuance of the reasons upon which the first was based cannot be presumed at law, but must be proved *de novo*. *Hinchman v. Ritchie*, Bright. 144, 182.

FEES OF COMMISSIONERS.

On the execution of a commission of lunacy, etc., the commissioners, for every day they are necessarily employed in hearing the testimony and taking the inquisition, shall be entitled to an allowance to be fixed by the court. The committee of a lunatic, idiot, or drunkard, may pay to the petitioner on whose application the commission was issued, or to his attorney, the costs and expenses of the application, and of the subsequent proceedings thereon, including the appointment of the committee, and without an order of the court for the payment thereof, when the bill of such costs and expenses has been duly taxed and filed with the clerk in whose office the appointment of such committee is entered, provided the whole amount of such costs and expenses does not exceed fifty dollars. But where the costs and expenses exceed fifty dollars, the committee shall not be at liberty to pay the same without a special order of the court directing such payment. Supreme Court Rules, No. 86; *Matter of Clapp*, 20 How. Pr. 385.

And when no attorney is employed, they are entitled to the same fees that he would be for the same services

rendered. As to attorneys' fees in such cases, see 3 R. S. 520, 902; Code of Pr., § 307; *Brookway v. Jewett*, 16 Barb.

FEEs OF JURORS.

The jurors sworn upon any inquest of office are each entitled to twelve and a half cents. 3 R. S. 912.

The prosecutor of a charge of lunacy, if the same be made in good faith, will not be compelled to pay costs, even though the inquisition fail to establish the fact charged. *Brower v. Fisher*, 4 Johns. Ch. 440.

It has also been held that a solicitor has no legal claim against a lunatic for opposing, unsuccessfully, a commission against him. But the court may, in its discretion, allow him costs, where the fact of the lunacy was so much in doubt that the chancellor, if applied to, would have directed such opposition upon the execution of the commission. *Matter of Conklin*, 8 Paige, 450.

RECENT ENGLISH DECISIONS.

ACT OF GOD.

Statutory construction: shipping: crew compelled to leave vessel.—A statute which refers to the matter of a common law liability, and declares to whom it shall attach, will not thereby create a new and extended application of that liability, unless it contains words expressly declaring such a purpose. The 10 Vict., c. 27 (the Harbors, Docks and Piers Act, 1847,) enacted that "the owner of every vessel, or float of timber, shall be answerable to the undertakers for any damage done by such vessel or float of timber, through whose willful act or negligence any such damage is done; shall, also, be liable to make good the same; and the undertakers may detain any such vessel, or float of timber, until sufficient security has been given for the amount of damage done by the same." There was a proviso exempting the owner from liability in cases where the vessel was in charge of a licensed pilot, whom the owner was "bound by law to employ and put his vessel in charge of." *Held* (affirming the judgment of the Court of Appeal), that, in a case where the damage to the pier had been occasioned by a vessel through the violence of the winds and waves, at a time when the master and crew had been compelled to escape from the vessel, and had, consequently, no control whatever over it, the owners were not liable. Per the Lord Chancellor (Lord Cairns): The clause is a clause of procedure only, dealing with the mode in which a right of action already existing shall be asserted, but not creating a new and extended liability. *River Wear Commissioners v. Adamson*, L. R., 2 App. Cas. (H. L.) 743.

COMMON CARRIER.

Limitation of liability by special contract: unreasonable condition.—A railway company made contracts to carry animals from a port of Ireland to a town in England, on "through" tickets. The paper or ticket contained, in substance, the following condition: "That with respect to any animals, etc., booked through by them or their agents, for conveyance partly by railway and partly by sea, or partly by canal and partly by sea, such animals, etc., will only be so conveyed on the condition that the company shall be exempt from any liability for any loss or damages which may arise during the carriage of such animals, etc., by sea, from the act of God, etc., accidents from machinery, etc., and all and every other damages and acci-

dents of the seas, rivers, and navigation of whatever nature and kind soever, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. Nor will the company be responsible for loss of, or damage to, animals, etc., arising from damages or accidents of the sea, or of steam navigation, the act of God, etc., jet-tison, barratry, collision, careless or unskillful navigation, accidents connected with machinery or boilers, or any default or negligence of the master or any of the officers or crews of the company's vessels." *Held*, that the words "master and crew of the company's vessels," in this condition applied to all such vessels as the company should employ, and not merely to vessels owned or worked by the company itself; and that the condition was unreasonable and void. If a railway company is guilty of an illegality by working steam-boats, not being authorized by law to work them, it cannot set up such illegality as an answer to a claim for damages arising out of the working of such steam-boats. *Doolan v. Midland Railway Co.*, L. R., 3 App. Cas. (H. L.) 792.

CRIMINAL LAW.

Venue in case of embezzlement.—A clerk, whose duty it was to remit at once to his employers, in Middlesex, all moneys collected by him as their clerk, collected at York, on the 18th of April, a sum of money as such clerk, but never remitted any portion of it. On the 19th and 20th of April he wrote and posted from places in Yorkshire, to his employers in Middlesex, letters, making no mention of the money so collected, and on the 21st of April he wrote and posted at Doncaster, in Yorkshire, to his employers, in Middlesex, a letter which was intended to make them believe that he had not then, in fact, collected the money in question. These letters were duly received by the employers in Middlesex. *Held*, by Kelly, C. B., Field, Lindley, and Manisty, JJ., that the receipt of the letter of the 21st of April, in Middlesex, was sufficient to give jurisdiction to try the prisoner in Middlesex. *Held*, by Huddleston, B., contra, that no part of the crime was committed in Middlesex, and that the prisoner was wrongly indicted in that county. *The Quern v. Rogers*, L. R., 3 Q. B. D., C. C. R. 28.

LIBEL.

Person convicted of felony: effect of enduring the punishment: justification: 9 Geo. 4, c. 32, s. 3.—In an action by the editor of a newspaper for libel in calling him a "felon editor," the defendants justified, alleging that the plaintiff had been convicted of felony and sentenced to twelve months' hard labor. The plaintiff replied that after his conviction he underwent his sentence of twelve months' imprisonment and hard labor, and so became as cleared from the crime and its consequences as if he had received the queen's pardon under the great seal. On demurrer: *Held*, a good reply. *Semble*, that it is defamatory to call a person who has been convicted of felony "a convicted felon," if he has received a pardon or suffered his sentence. *Leyman v. Latimer*, L. R., 3 Ex. D. 15.

MINES.

Liability for overflow resulting from working mines.—A mine owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes, in themselves beyond his control, though his own acts may have conduced to produce the injury.

if his acts have only been those of the proper and ordinary working of his own mine, without default or negligence. But where for his own convenience he does something, *e. g.*, divert the course of a stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow, so that, even if that overflow should be directly and mainly occasioned by an act of nature, his own conduct in not so forming the new and diverted course for the stream, of form and of sufficient capacity to carry off an accidental overflow of water, even of an exceptional kind, will be matter for consideration in determining the question of his liability. *Fletcher v. Smith*, L. R., 2 App. Cas. (H. L.) 781.

RIPARIAN RIGHTS.

Navigation of river above tide, not a public right.—

Per Lord Hatherley: These are two totally distinct and different things; the one is the right of property, and the other is the right of navigation. The right of navigation is simply a right of way. *Per Lord Blackburn:* The public, who have acquired by user the right to navigate on an inland water, have no right of property. *Per Lord Yordon:* The right which the public have is a mere right to use the river for the purposes of navigation, similar to the right the public have to passage along a public road or foot-path through a private estate. *Orr Evring v. Colquhoun*, L. R., 2 App. Cas. (H. L.) 889.

2. *Proprietor's rights on both sides: right to build mill dam.*—*Per Lord Blackburn:* The owner of the banks of a non-navigable river may, without any illegality, build a mill-dam across the stream within his own property, and divert the water into a mill-lade without asking leave of the proprietors above him, provided he does not obstruct the water from flowing as freely as it was wont; and without asking the leave of those proprietors below him, if he takes care to restore the water to its natural course before it enters their land. *Id.*

SALE OF LAND.

Implied covenant for adjacent and subjacent support: injunction to restrain acts calculated to endanger.—The vendor of land adjoining other land of his own under which are mines and minerals, and who knows at the time of the sale that the vendee is about to erect upon the land so purchased substantial buildings, implied covenants that he will not use or permit the adjoining land to be used in such a manner as to derogate from his grant. A sold land to B for the purpose of an iron-foundry. Adjoining the land so sold to B, A had other land under which was coal. A afterward leased the minerals to C, who commenced working the coal within such a distance from the land of B as to be reasonably calculated to endanger its stability. Held, ground for an injunction against A and C, although no actual damage had been sustained by B. *Siddons v. Short, Harley & Co.*, L. R., 2 C. P. D. 572.

RECENT BANKRUPTCY DECISIONS.

ARREST.

Bankrupt not entitled to release from arrest in civil action.—An adjudication of a bankrupt, who was under arrest in a civil action at the time the proceedings were commenced, does not entitle him to a release from such arrest. Sup. Ct., New Hampshire. *Brandon National Bank v. Hatch*, 16 Nat. Bankr. Reg. 468.

INDORSEMENT.

Where notice and protest not necessary to charge indorser.—Where a firm, which has indorsed a note of one of the partners, becomes bankrupt before the maturity of such note, protest and notice to the firm of its dishonor is not necessary in order to prove it against the joint assets. U. S. Dist. Ct., Massachusetts. *Ex parte Russell*; *In re Paul*, 16 Nat. Bankr. Reg. 476.

LIEN.

Rights of lien creditors against bankrupt estate and purchaser from assignee.—Where a suit against the bankrupt to enforce a lien is pending at the time of adjudication, the lien creditor may, before any final disposition of such suit, prove his demand in the Bankrupt Court, and have it allowed as a lien claim, with all the rights and privileges belonging to it under the bankrupt law. Where property has, by order of the Bankrupt Court, been sold subject to a lien, the assignee's deed providing that such lien is to remain in full force, the purchaser is estopped to deny the validity of such lien. Where the Bankrupt Court has adjudged a claim to be a lien upon property of the bankrupt, it has jurisdiction of an action to enforce such lien against third parties who have purchased said property subject to the lien at a sale by the assignee. U. S. Dist. Ct., Maine. *Bucknam v. Dunn*, 16 Nat. Bankr. Reg. 470.

PARTIES.

Any creditor may intervene on return day.—Any creditor, whose interests are directly affected by the proceedings, may intervene and contest the allegations of the petition with regard to acts of bankruptcy, notwithstanding the debtor fails to appear on the return day. U. S. Dist. Ct., California. *In re Jonas*, 16 Nat. Bankr. Reg. 452.

PARTNERSHIP.

Petition against firm: who may join in: involuntary petition procured by debtor.—Where the requisite number of creditors join in a petition against a firm, it is not necessary that they should all be creditors of the firm. The taking of partnership property, when the firm is insolvent, to pay a debt not a debt of the firm, although each of the partners may be liable for it, is an act of bankruptcy. Where the requisite number of creditors have signed the petition, an adjudication will not be set aside on the ground that such petition was procured by the bankrupts as an involuntary one to avoid the necessity of procuring the assent of the necessary number of creditors in case of a deficiency of assets; there can be no legal fraud in procuring an adjudication on involuntary proceedings unless it should be followed by a discharge that could not be had on voluntary proceedings. An adjudication by default can only be opened at the instance of a party to the default. U. S. Dist. Ct., Vermont. *In re Matot*, 16 Nat. Bankr. Reg. 485.

PENDING ACTION.

Who may prosecute.—A bankrupt may continue to prosecute an action pending at the time of adjudication where the cause of action is one which does not pass to the assignee. Where the cause of action is one which passes to the assignee, he should be notified and, in case of his refusal, the action must be dismissed. An order that a nonsuit be entered in case the assignee did not appear within a specified time, held to be erroneous. Sup. Ct., New Hampshire. *Towle v. Davenport*, 16 Nat. Bankr. Reg. 478.

LIMITATION OF TAXATION IN CORPORATE
CHARTER A CONTRACT NOT ALTER-
ABLE BY STATE LEGISLATION.

SUPREME COURT OF THE UNITED STATES, OCTO-
BER TERM, 1877.

FARRINGTON, Plaintiff in Error, v. STATE OF
TENNESSEE.

The charter of a bank, granted by the State of Tennessee, contained this: "The said company shall pay to the State an annual tax of one-half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes." Subsequently, under the State revenue law, annual taxes were imposed on shares of the stock amounting to one and one-sixth per cent thereon. *Held*, that the provision as to taxation contained in the charter was a contract between the State and the corporation limiting the amount of taxation, and that the revenue law authorizing a greater taxation was in contravention of the contract and invalid under the Federal Constitution.

IN error to the Supreme Court of the State of Tennessee. The opinion states the case.

Mr. Justice SWAYNE delivered the opinion of the court.

This case lies within narrow limits. The question to be decided arises under the Constitution of the United States. The ground of the discussion has been well trodden by our predecessors. Little is left for us but to apply the work of other minds. The facts are agreed by the parties and may be briefly stated.

The Union and Planters' Bank of Memphis was duly organized under a charter granted by the legislature of Tennessee by two acts, bearing date respectively on the 20th of March, 1868, and the 12th of February, 1869. Since its organization it has been doing a regular banking business. Its capital stock subscribed and paid in amounts to \$675,000, divided into 6,750 shares of one hundred dollars each. Farrington, the plaintiff in error, was, throughout the year 1872, the owner of 150 shares of the value of \$15,000.

The tenth section of the charter of the bank declares "that the said company shall pay to the State an annual tax of one-half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes."

The State of Tennessee and the county of Shelby claiming the right, under the revenue laws of the State, to tax the stock of the plaintiff in error, assessed and taxed it for the year 1872. It was assessed at its par value. The tax imposed by the State was forty cents on the hundred dollars, making the State tax sixty dollars. The county tax was one dollar and twenty cents on the hundred dollars, making the county tax one hundred and eighty dollars.

The plaintiff in error denies the right of the State and county to impose these taxes. He claims that the tenth section of the charter was a contract between the State and the bank; that any other tax than that therein specified is expressly forbidden, and that the revenue laws imposing the taxes in question impair the obligation of the contract. The Supreme Court of the State adjudged the taxes to be valid. The case was thereupon removed to this court by the plaintiff in error for review.

A compact lies at the foundation of all national life. Contracts mark the progress of communities in civilization and prosperity. They guard, as far as is possible, against the fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the

truthfulness and integrity of his fellow man. They are the springs of business, trade, and commerce. Without them society could not go on. Spotless faith in their fulfillment honors alike communities and individuals. Where this is wanting in the body politic, the process of descent has begun and a lower plane is speedily reached. To the extent to which the defect exists among individuals, there is decay and degeneracy. As are the integral parts, so is the aggregated mass. Under a monarchy or aristocracy order may be upheld and rights enforced by the strong arm of power. But a republican government can have no foundation but the virtue of its citizens. When that is largely impaired, all is in peril. It is needless to lift the veil and contemplate the future of such a people. *Trist v. Child*, 21 Wall. 441; 1 Montesque's Spirit of Laws, 25. History but repeats itself. The trite old aphorism, that "honesty is the best policy," is true alike of individuals and communities. It is vital to their highest welfare.

The Constitution of the United States wisely protects this interest, public and private, from invasion by State laws. It declares that "no State shall * * * pass any * * * law impairing the obligation of contracts."—Art. I, § 10. This limitation no member of the Union can overpass. It is one of the most important functions of this tribunal to apply and enforce it upon all proper occasions.

This controversy has been conducted in a spirit of moderation and fairness eminently creditable to both parties. The State is obviously seeking only what she deems to be right. The judges of her own highest court, whence the case came here, were divided in opinion.

Contracts are executed or executory. A contract is executed where every thing that was to be done is done and nothing remains to be done. A grant actually made is within this category. Such a contract requires no consideration to support it. A gift consummated is as valid in law as any thing else. *Dartmouth College v. Woodward*, 4 Wheat. 632, 683. An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both the parties. Only a slight consideration is necessary. *Pillans v. Van Mirop*, 3 Burr. 1,663; *Forth v. Stanton*, 2 Saunders, 211; Williams, note 2, and the cases there cited.

The constitutional prohibition applies alike to both executory and executed contracts, by whomsoever made. The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of this court to redress the wrong. *Von Hoffman v. City of Quincy*, 4 Wall. 551.

The doctrine of the sacredness of vested rights has its root deep in the common law of England, whence so much of our own has been transplanted. Kent, then chief justice, said: it is a principle of that law, "as old as the law itself, that a statute even of its omnipotent Parliament is not to have a retrospective effect. *Nova constitutio futuris formam imponere debet et non preteritis* (Bracton, lib. 228, 2 Inst. 292)." *Dash v. Van Kleeck*, 7 Johns. 471; see, also, *Society v. Wheeler*, 2 Gall. 104, and Broom's Legal Maxims, 34.

It was settled at an early period, that it was the prerogative of the king to create corporations, but he could not grant the same identical powers to a second corporation while the prior one subsisted, and unless

the power was reserved, he could not alter, amend, or annul a charter without the consent of the corporate body to which it belonged. To the extent of such assent amendments were effectual, and no further. *Dartmouth College v. Woodward*, *supra*, 675; *Rex v. Passmore*, 3 T. R. 290, and the cases cited.

In the worst times of English history no attempt was made by the Crown to do either of the things in *inritum*.

Near the close of the reign of Charles the I, the charters of many cities were wrested from them. The case of the city of London was the most memorable. It was done under the forms of law by means of a corrupt judiciary. After the close of the Revolution of 1688, and the accession of William and Mary to the throne, the charter of the metropolis was restored and immunity was given to it against such assaults in future by an act of Parliament. 3 Bl. Com. 264; 2 Camp. Lives of Chief Justices, 41.

It is the theory of the British constitution that Parliament is omnipotent. It can pass bills of attainder and acts of confiscation. Gibbon's Autobiography, 14. It can also create and destroy corporations. But these things involve the exercise, not of its ordinary, but of an extraordinary power, not unlike that of the Roman Emperors, sometimes applied in moulding and administering the civil law in special cases.

In *The King v. Passmore*, *supra*, 246, Buller, Justice, said he "considered the grant of incorporation to be a compact between the Crown and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves to" carry out the objects of the grant.

The question whether there is in such cases a contract within the meaning of the contract clause of the Constitution of the United States came for the first time before this court in the *Dartmouth College* case. A college charter was granted by the king before the American Revolution. The State of New Hampshire by several acts of her legislature, of the 27th of June and of the 18th and 26th of December, 1816, attempted materially to change the original charter and modify the government of the institution which had grown up under it. The college resisted. The case was brought here for final decision. It was argued at the bar with consummate ability. The judgments of the justices of this court who delivered opinions were characterized by a wealth of learning and force of reasoning rarely equaled. Perhaps the genius of Marshall never shone forth in greater power and lustre.

It was said, among other things, that the ingredients of a contract are parties, consent, consideration, and obligation. The case presented all these. The parties were the king and the donees of the powers and privileges conferred. Consent was shown by what they did. The consideration was the investment of moneys for the purposes of the foundation, the public benefits expected to accrue, and an implied undertaking of the corporation faithfully to fulfill the duties with which it was charged. The obligation was to do the latter under the penalty of forfeiture in case of "nonuser, misuser, or abuser." On the part of the king there was an implied obligation that the life of the compact should be subject to no other contingency. The question decided in that case has since been considered as finally settled in the jurisprudence of the entire country. Murmurs of doubt and dissatisfaction are occasionally heard, but there has been no re-argument here and none has been asked for. The same doctrine

has been often reaffirmed in later cases. The last one is *The Morris & Essex R. R. Co. v. Yard, Comm'r*, decided at this term. In none of them has there been a dissent upon this point.

In cases involving Federal questions affecting a State the State cannot be regarded as standing alone. It belongs to a union consisting of itself and all its sister States. The Constitution of that union and "the laws made in pursuance thereof are the supreme law of the land, * * * anything in the Constitution or laws of any State to the contrary notwithstanding," and that law is as much a part of the law of every State as its own local laws and Constitution. *Farmers and Mechanics' Bank v. Deering*, 1 Otto, 29.

Yet every State has a sphere of action where the authority of the national government may not intrude. Within that domain the State is as if the union were not. Such are the checks and balances in our complicated but wise system of State and national polity.

This case turns upon the construction to be given to the tenth section of the charter of the bank. Our attention has been called to nothing else.

The exercise of the taxing power is vital to the functions of government. Except where specially restrained, the States possess it to the fullest extent. *Prima facie* it extends to all property, corporeal and incorporeal, and to every business by which livelihood or profit is sought to be made within their jurisdiction. When exemption is claimed it must be shown indubitably to exist. At the outset every presumption is against it. A well-founded doubt is fatal to the claim. It is only when the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported. *West Wisconsin R. R. Co. v. Supervisors*, 93 U. S. 598; *Truoker v. Ferguson*, 22 Wall. 527.

Can the exemption here in question, examined by the light of these rules, be held valid?

Upon looking into the section several things clearly appear: (1) The tax specified is upon each share of the capital stock and not upon the capital stock itself. (2) It is upon each share *subscribed*. Nothing is said about what is paid in upon it. That is immaterial. The fact of subscription is the test, and that alone is sufficient. (3) This tax is declared to be "*in lieu of all other taxes*." Such was the contract of the parties.

The capital stock and the shares of the capital stock are distinct things. The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations. It represents whatever it may be invested in. If a large surplus be accumulated and laid by, that does not become a part of it. The amount authorized cannot be increased without proper legal authority. If there be losses which impair it, there can be no formal reduction without the like sanction. No power to increase or diminish it belongs inherently to the corporation. It is a trust fund held by the corporation as a trustee. It is subject to taxation like other property. If the bank fail, equity may lay hold of it, administer it, pay the debts, and give the residuum, if there be any, to the stockholders. If the corporation be dissolved by judgment of law, equity may interpose and perform the same functions. *Wood v. Dummer*, 3 Mason, 308; *Curran v. Arkansas*, 15 How. 304; *Gordon v. Appeal Tax-Court*, 3 id. 183; *People v. Commrs.*, 4 Wall. 258; *Van Allen v. The Assessors*, 3 id. 584; *Queen v. Arnaud*, 9 Ad. & El. (N. S.) 806; *Bank Tax Cases*, 2 Wall. 209.

The shares of the capital stock are usually represented by certificates. Every holder is a *cestui que trust* to the extent of his ownership. The shares are held and may be bought and sold and taxed like other property. Each share represents an aliquot part of the capital stock. But the holder cannot touch a dollar of the principal. He is entitled only to share in the dividends and profits. Upon the dissolution of the institution each shareholder is entitled to a proportionate share of the residuum after satisfying all liabilities. The liens of all creditors are prior to his. The corporation, though holding and owning the capital stock, cannot vote upon it. It is the right and duty of the shareholders to vote. They in this way give continuity to the life of the corporation, and may thus control and direct its management and operations. The capital stock and the shares may both be taxed, and it is not double taxation. The bank may be required to pay the tax out of its corporate funds, or be authorized to deduct the amount paid for each stockholder out of his dividends. *Angel and Ames on Corp.*, §§ 556, 557; *Union Bank v. The State*, 9 Yerg. 49; 3 Wall., *supra*; *Bradley v. The People*, 4 id. 462; 9 Adolph & Ellis, *supra*; *Nat. Bank v. Com.*, 9 Wall. 353; *State v. Brantn*, 3 Zab. 484; *McCulloch v. Maryland*, 4 Wheat. 436.

There are other objects in this connection liable to taxation. It may be well to advert to some of them.

1. The franchise to be a corporation and exercise its powers in the prosecution of its business. *Burroughs on Taxation*, § 85; *Hamilton v. Massachusetts*, 6 Wall. 633; *Wilmington R. R. v. Read*, 13 id. 264.

2. Accumulated earnings. *State v. Utter*, 34 N. J. Law, 493; *St. Louis Mutual Ins. Co. v. Charles*, 47 Mo. 462.

3. Profits and dividends. *Attorney-General v. Bank, etc.*, 4 Jones' Eq. (N. C.) 289.

4. Real estate belonging to the corporation and necessary for its business. *Wilmington R. R. v. Read*, 13 Wall. 264; *The Bank of Cape Fear v. Edwards*, 5 Ired. 516.

5. Banks and bankers are taxed by the United States: 1. On their deposits. 2. On the capital employed in their business. 3. On their circulation. 4. On the notes of every person or State bank used and paid out for circulation. Revised Laws U. S. 673.

The States are permitted in addition to tax the shares of the national banks. *Id.* 1015.

This enumeration shows the searching and comprehensive taxation to which such institutions are subjected where there is no protection by previous compact.

Unrestrained power to tax is power to destroy. *McCulloch v. Maryland*, 4 Wheat. 316.

When this charter was granted the State might have been silent as to taxation. In that case the power would have been unfettered. *Providence Bank v. Billings*, 4 Pet. 514. It might have reserved the power as to some things and yielded it as to others. It had the power to make its own terms or to refuse the charter. It chose to stipulate for a specified tax on the shares, and declared and bound itself that this tax should be "in lieu of all other taxes."

There is no question before us as to the tax imposed on the shares by the charter. But the State has by her revenue law imposed another and an additional tax on these same shares. This is one of those "other taxes" which it had stipulated to forego. The identity of the thing doubly taxed is not affected by the

fact that in one case the tax is to be paid vicariously by the bank, and in the other by the owner of the share himself. The thing thus taxed is still the same, and the second tax is expressly forbidden by the contract of the parties. After the most careful consideration we can come to no other conclusion. Such, we think, must have been the understanding and intent of the parties when the charter was granted and the bank was organized. Any other view would ignore the covenant that the tax specified should be "in lieu of all other taxes." It would blot those terms from the context and construe it as if they were not a part of it.

There is no reservation or discrimination as to any "other tax." All are alike included. Such is the natural effect of the language used. The most subtle casuistry to the contrary is unavailing. Under such a contract between individuals a doubt could not have existed. It may as well be said the power is reserved to tax anything else as further to tax the shares.

We cannot so hold without interpolating into the clause a term which it does not contain. This we may not do. Our duty is to enforce the contract as we find it and not to make a new one. If it was intended to make the exception claimed from the universality of the exemption as expressed, it would have been easy to say so, and it is fairly to be presumed this would have been done. In the absence of this expression we can find no evidence of such an intent. Our view is fully sustained by the leading authorities upon the subject. We will refer to a few of them.

In *the Binghamton Bridge Case*, it was declared by the act of the legislature authorizing the bridge to be built, that it should not be lawful to build any other bridge within two miles above or below the one so authorized. This court held the inhibition to be a covenant, and upheld and enforced the restriction against the authority conferred by a later act of the legislature authorizing a bridge to be so built. 3 Wall. 78.

In *The Wilmington Railroad v. Read*, 13 Wall. 264, the charter declared that "the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever." The legislature passed laws taxing the entire franchise and rolling-stock and certain lots of land necessary to the business of the company. This court held the exemption to be a contract, and adjudged the laws to be void.

The Union Bank v. The State, 9 Yerg. 490, is a case marked by eminent judicial ability and careful thought. There it was stipulated "that in consideration of the privileges granted by this charter, the bank agrees to pay to the State annually the one-half of one per cent on the amount of the capital stock paid in by stockholders other than the State."

It was held that a further tax on the capital stock was void, but that the State might tax the shares in the hands of individuals.

In the case before us the charter tax is upon the shares. The tax complained of is a further tax on those shares. Without the phrase "in lieu of all other taxes" the parallelism is complete. A further tax could no more be imposed upon the shares in one case than upon the capital stock in the other. The same negative considerations apply to both.

In *The Bank of Cape Fear v. Edwards*, 5 Ired. 516, the charter provided "that a tax of twenty-five cents on each share of stock owned by individuals in said bank shall be annually paid into the treasury of the

State by the president or cashier of the said bank on or before the first day of October in each year, and the said bank shall not be liable to any further tax." It was held that the bank was liable to no other tax, State or county, and that the banking-house and the lot upon which it stood was within the exemption.

Gordon v. The Appeal Tax-Court seems to us conclusive of the case in hand. The legislature of Maryland continued the charters of certain banks on condition that they would make a road and pay a school tax; and it was provided that upon any of the banks complying, the faith of the State was pledged not to impose any further tax or burden upon them during the continuance of their charters under the act.

It was held by this court that this was a contract, and that it exempted the stockholders from a tax levied upon them as individuals, according to the amount of their stock.

Comment here is unnecessary. The points of analogy are too obvious and cogent to require remark. See, also, *The State Bank v. Knoop*, 16 How. 369; *Dodge v. Woolsey*, 18 id. 331, and *The Home of the Friendless v. Rouse*, 8 Wall. 430.

The decree of the Supreme Court of Tennessee is reversed, and the case will be remanded with directions to enter a decree in favor of the plaintiff in error.

UNITED STATES SUPREME COURT ABSTRACT.

AGENCY.

1. *Principal cannot retain property acquired through fraud of agent: acts of government officer.*—Where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party. Judgment of Court of Claims affirmed. *United States, appellant, v. State National Bank of Boston*. Opinion by Swayne, J.

2. *Means borrowed to cover defalcation.*—A firm had borrowed money, belonging to the government, from the cashier of its sub-treasury. In order to enable the cashier to cover up his violation of duty, and in pursuance of an agreement, one of the firm procured a bank officer to purchase gold certificates, which were to be deposited in the sub-treasury, to remain to the subsequent day. The bank officer did so, and a receipt for the certificates was given by the cashier to C, who indorsed it to the bank officer. The receipt entitled its owner to receive gold certificates for those deposited, or their equivalent, on demand. The bank officer had no knowledge of the plan of the firm and the cashier, and the transaction he entered into was a usual one. Held, that the government obtained no title to the certificates, but was liable to return their value to the bank. *Ib.*

CARRIER OF PASSENGERS.

Who is not a gratuitous passenger: stipulation on ticket against carriers' negligence invalid.—Plaintiff below was negotiating, at Portland, Me., with defendant below, a railway company, for the introduction on its road of a patent car coupling, and was requested by defendant to go to Montreal and see one of its officers there, defendant agreeing to pay his expenses. He was given a pass directing conductors to pass him from Portland to Montreal. The pass contained this condition: "The person accepting this free ticket in consideration thereof assumes all risk of all accidents, and

expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or injury to the property of the passenger using the ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket and collect fare." While traveling from Portland to Montreal, on this pass, on one of defendant's trains, plaintiff was injured by defendant's negligence. Held, (1) that plaintiff was carried for hire, in pursuance of an agreement, and not as a gratuitous passenger; (2) that it was not competent for defendant to stipulate against liability for its own negligence in such a case, and it was liable for the injury. *Railroad Co. v. Lockwood*, 17 Wall. 357. Judgment of Circuit Court, Maine, affirmed. *Grand Trunk R'y Co., plaintiff in error, v. Stevens*. Opinion by Bradley, J.

CONSTITUTIONAL LAW.

1. *Provision forbidding special legislation.*—The Constitution of the State of Alabama declares that "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes." An act of the legislature authorized the Wills Valley Railroad Company (a pre-existing corporation) to purchase the railroad and franchises of the Northeast and Southwestern Alabama Railroad Company (another pre-existing corporation); and, after doing so, to change its own name to that of the Alabama and Chattanooga Railroad Company. Held, that there was nothing in this legislation repugnant to the constitutional provision referred to. That provision could not be construed to prohibit the legislature from changing the name of a corporation, or from giving it power to purchase additional property; and this was all that it did in this case. No new corporate powers or franchises were created. Decree of Circuit Court, S. D. Alabama, affirmed. *Wallace, appellant, v. Loomis*. Opinion by Bradley, J.

2. *Priority among mortgages: acts affecting.*—A railroad company issued mortgage bonds upon its road, payable in lawful money. These bonds were guaranteed by the State, and thereafter the company indorsed upon them a promise to pay them in gold. Held, not to affect the priority of the security over a second mortgage on the same property. *Ib.*

NATIONAL BANK.

Indebtedness to, for more than one-tenth of capital recoverable.—Defendant became indebted to plaintiff, a national bank, to an amount exceeding one-tenth of the capital stock of such bank. Held, that the provision of the national banking law (§ 27) forbidding the liabilities of any one person, firm or corporation to a national bank to exceed one-tenth of the capital stock paid in of such bank, did not operate to avoid the contract of indebtedness incurred by defendant, and plaintiff was entitled to recover the amount due. *Harris v. Rummels*, 12 How. 791; *O'Hare v. Second Nat. Bank of Titusville*, 77 Penn. St. 96; *Pangburn v. Westlake*, 36 Iowa, 546; *Vining v. Buckner*, 14 Ohio St. 331. Judgment of Supreme Court of Colorado affirmed. *Union Gold Mining Co., plaintiff in error, v. Rocky Mountain Nat. Bank*. Opinion by Hunt, J.

OFFICER.

Deputy clerk of Federal court, not employee of government.—A deputy clerk of the Supreme Court, of

the District of Columbia, who was appointed by the clerk, worked for him, was paid by him, and performed services which it was the duty of the clerk to perform, and for which the clerk received compensation by fees by litigants therefor; held, not an employee of the government, and not entitled to the additional compensation provided for employees of the government, by joint resolution of Congress of February 28, 1867. 14 U. S. Stat. 569. Judgment of Court of Claims reversed. *United States, appellant, v. Meigs*. Opinion by Miller, J.

PRACTICE.

1. *On whom process against corporation should be served.*—Every corporation has officers who speak and act for it by authority of law, and either by express provision of statute or by the nature of their functions, some one of these officers is the proper person on whom all process of notice must be served, which is necessary to bind the corporation in a judicial proceeding. Judgment of Supreme Court of Appeals, of Virginia, affirmed. *City Council of Alexandria, plaintiff in error, v. Fairfax*. Opinion by Miller, J.

2. *Action to confiscate debt: proceeding in rem.*—Where the purpose of the action is to confiscate a debt due by the corporation to an individual, and the proceeding is, by reason of the absence of the creditor, beyond the jurisdiction of the court, necessarily a proceeding in rem against the debt due him, the service of the process or notice on the debtor corporation, which is necessary to make a valid seizure of the debt, should be made upon some one of the officers of the corporation on whom a similar service would bind it in an ordinary civil suit against the corporation. *Ib.*

3. *Service on municipal corporation.*—By the Code of Virginia such service, in cases of towns and cities, may be made on the mayor, or, in his absence, on the president of the council, or if both be absent, on a councilman or alderman. Service on the auditor of Alexandria not followed by an appearance for that city in the progress of the case, nor by any appearance of the creditor, Fairfax, did not give the court jurisdiction of the indebtedness of the city or Fairfax, and its judgment condemning that debt is void. *Ib.*

4. *Injunction restraining action in State court.*—Except under the bankrupt act, no court of the United States can grant an injunction to prevent a proceeding at law in a State court. Act of March 2, 1793, § 5 1 Stat. 334; Revised Stat. U. S., 136, § 720; *Diggs v. Walcott*, 4 Cr. 179; *Peck v. Jennes*, 7 How. 625; *Watson v. Jones*, 18 Wall. 719. Decree of Circuit Court, E. D. Tennessee, affirmed. *Deal, appellant, v. Reynolds*. Opinion by Swayne, J.

5. *Parties in foreclosure.*—It is well settled that in a foreclosure proceeding the complainant cannot make a person who claims adversely to both the mortgagor and mortgagee a party and litigate and settle his rights in that case. *Ib.*

STATUTORY CONSTRUCTION.

1. *Acts relating to shipping: agreements of seamen.*—The provisions of the statutes (U. S. R. S., § 4511) requiring the agreements of seamen to be signed in the presence of a shipping commissioner refers only to the agreements described in section 12 of the original act; nor does it include those which are excepted from the operation of section 12 by the second proviso to the same section, nor either of the three cases excepted out of the operation of the same section by

the amendatory act subsequently adopted. Decree of Circuit Court of Massachusetts affirmed. *United States, appellant, v. Brig Grace Lothrop*. Opinion by Clifford, J.

2. *When agreements must be signed before shipping commissioners.*—Under the various statutes, the cases in which shipping commissioners must act, or in which the agreement of the seaman is required to be signed in the presence of such a commissioner, are as follows: (1) Where the ship is bound from a port in the United States to a foreign port, not including the ports of the British provinces, or the ports of the West India islands, or the Republic of Mexico, or lake-going vessels touching at foreign ports. (2) Ships of seventy-five tons burden or upward bound from a port on the Atlantic to a port on the Pacific or vice versa. *Ib.*

COURT OF APPEALS ABSTRACT.

AGENCY.

1. *Agent not disclosing principal: what is not a disclosure.*—Defendant, a broker, bought a quantity of grain from plaintiff, saying that it was for the B distillery, and was to be delivered there. Held, not a sufficient disclosure of his principal to relieve the broker from personal liability for the grain. Judgment below affirmed. *Cobb v. Knapp*. Opinion by Church, C. J. [Decided December 4, 1877.]

2. *Subsequent disclosure and action against principal, will not relieve agent.*—The subsequent disclosure of his principals by an agent, and the commencement of an action against them, is not conclusive of an election to hold only them responsible. *Ib.* [Decided December 4, 1877.]

APPEAL.

1. *Appeal to the Court of Appeals: what order of General Term allowing in case not involving \$500, must state.*—An order of the General Term giving to an unsuccessful party, in a litigation involving less than \$500, leave to appeal to the Court of Appeals, without assigning any cause for so doing, is not in compliance with the act of 1874, chap. 322. That act requires that the General Term should state that the case involves some question at law, which ought to be reviewed by the Court of Appeals. Appeal dismissed. *Bastable v. City of Syracuse*. Opinion per Curiam.

2. *Referring to opinion of court below in reports, not substitute for printing.*—Referring to the opinion in the court below, as reported in the Supreme Court reports, is not a substitute for a compliance with the rule of the Court of Appeals, requiring the opinion of the court below to be printed. *Ib.* [Decided January 15, 1878.]

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. *Title vests in assignee on acceptance of trust: filing of bond, etc., not necessary to vest title.*—The statute (Laws 1860, chap. 348) regulating voluntary assignments for the benefit of creditors does not make the giving of the statutory security by the assignees a condition precedent to the vesting of the estate in them as trustees, nor does the failure to give the security within the time limited invalidate the transfer and restore the title of the assigned property to the assignors. *Thrasher v. Bentley*, 1 Abb. N. Cas. 649; *Syracuse R. R. Co. v. Collins*, id. 47; *Julliard v. Rathbone*, 39 N. Y. 375. Order below affirmed. *Brennan v. Wilson*. Opinion by Allen, J.

2. *Assignees who formally accept may not afterward renunciate.*—Where assignees for the benefit of creditors have formally accepted the trust they cannot afterward, by renunciation or disclaimer, throw off or repudiate the duties or responsibilities of the office, or divest themselves of the title vested in them. They can be relieved of their trust only by a court of competent jurisdiction. *Hill on Trustees*, 221; *Shepard v. McEvers*, 4 Johns. Ch. 136; *Cruger v. Holliday*, 11 Paige, 314. *Ib.*

3. *All assignees must unite in conveyance of real estate.*—Where there are several assignees all must unite in the disposal of the trust property, and a deed by a part will not convey title. Accordingly where several assignees were named in the assignment and all accepted the trust, and afterward one renounced and refused to act with the others, and the statutory bond given for the performance of the duties of the assignees did not include his name, *held*, that while title to the trust property could not be conveyed without his uniting in the deed, he was unable, under the statute, to unite in the deed, and a deed executed by him and the other assignees was only a deed of the others and did not operate to convey title. *Ib.* [Decided December 21, 1871.]

EVIDENCE.

Hearsay as to marriage: what will not establish marriage.—To prove pedigrees and marriage, hearsay and traditional evidence is received from necessity. It is not conclusive, but makes a strong *prima facie* case, sufficient for the administration and devolution of property that there was either a formal marriage, which cannot otherwise be proved, or that the parties agreed *per verba de presenti* to a marriage, which was followed by cohabitation. C, an old man, had, during his early years, lived with E, a woman who was not of previous chaste character. There was hearsay testimony that she was called his wife by the neighbors, and that he had admitted on several occasions that she was his wife. A child was born to them, and subsequently they separated, she taking the child. There was evidence that thereafter she joined with him in a deed conveying land as his wife. After she had left he formally married another woman, and they lived together until his death. E outlived C, but during his life she took no steps to vindicate her claim as wife, though poor and dependent upon relatives for support; and she and her son made no claim for a share in his estate. *Held* to show that E was not the wife of C, but that the other woman was. Judgment below reversed. *Chamberlain v. McKibben*. Opinion by Earl, J. [Decided December 11, 1877.]

MUNICIPAL CORPORATIONS.

When common council not agent of city, and city not liable for neglect of duty.—The legislature, in 1866, passed an act wherein commissioners named were empowered to dock the Gowanus canal, in the city of Brooklyn, and to assess the lands adjacent to the canal for the expense. The work was unskillfully done, and the docks constructed sunk and became unfit for use. By Laws 1871, chapter 839, it is provided that the common council of Brooklyn shall cause to be repaired and be rebuilt, at the expense of the city, the ruined docks constructed by the commissioners. It was not shown that the canal was a public highway, and the work to be done was mainly for the benefit of private owners. In an action against the city for damages resulting to the owner of land upon which a

ruined dock existed from a neglect and refusal of the common council to perform the work of rebuilding, *held*, that the common council in reference to the work was the agent of the State, and not that of the city, and the city was not liable for its failure to perform the work. Judgment below affirmed. *N. Y. & Brooklyn S. M. & Lumber Co. v. City of Brooklyn*. Opinion by Church, C. J. [Decided January 15, 1878.]

NEGOTIABLE INSTRUMENT.

1. *Instrument given on agreement in contravention of section 45 of Bankrupt Law, valid in hands of innocent holder.*—A check given upon an agreement in contravention of section 45 of the Bankrupt Law, to an assignee in bankruptcy, for compensation for his services beyond the fees allowed by law, while void in the hands of the payee, is valid in the hands of a *bona fide* holder for value without notice. Judgment reversed and new trial granted. *Cowling v. Altman*. Opinion by Andrews, J.

2. *What sufficient to put on inquiry: check transferred fourteen months after date.*—A check was dated March 8, 1871, and placed by the maker in the hands of another person to remain until the happening of a specified event. On the happening of that event, on May 2, 1872, it was given by the third party to C, upon the order of the payee. On the same day, it was delivered by C to a bank, in payment of a note held by it against a firm of which C was a member, and the note surrendered. In an action against the maker of the check by the assignee of the bank, the defense was that the instrument was given in contravention of the bankrupt law, and was void. *Held*, (1) that the bank was a holder for value; (2) that while the date of the check was such as to put a purchaser on inquiry whether it had been discredited, the fact that it was not delivered to the payee until the 2d of May, 1872, would remove that objection, and the check was not overdue or dishonored, and the bank was bound to make no further inquiry, and the maker was liable to plaintiff upon the check, and could not avail himself of the defense interposed. *Boehm v. Sterling*, 7 Term R. 423, followed. *Ib.* [Decided December 18, 1877.]

PRACTICE.

In selling estates of lunatics: reference an essential requirement.—The provision in section 12, 2 R. S. 54, in relation to the estates of lunatics, requiring that upon the presentation of a petition for an order to sell the estate of a lunatic it shall be referred, etc., is a substantial requirement and cannot be dispensed with, and an omission of it would constitute a fatal defect in the proceeding, rendering invalid the title of land conveyed thereunder. *Pattel v. Torrey*, 65 N. Y. 294. Order below reversed. *In the Matter of Valentine*. Opinion by Church, C. J. [Decided January 22, 1878.]

RECENT AMERICAN DECISIONS.

SUPREME COURT COMMISSION OF OHIO.*

BANK CHECK.

1. *Possession of, by rightful owner without indorsement of payee, does not authorize payment.*—The rightful pos-

* To appear in 30 Ohio St. Reports.

session of a check, made payable to the order of a particular person, confers no authority on the drawee to pay the same to the person having such possession, without the genuine indorsement of the payee. *Dodge v. National Exchange Bank.*

2. *When custom among bankers does not excuse wrongful payment.*—The duty of the drawee, upon acceptance of such check, to pay the same only upon the genuine indorsement of the payee named therein, is not affected by a custom among bankers as to the mode of ascertaining the identity of the person indorsing the name of the payee and receiving payment. If the drawee relies upon false representations as to identity, for which neither the drawer nor payee are responsible, he makes payment to a wrong person at his peril. *Id.*

FRAUDULENT CONVEYANCE.

1. *When voluntary conveyance not void as to future creditors.*—A voluntary conveyance of land made by a husband to his wife, through the intervention of a trustee, will not be held void as to future creditors, on the mere ground that the husband subsequently became insolvent. *Evans v. Lewis.*

2. *When it will be held void as to subsequent creditors.* Such conveyance will be set aside at the suit of a subsequent creditor, only on proof that it was made with intent on the part of the grantor thereby to defraud such subsequent creditor or creditors. *Id.*

3. *Action sounding in tort.*—One having a valid cause of action, sounding in tort, against such grantor, at the time of such conveyance, upon which an action was subsequently brought and judgment recovered, is to be regarded as a subsequent creditor. *Id.*

HIGHWAY.

Change of grade of, entitles adjoining land-owner to compensation.—Where a public highway has been adopted by a municipal corporation as a street, and used the same as such without change of grade for more than thirty years, and lot-owners upon such street have used reasonable care, discretion, and judgment in making their improvements, with a view to future proper and reasonable change of such grade, and the municipal authorities cause a change of grade in such street to be made, which occasions injury to the lot-owner, and the change of grade causing the injury could not, by ordinary care, discretion, and judgment, have been anticipated, such municipal corporation will be liable for the injury. *City of Youngstown v. Moore.*

PATENT RIGHT NOTES.

Non-negotiable note not included in act in relation to.—The act of May 4, 1869 (66 Ohio L. 93), making it a penal offense to take a "promissory note or other negotiable instrument," not containing the words "given for a patent right," knowing the consideration thereof to be a patented invention, does not include in such offense the taking of notes or instruments not negotiable. An indictment which does not show that the note or instrument on which it is founded was negotiable, does not show an offense under the act, and may be met by demurrer. *State v. Brower.*

STATUTE OF FRAUDS.

Verbal contract void by, performed by one party: recovery on quantum meruit.—Although an action cannot be maintained upon a verbal contract not to be performed within one year, yet when such contract has been fully performed by one party, the other having obtained its benefits, he cannot refuse to pay the

reasonable value thereof. T. agreed to work until coming of age, a period of six years or more, for M. Having performed the contract, T. may maintain an action *quantum meruit* for his services. *Towlesley v. Moore.*

CORRESPONDENCE.

THE PROCEDURE RELATING TO THE COLLECTION OF DEBTS.

To the Editor of the Albany Law Journal:

SIR—Now that re-codification and "reform" is the order of the day with our legislature, I wish to suggest that a most excellent opportunity is offered for an amendment to the existing system of procedure relating especially to the collection of debts.

Of course, in their broadest scope, all actions arising on contracts are actions to collect debts, but in this communication it is proposed to use the word "debt" in its common significance among business men and traders, *i. e., a liability arising out of a sale of goods or other property.*

As the law stands at present, it would seem to have been made for the especial benefit of dishonest and falling debtors, and hence for the discomfiture and defrauding of diligent and honest creditors, whenever the latter attempt to recover their claims and debts by an action on contract.

Delay can be interposed, as is known to every lawyer who conducts a commercial practice, and that almost without limit. The defendant meanwhile prepares for the storm and makes every thing safe and snug by the assistance of a friendly creditor or relative, and before judgment can be entered and execution issued, puts his property beyond the reach of process by an assignment for the benefit of creditors. If this proceeding usually carried out the design of the general assignment act, by dividing the debtor's property equitably among all the creditors, it would be well enough, perhaps, and possibly that act gives as beneficial a method of settling up an insolvent's affairs as could be devised and applied by human beings limited and encompassed by their "environment."

Such, however, is not the case. In at least seventy-five per cent of the general assignments made by business houses in this State, I venture to affirm that the moving power and motive that induced them was an intention to hinder, delay and defraud the creditors, or the majority of them, and to give the debtor a chance to pay off his debts at a small percentage and resume business again in better condition, financially, than ever before, though perhaps not in his own name.

The bankruptcy laws of the United States were intended to remedy this evil, but the remedy is worse than the disease itself, on account of the attendant expense and procrastination.

So, also, the many forms of action to set aside fraudulent conveyances, fail to secure justice, because of the extreme difficulty in proving the fraud where the debtor has been at all astute or has acted under unscrupulous legal advice. It is unnecessary to go into further details. Few lawyers have failed to notice the fact and comment upon it, but fewer still have ever seriously attempted to propose a remedy; most of them, perhaps (let it be said with bated breath!) paying more attention to the fat fees and bills of costs that arise from its existence, than to the furtherance

of the interests of the commercial world, by cutting off the dangers that menace the very existence of most of our honest wholesale firms who, while paying dollar for dollar themselves, are constantly defrauded by the defective operation of the very law that was designed to protect them and give them a just reward for diligence in pursuing their legal remedy for a breach of the debtor's contract of payment. It is even maintained, in some quarters, that there can be no effectual remedy devised, on the principle, I presume, that the law can seldom obviate the natural result of a badly diseased moral state in the community in general. This may be true to a certain extent, but can never be an absolute obstacle or rebuke to legislation, until every means has been tried without success to better the existing methods of procedure.

The question then is, what is the remedy? One method advocated, I believe, by the board of trade of the city of Albany, in a petition to the legislature now in session, is to adopt the Massachusetts practice of beginning all civil actions by attachment of the debtor's property. To my mind this would prove a dangerous weapon in the hands of the dishonest debtor and his allies, as well as for the creditor. What would, in my judgment, be a much safer and surer expedient, is the very simple one of amending the sections of the Code relating to the commencement of actions upon contract by inserting a provision that, at the time of the service of the summons and notice or complaint, a copy thereof should be filed and properly docketed in the office of the clerk of the county where the defendant resides or has property, and that thereby a lien should be created for the amount of the claim. That this lien should extend to: First, the personal property of the debtor; second, if not enough personal property to cover it, then to his real property, and should continue until final judgment, unless the defendant gave a sufficient undertaking, such for instance, as the present undertaking by defendant to discharge an attachment, securing the payment of the debt.

This, of course, could be arranged so as to supply the necessary guards and checks upon unfounded claims, and while open to many objections, would still prove a valuable and efficient remedy for the existing evils. At any rate, I venture to suggest it in the hope that some one will give the whole question a thorough examination, and perhaps stir up enough public sentiment to induce the legislature to attempt some such reform. By the way, since Blackstone's theory of property, arising out of possession, has been exploded, and is now generally displaced by the sounder views of the best jurists and political economists, that it originated and still originates in labor, could not a very comprehensive argument be made that the above proposed amendment would be nothing more than an extension of the laborer's or creator's lien for the purchase or repair price of the article created or benefited? Surely it would, as in the mechanic's lien cases, merely substitute the filing and docketing of the claim for the control or possession of the property by the claimant. Vide *Williams v. Tearney*, 8 S. & R. (Penn.) 58, and many other cases.

But there must be a limit to this communication, and though that branch of the subject is tempting, it must be left to some one else to elaborate hereafter. What this letter was meant to do was merely to open up the question for your readers to consider.

Yours, etc.,

T. C. BECKER.

BUFFALO, N. Y., Jan. 29, 1878.

QUERY.

LOWVILLE, February 8th, 1878.

To the Editor of the Albany Law Journal:

SIR—Will you be kind enough to give your opinion in the next number of JOURNAL on the following question:

A was elected commissioner of excise under the provisions of chap. 444 of Laws of 1874, which provides that while holding such office he shall not (among others) hold the office of trustee in an incorporated village. After assuming and discharging the duties of commissioner of excise, he was elected trustee of a village incorporated under the general act, and is now discharging the duties of both offices.

Question: Did his election as trustee vacate the office of commissioner of excise, or did the fact that he held the office of commissioner of excise render him ineligible to the office of trustee, and invalidate his election thereto.

Yours, etc.,

E. McC.

[His acceptance of and qualification for the office of trustee was *ipso facto* a vacation of the office of commissioner of excise. See *People v. Carrique*, 2 Hill, 93; *Studds v. Lee*, 18 Am. Rep. 251; S. C., 64 Me. 195; *Van Orsdale v. Hazard*, 3 Hill, 248; *Magie v. Stoddard*, 25 Conn. 265.—ED. A. L. J.]

COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, February 12, 1878:

Judgment affirmed, with costs—*King v. N. Y. Central, etc., Railroad Company*; *Elghmy v. Barker*; *Reld v. Sprague*; *Merchants' Bank of Canada v. Griswold*; *McKay v. Barnes*; *Grady v. Crook*; *Scotfield v. Doscher*.—Order affirmed, with costs—*In re petition of Littman to vacate assessment*.—Appeal dismissed, with costs—*Mackay v. Lewis*; *People ex rel. Linney v. Campbell*; *People ex rel. McCone v. Green*.—Motion to dismiss appeal granted, with costs of appeal to time of motion, and \$10 costs of motion—*Bensen v. Perry*.—Motion to dismiss appeal denied, with \$10 costs—*Beunett v. Austin*.—Judgment reversed and new trial granted, costs to abide event—*Harrison v. Glover*; *Parr v. President, etc., of Greenbush*.—Order of General Term reversed and judgment on verdict affirmed, with costs—*Evans v. Cleveland*.—Judgment of Supreme Court reversed, so far as it awards costs to the appellant, and modified by directing a feigned issue to be made up and settled, to be tried at the next Circuit Court to be held in Westchester county, instead of remitting the judgment to the surrogate, without costs to either party as against the other in this court—*Sutton v. Ray*.

NEW BOOKS AND NEW EDITIONS.

BAXTER'S (TENNESSEE) REPORTS, VOLUME I.

Reports of cases argued and determined in the Supreme Court of Tennessee for the Middle Division, at the December Term, 1872. Edited by Jere Baxter: Volume I: Nashville.

THIS volume is issued as an individual enterprise on the part of the reporter, who has to depend upon the sale of the work to remunerate him for his services and expenses. The cases are of the year 1872 and 1873, but the succeeding volumes, which will be given as rapidly as the support furnished by the profession

will encourage, will bring the series as rapidly up to the current decisions as is practicable. The head notes are carefully prepared and accurate, and Mr. Baxter has produced a volume that he need not apologize for. Among the cases of value appearing here we notice these: *Fritz v. State*, p. 15; a statute forbidding the sale of "spirituous liquors" on Sunday, *held*, not to forbid the sale of wine. *Hennessey v. Mills*, p. 38; the want of jurisdiction in a United States court to grant a discharge in bankruptcy may be set up to defeat the effect of the discharge in a State court. *Marks v. Borum*, p. 87; killing a thief, while committing petit larceny, no attempt being made to arrest him, is unjustifiable, as in an action for damages for such killing, the act of the thief will not relieve the defendant on the ground that the deceased contributed to his death. *Cain v. Southern Express Co.*, p. 315; a recovery cannot be had on a note given for the purpose of compounding a felony. *Planters' Ins. Co. v. Sorrels*, p. 352; it does not avoid the policy of insurance upon a house insured as a dwelling-house that it was, after insurance, occupied as a boarding-house. *Mayor of Nashville v. First Nat. Bank*, p. 402; to maintain a suit upon an interest coupon of a city bond the bond need not be produced. The index is fair, and the book is well printed and bound.

POWELL'S ANALYSIS OF AMERICAN LAW, SECOND EDITION.

Analysis of American Law, By Thomas W. Powell, Second Edition.. Philadelphia, J. B. Lippincott & Co., 1878

The author of this work, in his preface, says that the volume "is intended only as an outline of the law—as a first book for those who are disposed to make it a study." As a guide to the student, it must prove of value, though as an elementary work, it is not needed by those who have the treatise of Chancellor Kent upon American law. It opens with an introduction containing a chapter on the study of the law, one upon the law in general, and a third upon the application of the law, and the extent of territory of the United States. The body of the work is divided into four books, the first relating to public rights and law, the second to private rights and law, the third to private wrongs and civil remedies, and the fourth to crimes, misdemeanors and their punishments, the well-known divisions of Blackstone being, as will be seen, adopted. The book is carefully written, and the statements of principle appear to be correct. The law given, except when relating to Federal matters, is that of the State of Ohio, so that the work for general readers cannot be safely used out of that State. The student, who is expected to use the work only as a guide or in connection with other standard treatises, will, however, not be misled. The practitioner everywhere will find the book a valuable aid in refreshing his mind upon the first principles of jurisprudence. The present edition contains very few changes from the first one, as in an elementary work such as this, there is little call for changes. The book has a fair index and is well printed.

NOTES.

MESSRS. Appleton and Company have reprinted in a pamphlet form Herbert Spencer's essay on Prison Ethics. The reputation of Mr. Spencer as a thinker and a writer on subjects of this kind is very high, but his works have heretofore been in a form that rendered them inaccessible to very many readers. The subject of the present treatise is one that interests every citi-

zen, and the reading of the very able discussion of it contained in this little pamphlet cannot fail to be of great benefit. The laws at present existing fail to check crime, but this is not the chief objection to them. When a penalty is inflicted under them it is liable to fall upon the wives and children of the criminal with more severity than it does upon the criminal himself. The criminal is confined in prison, but he is clothed, fed and warmed, and in many instances he is not compelled to do any labor. His family, however, suffer because their support is taken away. Ex-Governor Seymour says, "The way we deal with crime is a reproach to our civilization. We shall have no reform until we get the people of our country to look into our system. The work of Mr. Spencer will lead men to think upon these subjects."

The *Solicitors' Journal* thus speaks of the growth of English law during the past year: "As to the growth of English law during the year, there is little to be said. The last session produced several important administrative acts, such as the Prison Act and the Solicitors' Examination Act; but, as regards alterations in the substance of the law, it was almost a blank. There were two or three comparatively small changes in real property law, an amendment of the Factors' Acts, and a useful consolidation of the Settled Estates Acts, but little more. Nor can we point to many judicial decisions of wide-reaching scope or great importance. The recently devised doctrine of the fiduciary relationship of the promoter has been again laid down; and the doctrine of contempt of court, which at one time threatened to assume alarming proportions, has been opportunely checked by the Court of Appeal, which, in reversing a singular decision of Vice-Chancellor Malins, stated that "the exercise of this arbitrary jurisdiction ought to be most jealously and carefully guarded;" that a court "ought not to resort to it except in cases where no other remedy is to be found;" and that it was "a power which ought only to be used in extreme cases." It is in lengthy criminal inquiries and in ecclesiastical law cases that the year has been mainly memorable. The case of *Clifton v. Ridsdale* has probably settled for some time the questions as to external observances; and the case of the Rev. Arthur Tooth, who, after being "attached by his body until he should have made satisfaction for his contempt," succeeded in placing his heel on the neck of Lord Penzance, has brought home to the public at large a profound conviction of the mysterious uncertainty of ecclesiastical law."

Sumner, in one of his letters to Judge Story, related this of Bompas, senior leader of the Western circuit: "In argument he is very earnest and noisy, sometimes confused. Chief Justice Tindal was once asked 'if he thought Bompas a sound lawyer.' 'That will depend,' said the Chief Justice, 'upon whether roaring is an unsoundness.'"

The *Journal of Jurisprudence and Scottish Law Magazine*, for February, contains only two articles of interest outside of Scotland. The subject of "Ademption" is ably considered, and the leading Scotch and English cases bearing thereon considered and compared. "The Liability of Masters and Servants" is the title of the other article referred to, which is devoted to a discussion of the principles enunciated in various Scotch decisions. The editorial matter is, as usual, interesting.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, FEBRUARY 23, 1878.

CURRENT TOPICS.

THE legislature has, so far, passed, in all, twenty-seven statutes, three of which only are public and general statutes. Of these, the first makes an appropriation for continuing work on the New Capitol, the second extends the time for the collection of taxes and the other makes certified copies of all official field books, maps, surveys, records, etc., in the office of the State Engineer and Surveyor evidence in like manner as the originals. There is, however, a large grist of bills in the hopper, and the grinding out process will soon begin in earnest. When there shall be general acts enough to fill four pages we shall issue them in a supplement. The general and public laws so published by us will this year be more fully annotated than heretofore, and will be accompanied by a list of all acts passed and a full index. Those desiring to receive the supplements should send their subscriptions therefor to the publishers.

Dr. Spear this week reviews the decisions of Judge Benedict in the extradition cases of Caldwell and Lawrence, and very conclusively shows them to be bad law, or rather never to have been law at all.

The sixth section of the proposed constitutional amendment in relation to municipal government, which was adopted by the legislature of 1877, having provoked a considerable opposition upon account of its supposed limitation upon the privilege of suffrage, it has been suggested by some, that the present legislature provide for the submission to the people of that section as a separate proposition, in order that it may not prevent the other sections, against which there is no popular clamor, from being sanctioned. The right of the legislature to take such a course is questioned however, and the opinion of several eminent counsel has been given adversely to the course proposed. The counsel are Messrs. Joseph H. Choate, E. Randolph Robinson, Wheeler H. Peckham, and Simon Sterne, and the Hon. George F. Comstock concurs in the conclusions arrived at by them. The opinion is published in the form of a letter to Alexander Hamilton, Esq., of New York, and presents what to us appear to be conclusive reasons why the present legislature

should not pass the amendment in any different form, or provide that the people shall vote upon it in any different form than the one in which it came from the legislature of 1877. According to the views of the counsel, whatever is proposed under article 13 of the Constitution, and agreed to by the first legislature as a single and entire alteration of, or addition to, the Constitution, though it may be made up of several propositions, constitutes an amendment, and is in itself one whole and complete thing, and must be acted on by the subsequent legislature and by the people as one whole and complete thing. They are of opinion, also, that if the propositions of this amendment should be submitted separately to the people, those adopted could not be regarded properly as a part of the Constitution. Upon this point they cite Cooley on Const. Lim. 804, 3d ed. Opinions of Judges, 8 Cush. 573; *Collier v. Frierson*, 24 Ala. 100; *State v. McBride*, 4 Mo. 308. It is also claimed that the sixth section of the amendment is not independent of the remaining sections, but forms an inseparable part of them. Whatever may be thought of the arguments advanced in this opinion, the recommendation that the legislature should abstain from an expedient which would raise the troublesome question whether the amendments have been constitutionally adopted, ought to have great weight. As the counsel say, it is better that the advocates of the amendment openly fail than achieve an apparent half success that would cause "confusion in municipal affairs and almost endless litigation."

In the legislature during the past week but few bills of interest were introduced; one providing that a mortgage upon the property of a corporation formed under the general law shall not be valid unless the consent of two-thirds of the stockholders of the corporation is filed in the office of the county clerk where the property is situated; one providing that in the election of directors of life insurance companies, votes cannot be cast on proxies given more than six months previously; and one forbidding the plea of usury to be set up in actions by or against executors and administrators, being all that we notice. A resolution for the amendment of the Constitution so that members of assembly shall hold office for two years, at a salary of \$1,000 a year, was introduced in the assembly.

The bill forbidding the plea of usury to be set up against executors and administrators above mentioned, is a move in the right direction, and ought to pass. One of the great objections to the law allowing the defense of usury is the temptation it offers to the debtor to commit perjury. A loan of money is made at the regular rate of interest to one who has no property besides that upon which the loan is secured. The witnesses of the transaction

are the borrower and lender, and a friend or relative of the borrower. If the lender dies, and in an action to foreclose the mortgage brought by his personal representative, the defense of usury is set up, the case depends upon the testimony of one unfriendly to, or possibly interested against the plaintiff. This is not merely a possible case, but it is one very likely to occur, and undoubtedly does occur frequently. The law relating to usury is so firmly established that there is little hope of its repeal or essential modification, but we are confident the legislature will see that it is not permitted to be used as a means of fraud and injustice in the manner mentioned.

The connection of riches and insanity has been forcibly made manifest by several cases pending before the courts of New York during the past month or two. The Lord-Hicks' case and that of Miss Dickie have given the newspapers an opportunity to attack the laws relating to lunacy and the estates of persons of unsound mind, and to propose all sorts of changes therein for the purpose of protecting those whose property is liable to tempt their immediate relatives to construe eccentric acts into evidences of insanity. That the laws need amendment is undoubtedly true, but they should not be so altered as to take from the immediate relatives of persons believed to be insane all right to appeal to the courts of law and authorities for power to control such persons and their property. While the immediate relatives of an individual may not always be solicitous after his welfare, as a rule they are so, and they certainly are more to be trusted than a stranger who volunteers to interfere. The subject is one of difficulty, and under the best devised systems will occur cases of wrong and oppression.

The appointment of Judge Blatchford of the District Court to be judge of the Second Judicial Circuit will meet the approval of every one. It is very generally conceded that the higher judicial places should be filled by men who have had judicial experience; but in appointing the Federal judiciary, this principle has been frequently disregarded. A conscientious judge, who performs his duty, has no time, and, as a rule, no disposition to look after his own advancement, and thus the vacancies in the higher courts are sometimes given to inexperienced men who take the trouble to seek after them. The present executive, however, in his selections seems to have adhered to the proper rule.

The Supreme Court of Illinois have just decided in the case of *Law v. People ex rel. Huck*, that the certificates of indebtedness issued by the city of Chicago in excess of the constitutional limit of municipal indebtedness are void, and that the city authorities have no power to levy a tax or make an appropriation to pay such certificates. It appears that the bonded debt of the city has at all times, since

the present State Constitution was adopted, been equal to the limit allowed, which is five per cent on the assessed value of taxable property. The amount of certificates which have been issued reaches several millions of dollars, a portion of which, however, has been paid. The trouble seems to have come from the non-payment of taxes by property owners, and the indebtedness was incurred to meet temporary necessities until the taxes could be collected.

Judge Freedman, in charging the jury in a case tried last week in the New York Superior Court, made some pertinent remarks upon the interesting subject of the value of a lawyer's services. Litigants, and those who have occasion to apply to the profession for service or advice, are too apt to estimate the worth of what is done for them by the time occupied in doing it, and, therefore, are very much dissatisfied, when a charge of a considerable amount is made for what apparently occupied only a few hours or a few days of the counsel's time. But as Judge Freedman says:

"To become proficient in the necessary knowledge relating to all these matters involves years of self-denial, close application and devotion, and a study of almost a life-time. A lawyer's compensation is, therefore, not to be measured merely by the time he actually spends in the discharge of his duties. An advice given in a short interval, but founded upon years of previous acquaintance with the question involved, may, in an important case involving large interests, be worth quite a sum of money."

The popular feeling in reference to lawyers charges is, however, to some extent encouraged by the action of certain members of the bar who, to secure business, underbid their brethren and certain others who habitually make no charge for advice even to those able and willing to pay.

NOTES OF CASES.

IN the cases of *Johnston v. Commonwealth* and *Rolland v. Commonwealth*, recently decided by the Supreme Court of Pennsylvania, and reported 5 W. N. Cas. 49 and 53, some interesting questions in relation to the crime of burglary are discussed. Rolland, one of the defendants, who had, by a systematic course of friendly and business dealing, gained the confidence of the cashier of a bank, called one evening with Johnston, his confederate, at the cashier's residence, which was in the bank building, and rang the door-bell. Being informed by the person who opened the door that the cashier had gone out, Rolland stated that his companion wished to transact some business with the cashier, and that they would call again later in the evening. On their return, some twenty minutes afterward, the cashier having come in, they were admitted without remark. As soon as they were alone with the cashier they attacked and overcome him and

stole a package of money and escaped. The defendants had separate trials. In the case of Johnston, the court held that the entry into the house was a constructive breaking, and that a conviction was proper under a count charging burglary by "breaking and entering." See, as supporting this doctrine, 2 Wharton's Cr. Law, § 1,539; Roscoe's Cr. Ev. 307; 8 Chitty's Cr. Law, 856, citing numerous authorities; *Ducher v. State*, 18 Ohio, 317. In the case of Rolland, the defendant also opened an inner door with the intent to secure another person, and thereafter to go to the bank, which was in another room, and rob it. This was held to constitute burglary, though it was said that it would not be if the door was opened with the intention of escaping. In a previous hearing of the same case on error (82 Penn. St. 306; 22 Am. Rep. 758), a breaking out was held not burglary at common law. But a contrary doctrine was held in *State v. Ward*, 43 Conn. 489; 21 Am. Rep. 665. In *State v. McPherson*, 70 N. C. 239; 16 Am. Rep. 769, where defendant was charged in an indictment with "breaking and entering" a house it was held error to charge the jury that if they believed "the defendant, however he got into the house, broke out of it, he was guilty." See, also, *Clarke's Case*, 2 East's P. C., ch. 15; 1 Hale, 554, where it is said: "If a man enter in the night time by the doors open, with the intent to steal, and is pursued, whereby he opens another door to make his escape, this, I think, is not burglary." And see 4 Black. Com. 223, and note to *Rolland v. Commonwealth*, 15 Alb. L. J. 55.

Whether any of the contracts of an infant are void is a question which has led to some discussion. The rule at one time was understood to be (*Keane v. Bagcott*, 2 H. Black. 511) that when the court can pronounce the contract to be for the benefit of the infant as for necessities, it is good; when to his prejudice, it is void, and where the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant. In *Harner v. Dipple*, 31 Ohio St. 73, it is said that the current of more recent decisions repudiates the distinction between void and voidable contracts on account of their prejudicial nature, and holds them all to be voidable only. In this case it was held that an undertaking by an infant as surety for the stay of execution is not void, but only voidable, and when ratified by him after arriving at majority, becomes a valid and enforceable contract. In *Owen v. Long*, 112 Mass. 403, a surety contract was held to be voidable only, for the reason that such contract, as matter of law, cannot be said to be necessarily prejudicial to the surety. Also, an account stated is held to be voidable only. *Williams v. Moor*, 11 M. & W. 255. Also, a conveyance by lease and release. *Touch v. Parsons*, 3 Barrows, 1794. In *Whitney v. Dutch*, 14 Mass. 457, it is said: "Perhaps it may be assumed as a principle that all simple contracts by infants, which are not founded on an illegal consideration, are strictly not void, but only voidable, and may be made good by ratification. They remain a legal *substratum* for a future assent, until avoided by the infant; and if, instead of avoiding, he confirm them, when he has legal capacity to make a contract, they are, in all re-

spects, like contracts made by adults." And in *Reed v. Batchelder*, 1 Metc. 559, it is said: "The question what acts of an infant are voidable and what void is not very definitely settled by the authorities; but, in general, it may be said that the tendency of modern decisions is to consider them as voidable, and thus leave the infant to affirm or disaffirm them when he comes of age, as his own views of his interest may lead him to elect." See, also, the following cases, which are to the effect that an infant's contract of suretyship is merely voidable, and may be ratified. They also show, with more or less force and directness, that the distinction between void and voidable contracts of infants, on the ground of benefit or prejudice, is not sound. *Curtin v. Patton*, 11 Serg. & R. 305; *Hindly v. Marganitz*, 3 Barr, 428; *Gatchin v. Cromach*, 13 Ver. 330; *Vaughn v. Darr*, 20 Ark. 600; *Shropshire v. Burns*, 46 Ala. 108; *Williams v. Moore*, 11 M. & W. 256; *Fetrow v. Wiseman*, 40 Ind. 148; *Fonda v. Van Horne*, 15 Wend. 631; *Scott v. Buchanan*, 2 Humph. 468; *Cole v. Pennoyer*, 14 Ill. 158; *Cummings v. Powell*, 8 Texas, 80; 1 J. J. Marshall, 296; *Mustard v. Wohlford's Heirs*, 15 Grattan, 329.

In *State v. Hyer*, 10 Vroom (39 N. J. Law), 598, it is said that although the practice of courts is to advise juries not to convict a defendant on the uncorroborated testimony of an accomplice, yet a conviction founded on such evidence is strictly legal. This doctrine is supported by high authority. In *Atwood and Robbins' case*, 1 Leach's C. C. 464, which was a trial for robbery from the person, the only evidence to identify the prisoners and connect them with the robbery was the testimony of an accomplice, that he and defendants were the persons that committed the crime, and a conviction was held legal. In *Re v. Durham*, 1 Leach's C. C. 478, the case was permitted to go to the jury upon the sole evidence of an alleged accomplice, the judge stating that the twelve judges who sat in the *Atwood and Robbins' case* were unanimously of the opinion that the practice of rejecting an unsupported accomplice was rather a matter of discretion with the court than a rule of law. In *Re v. Jones*, 2 Campb. 131, Lord Ellenborough remarks, "no one can reasonably doubt that a conviction is legal, though it proceed on the evidence of an accomplice. Judges in their discretion will advise a jury not to believe an accomplice unless confirmed." In *Re v. Wilkes*, 7 C. & P. 272, Alderson, B., said to the jury, "you may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony." To the same effect see *Reg. v. Farlar*, 8 C. & P. 106. In *Reg. v. Stubbs*, 33 E. L. & Eq. R. 552, it is said "it is not a rule of law that accomplices must be confirmed in order to render a conviction valid, but it is usual in practice for the judge to advise the jury not to convict on such testimony alone, and jurors generally attend to the judge's direction, and require confirmation, but it is only a rule of practice." In 1 Wharton's Cr. Law, § 783, the author states that the preponderance of authority in this country is that a jury may convict a prisoner on the testimony of an accomplice alone, though the court may at its discretion advise them to acquit unless such testimony is corroborated on material points, and numerous authorities from different States are given in support of this statement. In Pennsylvania, the statute establishes a different rule. If the credibility of the accomplice be otherwise impeached, it is ground for new trial. *People v. Haynes*, 55 Barb. 450.

THE CASES OF CALDWELL AND LAWRENCE.

BY SAMUEL T. SPEAR, D. D.

ORDINARILY, treaties are simply compacts between nations, generally made by their executive heads, possessing in themselves no legislative character whatever, binding the faith of the contracting parties, and, as to their application and construction, the subjects of executive and diplomatic rather than judicial consideration. The Constitution of the United States, while not discarding these principles, nevertheless, in its sixth article, gives to the treaties of the United States the attributes of law, and makes them a part of "the supreme law of the land." As such, they furnish an imperative rule for the guidance of courts, both State and Federal.

The explanation of this doctrine by the Supreme Court of the United States, in *Foster v. Neilson*, 2 Pet. 253, is that where a treaty "operates of itself, without the aid of any legislative provision," it is "to be regarded in courts of justice as equivalent to an act of the legislature," and that where it requires legislation to carry it into effect, "the legislature must execute the contract before it can become a rule for" courts. In both cases the treaty is a law only in its internal operation among the people of the United States; and as it respects a foreign nation, it is merely a contract between the two governments, pledging their faith in reference to the matters involved. Its municipal character has no extraterritorial action, and, of course, cannot affect other countries or their rights.

The express stipulations of the extradition treaties of the United States were, in a previous article, entitled, "The Extradition Remedy," considered with reference to the question whether they imply an obligation as between the contracting governments, that a person extradited shall be tried only for the offense for which he was demanded and surrendered, thus excluding the right of trial or detention for all other offenses committed prior to his extradition. The answer to this question was that there is such an obligation, not, indeed, stated in positive terms, but implied in the express provisions of these treaties, and that this construction is equally implied in the legislation of Congress to carry them into effect.

It is not proposed here to reargue this question. What we now say is that the Constitution makes this implied obligation, if real, a part of "the supreme law of the land," binding upon courts in all cases to which it applies, and, as a law, superior to any State constitution or any State enactment, and superior even to an anterior law of Congress in conflict with it. It gives to the extradited person a right arising under these treaties which courts of justice in this country are bound to respect. This results from the reality of the obligation, which,

having already argued this point, we shall for the most part here assume.

Two of the cases in which the question was considered by the courts of this country, whether a person surrendered under a treaty can be put on trial for any other than the extradition charge, came before the Circuit Court of the United States for the Second Circuit, and were decided by Judge Benedict. These cases it is proposed to examine in this article.

The first case is that of *The United States v. Caldwell*, 8 Blatchf. C. C. R. 181, decided in January, 1871. Caldwell, in 1870, was extradited from the Dominion of Canada on the charge of forgery, for which he was not tried at all, but was indicted, tried, convicted and punished for bribing an officer of the United States, which was not an extraditable offense under the treaty of 1842 with Great Britain. (See Clarke on Extradition, sec. ed., pp. 107, 108.) He raised before Judge Benedict the question of the court's jurisdiction to try him for any offense, committed prior to his extradition, other than the one for which he had been delivered up by the Canadian authorities. The Judge held the plea to be bad, and gave him liberty to withdraw it and enter a plea of not guilty. The following extract contains the substance of the deliverance of the Judge in respect to the question of jurisdiction:

"I am of the opinion that the relief could not be granted, for the reason that the person of the prisoner is not within the jurisdiction of the United States by virtue of any warrant issued out of this or any court. The prisoner was brought within the jurisdiction of the United States by virtue of a warrant of the executive authority of a foreign government, upon the requisition of the Executive Department of the Government of the United States; and, while abuse of extradition proceedings, and a want of good faith in resorting to them, doubtless constitute a good cause of complaint between the two governments, such complaints do not form a proper subject of investigation in the courts, however much these tribunals might regret that they should have been permitted to arise. * * * But whether extradited in good faith or not, the prisoner, in point of fact, is within the jurisdiction of the court, charged with a crime therein committed; and I am at a loss for even a plausible reason for holding, upon such a plea as the present, that the court is without jurisdiction to try him. * * * And I cannot say that the fact that the defendant was brought within the jurisdiction by virtue of a warrant of extradition for the crime of forgery affords him a legal exemption from prosecution for other crimes by him committed."

The doctrine here stated is that Caldwell, having been brought within the jurisdiction of the United States, not by virtue of a warrant issued by the court or that of any court, but by the surrender of a foreign government in compliance with a requisition made by the United States under the provisions of a treaty, and being there duly charged with crime, could not, as to the crime for which it would be

allowable to put him on trial, make any appeal to the treaty or the extradition proceedings under which he was thus brought into the jurisdiction. The court did not examine the treaty or pass any judgment upon its provisions, and did not consider for what crime or crimes Caldwell had been extradited. Whether the proceedings were in good or bad faith was a matter of no consequence, except as between the two governments. These questions were immaterial, regarded as affecting the jurisdiction of the court to try the prisoner for any offense charged against him, whether it was or was not the crime for which he had been demanded on the one hand, and surrendered on the other. No plea based upon the treaty or the proceedings under it was pertinent on his lips. Such we understand to be the substance of this deliverance.

Bearing, then, in mind that every treaty of the United States, that is self-executing by its own terms, or for whose execution Congress has provided by law, is a part of "the supreme law of the land," and, as such, binding upon courts, and that Congress had provided for the execution of the extradition stipulation of 1842, with Great Britain, and that consequently that stipulation was a part of the law of the land, we propose briefly to compare the ruling of the Judge with this stipulation. Take the following points :

1. The treaty enumerates seven specific crimes as the only ones for which extradition can be had at all, and bribing an officer of the United States is not one of these offenses. By obvious implication the treaty limits the remedy which it secures to the list of crimes enumerated. If this be not so, then the enumeration is without meaning and without practical efficacy. And yet Judge Benedict, in effect, says that when possession of the accused person has been obtained under the treaty, the court may proceed to try him for any offense, whether within the list of extradition crimes or not.

2. The treaty says that a specific crime or crimes must be "charged" as the basis of the demand, and the ground of delivery, and that this charge must fix the *locus delicti* in the demanding country, and allege that the criminal has escaped from its justice and sought asylum, or is found within the country on which the demand is made. There can be no extradition without such a charge. And yet Judge Benedict, in effect, says, that such a specific charge having been made, and custody of the accused having been thus obtained, it is at the option of the government gaining the custody to abandon the charge altogether if it shall so please, and put the person on trial for an offense not only not within the extradition list, but not at all named or contemplated in the proceedings.

3. The treaty says that the delivery of the person accused shall be made only upon a specified

amount of evidence in support of the charge, and that the government asked to make the delivery is to be the judge whether the crime charged is within the extradition list, and, if so, whether it is proved by evidence sufficient to call for the surrender. And yet Judge Benedict, in effect, says that when the accused party has been delivered upon evidence deemed sufficient by the delivering government, he may be tried and convicted of a crime not only not within the extradition list and not charged at all in the proceedings, but also one in respect to which not a particle of evidence in proof thereof was presented to or considered by the government that made the surrender. The right of that government, growing out of the stipulation in respect to evidence, is entirely set aside by this theory.

4. The treaty, in virtue of the above provisions, clearly implies that the right of asylum, in the country where the fugitive is found, is by the delivery impaired and withdrawn only to the extent and for the purpose specified in the extradition proceedings. And yet Judge Benedict, in effect, says that the moment the receiving government gets possession of the fugitive, the right is withdrawn to the fullest extent and for all purposes.

5. The treaty, in its implied obligations as arising from its own provisions, is a law of the land, and as such, a rule for the guidance of courts in settling any question of jurisdiction or of individual rights to which it is applicable. And yet Judge Benedict, in effect, and that, too, without inquiring whether the implied obligation, as claimed by Caldwell, was real or not, says that courts have nothing to do with this question one way or the other. The plea of Caldwell was bad, though he appealed to a treaty as its basis.

We confess ourselves unable to place the ruling of the Judge and the treaty of 1842, with Great Britain, side by side, without coming to the conclusion that the two are in palpable conflict. If the former stands as good law, it must stand at the expense of the latter. We do not believe that it is good law.

The fact in this case is that Caldwell was extradited for an offense for which he was not tried at all, and was tried and punished for an offense for which he was not and could not have been extradited. The jurisdiction was not used for the purpose for which it was gained, and was used for a purpose for which it was not and could not have been gained. It is difficult to conceive of a proceeding under the forms of law more entirely foreign to the nature and design of the extradition remedy, or more inconsistent with the implied obligation that results from the express stipulations of the treaty of 1842, with Great Britain, and, therefore, with that provision of the Constitution which makes a treaty

a part of the law of the land, and gives to every party, when standing before a court, whatever rights grow out of this fact. Any rule of criminal practice that can be followed only at the sacrifice of a treaty is constitutionally, in that connection, a bad rule, whatever the books may say about it as a general rule. The jurisdiction of a court over a person placed at its bar, and there charged with crime, is subject to whatever qualification the express or implied obligations of a treaty of the United States may impose, and that, too, because the treaty has the authority of a *supreme law* for the government of that court. It is both the right and the duty of the court to hear a plea founded on a treaty, and secure to the party making the plea whatever rights the treaty secures. The question presented is one of law.

The other case is that of *The United States v. Lawrence*, 13 Blatchf. C. C. R. 295, decided in March, 1876. Judge Benedict, after saying that "this case comes before the court upon a demurrer interposed by the United States to a rejoinder filed by the defendant," proceeds to make a statement in respect to the pleadings. This statement, though not positively declaring the fact, naturally gives the impression that the United States were moving for the trial of Lawrence on the charge of all the offenses for which he was indicted, all of them "being forgeries, alleged to have been committed within the jurisdiction of this court, and all, by statute, offenses against the United States." One of the items in the plea of the defendant, as stated by the Judge—the only one with which we are concerned—is "that the offenses with which the accused is charged in the indictment are not the offenses on which the surrender to the United States was grounded, but are other and different crimes from those specified in said warrant of extradition, and that he has been held in custody for the crimes specified in the warrant of extradition, but he has not been tried for either of said offenses," and that for this reason he claims that the "court has no jurisdiction to try the present indictment" until the accused shall have a reasonable time, "after his trial for the crimes specified in the extradition warrant," to return to her Majesty's dominions. The replication filed to this plea, as stated by the Judge, admits some of its allegations and denies others, but insists "that by the laws of Great Britain and the United States, as well as by the practice of both parties to the treaty, no limitation exists as to the number and character of the offenses for which a person extradited may be tried." The rejoinder filed by the defendant is stated to be a repetition of the facts set forth in the plea, "without substantial change." To this rejoinder the Government filed a general demurrer, and thus the cause came before the court on the demurrer.

Such is the statement of the case; and although, in his deliverance, the Judge nowhere explains the indictment on which Lawrence was arraigned, but confines himself mainly to making a response to his plea and rejoinder, one would infer from both the plea and the replication, as well as from the deliverance, that it was the purpose of the Government to try the defendant on all the charges brought against him, whether they were included in the extradition warrant or not. Was this the fact?

Secretary Fish, in his letter of May 22, 1876, replying to the statement of Lord Derby that her Majesty's Government had been "assured of the intention of the United States Government to try Lawrence for other than the extradition crime, for which he was surrendered," says: "Her Majesty's Government has never been thus assured, and for the very good reason that the Government of the United States has never reached any such conclusion, and has neither expressed nor formed any such intention:" *Foreign Relations of the United States*, 1876, p. 243. This letter expressly reverses the impression one would receive from the proceedings before Judge Benedict in the previous March.

Mr. George Bliss was the District-Attorney of the United States who had the direct charge of this case; and in his letter of November 22, 1877, written in response to a previous one of inquiry as to the facts, he gives a general history of the case from its inception to its final completion. Upon his authority we make the following statement:

1. Several indictments were found against Lawrence, charging him with a number of separate and distinct forgeries, certified copies of some of which accompanied the requisition upon the British Government for his delivery as a fugitive criminal; and afterward, for special reasons, thirteen commissioner's warrants were also sent, charging him with as many different forgeries. 2. The examination of the case in England before Sir Thomas Henry resulted in establishing "in complete detail" the charge of forgery made in one of these warrants, for which he was afterward indicted. 3. Sir Thomas Henry certified the charge to the Home office of the British Government, and on the basis thereof Lawrence was delivered up, and by the agent of the United States brought to this country, and, passing into the hands of the marshal, was committed to prison. 4. When all the facts in connection with the proceedings in London became known to the United States Government, "care was taken that Lawrence should not be arraigned upon or asked to plead to any charge, except the indictment for the forgery which was unquestionably proved clear through before Sir Thomas Henry." 5. As a matter of fact, he was never arraigned upon any other charge, although his counsel in their plea and for their own purposes "set up the contrary." 6. Soon after

Judge Benedict rendered the decision reported in 13 Blatchf., *supra*, Lawrence pleaded guilty to the charge specified in the warrant of extradition, under an arrangement which we give in the following language of the District-Attorney:

"Lawrence, I feel at liberty to say, was allowed to plead guilty to the charge on which he was extradited, under a written agreement to render aid in convicting others and recovering money for the Government, in consideration of which a motion for sentence was postponed to enable him to furnish the aid. But the discretion when he should move for sentence was left wholly in the hands of the District-Attorney; and it was further arranged that he (Lawrence) was not to expect a sentence of less than two years additional to the year he had already been in prison. * * * * What influenced the Government beyond what appeared in the agreement with Lawrence I never knew, though I could guess as near as most Yankees. That there was something beyond the mere aid in convicting others and recovering money, there is no doubt."

District-Attorney Woodford, in his letter of November 19th, 1877, says: "The dockets of the Circuit Court show that, on May 25th, 1876, Mr. Lawrence pleaded guilty and gave bail and was released, sentence not being moved." The court did not sentence him because no motion was made to this effect; and the motion was omitted in consequence of the arrangement above described. This arrangement, though directly made by Mr. Bliss, was really planned by "the Cabinet at Washington," two of whose members came to New York and "saw Lawrence and his papers."

These statements show that the Government never did arraign Lawrence upon any other than the extradition charge, and never declared any such intention, though in the Winslow correspondence, Secretary Fish asserted the right to do so. The deliverance of Judge Benedict seems to be sustaining this right, not as an abstract question, but as a right that was then sought to be exercised. He set aside "the plea to the jurisdiction and all subsequent pleadings" in the case, and gave "liberty to the defendant to plead anew to the charges in the indictment contained." Unless otherwise informed, one would suppose that at least some of these "charges" passed beyond the circle of the extradition warrant. If they did not, then there was really no issue between the prosecution and the defendant, except the truth of the extradition charge, and no pertinency in the plea of Lawrence to the indictment on which he was arraigned.

Judge Benedict, in his deliverance, considers the several points set up in the plea of the defendant, one of which, as stated by the Judge, was "that all extradition proceedings, by their very nature, secure to the person surrendered immunity from prosecution for offenses other than the one upon which the surrender was made." It is in relation to this

question only that we propose to examine this deliverance.

1. Having adverted to the fact that the same question was considered and settled in *The United States v. Caldwell*, *supra*, and also referred to the decision in *Adrian v. Lagrave*, 59 N. Y. R. 110, the Judge proceeded to say: "This ground of defense is, therefore, dismissed with the remark that an offender against the justice of his country can acquire no rights by defrauding that justice. Between him and the justice he has offended no rights accrue to the offender by flight. He remains at all times, and everywhere, liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm."

There certainly is no objection to these general propositions, provided the phrase, "he comes within the reach of its arm," be understood to mean an ordinary coming within the reach of offended justice, or an ordinary arrest, and provided still further, that a prosecution for the offense is not excluded by limitation of time. The law, as a general principle, operates upon criminals whenever and wherever it can find them, and brings its processes of trial and punishment to bear against them.

But if this coming "within reach of its arm" means that a person accused of crime is brought within the jurisdiction through the interposition of another government that has consented, upon specified terms and proceedings, to arrest him in its own territory, to withdraw from him the right of asylum in that territory, and to deliver him up for a distinctly expressed purpose, as was the fact in the case of Lawrence, and is the fact in every case of extradition, then the question is most materially changed. The rights of another government and the obligations due to that government are involved in the very nature of the transaction. The accused party is in custody because that government has chosen to give the custody, not for an offense committed against its own laws, but against those of another country; and whatever rights are secured to him, as incidental to the terms of the extradition, whether express or implied, must be respected, or the terms themselves will be violated.

The general propositions of Judge Benedict, however true and just in ordinary cases, must therefore be taken with those modifications and limitations which are imposed by an extradition treaty. This is especially the case when the fundamental law, as is the fact in this country, makes the treaty a part of the supreme municipal law, and hence an imperative rule to guide the action of courts. The propositions in application to an extradited person are subject to this qualification. Unless so qualified, they are not true.

2. The Judge further says that "the language of the treaty is calculated to repel the idea" set up by the defendant, "for it declares that the offender

shall be delivered up to justice—a significant and comprehensive expression, plainly importing that the delivery is for the purposes of public justice, without qualification." Whether this is a correct construction of the treaty or not depends entirely upon the connections in which the phrase "delivered up to justice" is used; and to these the Judge makes no reference.

It so happens that the treaty specifies seven crimes as the only ones for which there shall be any delivery; that it requires in each case a distinct charge of a definite crime or crimes within the list; that this crime, or these crimes, must be proved to the satisfaction of the government asked to make the delivery; and that by these terms, which are express parts of the treaty, the "justice" referred to in it is and must be that, and that only, which lies within the circle of the terms. The connections conclusively show that the delivery is *not* for "the purposes of public justice, without qualification." It is just the reverse. It is for a specified purpose, clearly stated and carefully guarded in the treaty; and this is a "qualification." To detach the phrase from its connections, and then impose a meaning upon it *ad libitum*, is not interpreting the treaty at all. There can be no delivering up to justice under this treaty for more than some one or more of seven particularly enumerated crimes, or for any one or more of these crimes, without a formal charge designating the crime or crimes for which the delivery is asked, or even then unless the crime or crimes charged shall be proved, by sufficient evidence.

If this does not mean that the "justice" referred to shall be limited and qualified by these terms, then what does it mean? The conditions associated with the delivery, and forming a vital part of the transaction, show that what was so plain to the Judge is just the opposite of what he states it to be. It is not possible, with his understanding of the treaty, to invent a respectable reason for its provisions in respect to the crimes for which extradition may be had, and for the proceedings necessary to secure it. Why is extradition surrounded with these provisions if they are not meant to be limitations upon it and its purposes.

3. Reference was made by the Judge to the Act of Congress passed in 1848, by which the Secretary of State is authorized to order the offender "to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign government, *to be tried for the crime of which such person shall be so accused*, and such person shall be delivered up accordingly." The words in italics are precisely the words used in the British act, passed soon after the negotiation of the treaty. Judge Benedict, in his comment upon these words, says: "The provision of the Act of 1848 is within the

broad provision of that treaty, but it does not restrict the operation of that provision; and it may be safely assumed that, if the intention to limit the effect of, or give a construction to, that or any other treaty had been entertained—assuming such a function to belong to a statute of this character—that intention would have been plainly expressed." Let us look at this language.

By "the broad provision of that treaty" the Judge evidently means a provision for the delivery of the accused person "for the purposes of public justice, without qualification." This is a construction of the treaty which, as we have just shown, is in conflict with its express terms. The treaty contains no such "broad provision." The legislative acts of the two governments for its execution are not "*within* the broad provision of that treaty," but simply parallel with it, neither restricting nor enlarging its operation. What they propose is that the person who, according to the provisions of the treaty, *should* be delivered up, *shall* be so delivered. For what purpose? The answer of both acts is that he may be "tried for the *crime* of which such person shall be *so accused*." The phrase "so accused" refers to the proceedings which have been taken in the case, and which have resulted in making and establishing the specific accusation according to the provisions of the treaty. While there is no attempt in either act to change the treaty in any way, there lies upon the very face and in the language of both acts the distinct implication, which equally lies in the express terms of the treaty, that the person delivered up is to be tried *only* for the offense "charged" within the limits of the extradition list, and proved by the proper evidence, and of which he has been "so accused." Both acts point directly to this offense, and to no other; and this is just as true of the treaty.

Now, to infer, as Judge Benedict does, that the party having been delivered up for the crime of which he has been "so accused," may be tried for other offenses, because there is no express declaration that he shall not be so tried, is not only to draw a conclusion where there are no premises, but to run counter to the plain and natural implication of the language. If a principal should direct his agent to invest a thousand dollars in a given stock, and the latter should make the investment in some other stock, it would be rather a sorry answer for the faithless agent to say that he was not *expressly* directed not to make the investment he did make; and yet his logic and that of Judge Benedict, in this case, would not materially differ.

4. The Judge also refers to the act of Congress passed in 1869 for the protection of extradited persons brought to this country, against "lawless violence;" and he is entirely correct in limiting the purpose of this act to such protection. Yet the act, like that of 1848, proceeds upon the assump-

tion that the party extradited is to be tried only for the offense for which he was extradited. The President is authorized to provide for his protection "against lawless violence until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter." It is a little remarkable that this language, forming a part of the act, should have escaped the attention of the Judge. It shows that Congress, when enacting the law, had no idea that the party delivered up to the United States would or could be tried for any other crimes than those "specified in the warrant of extradition." This is the only trial referred to in the statute; it is the only trial of which Congress thought as arising from the treaty; and nothing can be more foreign to the clear implication of the language than the idea that the case admits of any other trial. The understanding of Congress is clearly indicated by the words used, and not the less significantly because it incidentally appears.

5. The Judge further says that it has not been "made to appear that any such construction of the treaty of 1842," as excludes trial for other offenses than those specified in the extradition proceedings, "has been adopted by the Executive Department of either Government." We do not know precisely what did or did not appear; yet there are some facts in relation to the matter that might have appeared.

It is a fact that Lord Derby, in his letter of February 29, 1876, to General Schenck, then our Minister to Great Britain, written prior to the deliverance of Judge Benedict, adverted to the case of Lawrence and to the impression of the British Government that the United States Government meant to try him for other than the extradition offense, and said that this would be contrary to the implied understanding "which Her Majesty's Government had previously supposed to be practically in force," and for this reason required some assurance in regard to Winslow—whose case had then just arisen. This fact existed when Judge Benedict said that it had not been made to appear that the Executive Department of either Government had adopted such a construction of the treaty of 1842, as would preclude a trial for other than the extradition charge. *Foreign Relations of the United States, 1876, p. 207.*

It is further a fact that the British Parliament, in 1870, had enacted a law to which the Judge refers, and which provides expressly that British courts shall try extradited persons only for the crime or crimes proved by the facts on which their surrender was grounded, and which also provides that the Executive Department of the British Government shall not deliver up any fugitive criminal, without an assurance either given by law or by arrangement that he will not be tried for any but the extradition

charge, until he has been restored or had an opportunity of returning to Her Majesty's dominions. Such was the law of Great Britain, and had been for six years, when the Judge made the statement above referred to.

It is still further a fact that when the question of a new extradition treaty was under consideration in 1870, the British Government informed Secretary Fish that any stipulation for trial for any other than the extradition offense "would be inadmissible." *Foreign Relations of the United States, 1876, p. 228.*

It is also a fact that the Attorney-General of the United States, having "a long record and an opinion of Judge Benedict" in regard to the Lawrence case placed before him, and by mistake being led to suppose that the District-Attorney designed to put the prisoner on trial for offenses not included in the extradition warrant, addressed a letter to him on the 22d of December, 1875, which speedily found its way into the public press, expressly directing that Lawrence should be tried upon the extradition "charge and that only," and saying that "grave political reasons" demanded this course. *Id. p. 229.* This letter shows that the Government of the United States was apprised that the British Government was dissatisfied with the course which, as it supposed, was about to be pursued toward Lawrence. It is not true that, when Judge Benedict made his deliverance in the month of March, the British Government accepted or adopted his construction of the treaty of 1842, but is true that it most explicitly rejected it.

It is also a fact that when Lawrence was arraigned before the Judge and made his plea, he was by the express order of the Government arraigned only for the extradition charge, and that the Government had never expressed any purpose of putting the theory of Judge Benedict into practice. The letter of Mr. Bliss, the District-Attorney, previously referred to, sets forth the former of these facts, and that of Secretary Fish, also previously referred to, declares the latter fact. The Government of the United States was not doing, and was not seeking to do, but was cautiously omitting to do, what Judge Benedict entered into an elaborate argument to prove that it had the right to do. Lawrence stood before him on an indictment charging the very crime for which he had been delivered up, and there was no expressed purpose to arraign him upon any other charge.

Such were the facts when Judge Benedict said that it had not been "made to appear" that "the Executive Department of either government" [had adopted a "construction of the treaty of 1842" which excluded trial for any but the extradition charge. How far he was informed of these facts we do not know; yet he certainly was mistaken as to the position of the British Government, and he made an argument to prove a right which the Gov-

ernment of the United States was not attempting to exercise in respect to the party arraigned before him. His reference to the case of Heilbronn, which occurred in 1854, is not pertinent, as we shall show in another connection, since the prosecution was a private one, and the British Government did not at the time know that the prisoner had been tried for any offense other than the one for which he was surrendered. The case of Burley, to which he refers, and which we shall consider hereafter, fails to establish a practice as between the two governments; and all that there is in the case consists, not in what was done with the prisoner, but in what was *said* by the then law-officers of the British Government, but not diplomatically said to the United States.

There are several other points in the plea and rejoinder of Lawrence to which Judge Benedict refers; but as they have no bearing upon the construction of the treaty—the only question we are considering—we pass them without notice. Whether these points were good or bad is a matter of no consequence in relation to the meaning of the treaty. That meaning, as the Judge construed it in the case of Caldwell, and also that of Lawrence, allows the trial of an extradited person for any offense, no matter what, and no matter whether it is or is not included in the list of extradition crimes, and equally no matter whether it was or was not brought under consideration in the extradition proceedings, or specified in the warrant of delivery. The British Government, in the Winslow correspondence, took the ground that this is not the doctrine of the treaty, or of the principles and purposes of extradition. We think the British Government right and Judge Benedict wrong on this subject.

TRANSFER OF SHARES IN NATIONAL BANKS.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF MISSOURI, FEBRUARY 6, 1878.

JOHNSON, Receiver, etc., v. LAFLIN.

Shareholder's right to transfer shares in a National Bank—Elements of a complete transfer—Certificates—Blank power to transfer—Registration of transfer—Rev. Stats., §§ 5139, 5141, 5201, 5251, construed.

1. Under the national banking act, a shareholder has the right to make an actual and *bona fide* sale and transfer of his shares to any person capable in law of taking and holding the same, and of assuming the transferor's liabilities in respect thereto; and, in the absence of fraud, this right is not subject to a veto by the directors or the other shareholders.
2. Where such a sale of shares is made and the transfer entered on the books of the bank, the transferor ceases to be a shareholder, and is freed from liability in respect of such shares.
3. The provision of the national banking act (Rev. Stats., § 5139) that shares shall "be transferable on the books of the association," construed; and held not to give the directors the power to refuse to register a *bona fide* transfer of stock without some valid and sufficient reason for such refusal.

4. As between the seller and purchaser of shares in a national bank, the sale is complete when the certificate of the shares duly assigned, with power to transfer the same on the books of the bank, is delivered to the buyer, and payment therefor is received by the seller; and either the purchaser or seller may compel a registration of the transfer on the books of the bank, unless the bank has some valid and sufficient ground for refusing to register the transfer.

5. The defendant, Laffin, owning full paid shares of stock in a national bank of which his co-defendant, Britton, was the president, employed a broker to sell the same in the market; the broker, without Laffin's direction or knowledge at the time, sold the same at the market value to Britton individually, and received in payment his individual check on the bank for the purchase-price, and delivered to the purchaser the share certificates assigned in blank, with blank powers of attorney thereon indorsed, authorizing the transfer of the shares on the books of the bank; subsequently, after the amount of the check had been collected, but on the same day, the president, without the knowledge of Laffin or the broker, directed the book-keeper of the bank to credit his individual account with the amount of the check which he had given for the shares, and to transfer the shares (the book-keeper inserting his own name in the blank power of attorney as attorney to make the transfer) to Britton, "trustee," not specifying for whom he was trustee, and charging the sum to the "sundry stock account" of the bank, all of which was done. The bank, although it had not committed any act of insolvency, was then insolvent, but this fact was not known by Laffin or the broker. Held, that, although the bank, or its officers for it, was prohibited from purchasing its own shares (Rev. Stats., § 5201), yet that Laffin having sold in good faith, without notice of the illegal purpose of Britton in buying the stock, or of his intended misappropriation of the funds of the bank in paying therefor, was not liable to pay back to the receiver the money received in payment of the shares.

THE plaintiff is the receiver of the National Bank of the State of Missouri, appointed June 23, 1877, by the comptroller of the currency.

That bank suspended payment and closed its doors June 20, 1877.

The defendant, Laffin, had, for some years prior to May 16, 1877, been the owner of 85 shares of full-paid stock in that bank, but was not a director. The defendant, Britton, was the president of the bank.

On the 10th day of May, 1877, Mr. Burr, the president of another bank in which Laffin was a director, wrote a letter to a correspondent, who was the owner of stock in the National Bank of the State of Missouri, stating (without giving the grounds of his advice), "you had better sell your stock in that bank, because you can buy it back again at a profit if you wish to do so." Mr. Burr casually showed Laffin this letter and said, "Go do likewise." An election was to be held for directors on the 29th day of May, 1877, which it was supposed would give the stock a greater value in the market before the election than it would have after that event.

Acting upon this general advice of Mr. Burr, and without personal knowledge of the actual financial condition of the bank, Laffin, on the 16th day of May, 1877, authorized one Keleher, a broker, to sell in the market his 85 shares of stock. Keleher sold the same at private sale for \$5,037.50 to James H. Britton, who then was, and for some years had been, the president of the bank. Mr. Britton gave Keleher to understand that he was buying either for himself or a party whose name he did not disclose. Britton paid Keleher the \$5,037.50 by his individual check on the bank of which he was president, and Keleher thereupon delivered Britton the certificates assigned in blank for the 85 shares of stock, together with a blank power of attorney, indorsed thereon, signed by Laffin, authorizing the transfer of the stock on the books of the bank. The stock certificates contained this provision: "Transferable only on the books of the said bank in person, or by attorney on the return of this certifi-

cate, and in conformity with the provisions of the laws of Congress and the by-laws which may be in force at the time of such transfer."

There were no by-laws on the subject of the transfer of stock. Keleher immediately presented Britton's check at the counter of the bank, and received thereon the \$5,037.50, and deposited the amount in his own name with his bankers, the Messrs. Bartholow, Lewis & Co., upon whom he gave Laffin his own check for \$4,995—being the proceeds of the sale to Britton less his commission of 50 cents per share. Keleher did not inform Laffin to whom he had sold the stock, and even declined to do so. Laffin did not actually know that it had been sold to Britton until some time afterward. Keleher supposed Britton was making the purchase for himself or for some other person, and did not know that he was buying it as "trustee for the bank." After Keleher had delivered the stock certificates for the 85 shares assigned in blank, with the blank power to transfer indorsed thereon, and had collected the check and had left the bank, but on the same day, Britton delivered the stock certificates, together with the blank powers of attorney signed by Laffin, to one E. Girault, the general book-keeper of the bank, with instructions to credit from the general funds of the bank, Britton's individual account with the amount paid for the stock, viz., \$5,037.50, which was done, and to charge the like amount in the books of the bank to "sundry stocks" account, and to transfer the 85 shares on the stock transfer book to "James H. Britton, trustee." Girault obeyed these directions. The transfer of the stock on the transfer book was accordingly made to "James H. Britton, trustee," not stating for whom he was the trustee. But in the stock ledger the transaction was entered in an account entitled, "James H. Britton, trustee for bank," meaning Britton's own bank. Girault, in making the transfer of the shares, filled in his own name as attorney in the blank powers of attorney signed by Laffin, and signed the transfer to Britton as trustee thus, "S. H. Laffin by E. Girault, attorney." Girault had actual knowledge at the time that this stock had been paid for in the manner hereinbefore stated. No new certificate of stock for the 85 shares were ever issued to Britton or any one else. Neither Keleher nor Laffin knew of the foregoing directions of Britton to Girault, nor what Girault did in respect thereto. Other stock to a very large amount was from time to time purchased from other persons by Britton and paid for in the same way and transferred and entered in the same manner. No formal resolution of the directors appear authorizing this to be done, but directors knew of and assented to Britton's acts in this regard.

At the time of the suspension of the bank, June 20, 1877, there were, it seems, 4599 shares of its own stock standing in the name of "James H. Britton, trustee," which had been purchased by him with the funds of the bank, under circumstances more or less similar to the purchase from the defendant, Laffin.

All of the stock thus standing in the name of Britton, trustee, including that purchased from Laffin, was voted by him at the election of directors held May 29, 1877. Britton had been for years the owner of a large amount of stock in the bank in his own name and right, and thus owned 1542 shares when the bank suspended. Britton's credit was good at the time of this transaction, and there was nothing in the nature

of the transaction—in the fact of the purchase, the amount or mode of payment or the price paid—calculated to awaken suspicion on the part of Keleher, that it was not a regular transaction on Britton's own account. Laffin did not receive more than the stock was then considered to be worth in the market. Laffin did not know that the bank was insolvent and his firm continued to deposit money with it until it closed. Keleher testifies that he considered the bank "sound in all respects" when he made the sale to Britton. The bank had not at that time committed any act of insolvency.

This is a bill in equity by the receiver against Laffin & Britton to compel Laffin to pay back the \$5,037.50; to set aside the transfer of the 85 shares of stock; to have Laffin declared to be still a stockholder in the said bank in respect of said shares, and to have Britton ordered to re-transfer the shares to Laffin on the book of the bank.

The bill as to Britton stands confessed. Laffin answered denying the material charges in the bill. Replication was filed and proofs taken. The cause is before the court on final hearing.

The following provisions of the national bank act, taken from the Revised Statutes, are those which more directly relate to the questions arising in this case:

§ 5120. The capital stock of each association shall be divided into shares of \$100 each, and be deemed personal property, and be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of the association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies or securities of the existing creditors of the association shall be impaired.

Again, § 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein at the par value in addition to the amount invested in such shares. * * *

§ 5201. No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall within six months from the time of its purchase be sold or disposed of at public or private sale, or in default thereof a receiver may be appointed to close up the business of the association, according to section 5234.

§ 5204. No association or member thereof shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. * * * But nothing in this section shall prevent the reduction of the capital stock of the association, under section 5143.

§ 5152. Persons holding stock as executors * * * or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, * * * or person

interested in such trust funds would be, if living and competent to act and hold the stock in his own name.

§ 5210. Requires a full and correct list of all the shareholders to be kept, subject to inspection of all the shareholders and creditors, and a verified copy of such list to be sent annually to the comptroller of the currency.

Henderson & Shields, for the plaintiff.

A. W. Slayback, for the defendant, Laffin.

DILLON, Circuit Judge. The plaintiff is the receiver of the National Bank of the State of Missouri, appointed by the comptroller of the currency, June 23, 1877, the bank having suspended payment three days before. (Rev. Stats., § 5234.) The defendant, Laffin, had for some years prior to May 16, 1877, been the holder of 85 full-paid shares in that bank. At the date of the suspension of the bank the defendant, James H. Britton, was its president, and had been such for some years prior to that event. On the 16th day of May, 1877, Laffin sold through one Keleher, a broker, the 85 shares of stock to Britton, and delivered to him the share certificates, duly assigned in blank, with powers of attorney in blank thereon indorsed, to transfer the shares on the books of the bank. Laffin's broker, who effected the sale, understood that he sold to Britton individually, or to some unknown person for whom Britton acted, and he received in payment for the shares the personal check of Mr. Britton on the bank for \$5,037.50, which was immediately presented and paid. Laffin did not know until some time after the transaction who had become the purchaser of his shares. After the shares had been thus delivered and paid for by Britton's check and the money received, but on the same day, they were transferred in pursuance of Mr. Britton's directions by Mr. Girault, the book-keeper of the bank (by virtue of the powers of attorney from Laffin), to "James H. Britton, trustee," and at the same time the book-keeper credited Britton's individual account at the bank, with the amount of his check given in payment for the shares, and charged the same amount to the "sundry stocks account" on the books of the bank. On the official stock register, the shares were thus made to stand in the name of "James H. Britton, trustee," without stating for whom he was trustee. On the stock ledger of the bank the transaction was entered in an account entitled "James H. Britton, trustee for the bank." Neither Laffin's agent, who negotiated the sale of the shares, nor Laffin himself, had any actual notice of the manner in which the transfer of the stock had been registered, nor that the funds of the bank had been thus used to pay for it, nor of the entries in respect thereto on the books of the bank. But of all these facts, Mr. Girault, the book-keeper of the bank who made the entries, and who had inserted his name in Laffin's blank power of attorney to transfer the stock, had actual knowledge at the time.

This is a bill in equity by the plaintiff as the receiver of the bank, against Laffin and Britton, to compel Laffin to repay the \$5,037.50 (the amount of Britton's check for the shares paid by the bank), and to set aside the registered transfer of the 85 shares on the stock transfer books of the bank.

The case presents questions of grave moment concerning the rights of stockholders and creditors in national banking associations. And if the insolvency

of the bank here in question is such as shall make it necessary to enforce the individual liability of the shareholders (Rev. Stats., § 5151), it is important to those shareholders who made no sale of their stock, to know who are shareholders with them liable to contribute to meet "the contracts, debts and engagements of the association." These questions principally depend upon the true construction of certain provisions in the national banking act to which we shall refer as we proceed.

Inasmuch as this act in express terms prohibits a national bank from thus becoming a "purchaser of the shares of its own capital stock," (Rev. Stats., § 5201) if Laffin had made a contract to sell his shares to the bank, or to its president for the bank, it is plain that such a contract would have been *extra vires*, and illegal both as respects creditors and other shareholders, and the transaction could have been impeached by the bank in its corporate capacity, or by its other shareholders, even if the bank were still solvent and going on, or by the receiver as the officer appointed to wind up its affairs. *Re London, etc., Exchange Bank*, Law Rep., 5 Ch. App. 444, 452; *Great Eastern Ry Co. v. Turner*, Law Rep., 8 Ch. App. 149; *Currier v. Lebanon State Co.*, 56 N. H. 282. And although Laffin did not contract to sell his shares directly to the bank, or to the president for the bank, still, if, before the transaction was completed as to him, he had notice, actual or constructive, that the purchase was in fact a purchase for the bank, and paid for by the money of the bank, the transaction cannot stand, and the receiver may compel him to pay back the money thus received, and have him declared still to be a shareholder.

It would be easy to support these propositions by argument and by the authority of adjudicated cases, but they are so plain that it is not necessary to do so. But Laffin, or his agent, Keleher, did not deal with the bank or with the president with knowledge that the latter in fact intended to pay for the shares out of the moneys of the bank. Laffin was acting in good faith. Neither he nor his agent, Keleher, had any actual knowledge of Britton's purpose to turn these shares over to the bank, and to pay for them out of the funds of the bank. If Laffin can be charged with notice, it must be constructive notice, arising either, first, from the mere fact that he was a shareholder in the bank, or second, from the law imputing to him all the knowledge in this behalf which was possessed at the time by Mr. Girault, the book-keeper, who made the transfer of the shares on the transfer books of the bank under Laffin's blank powers of attorney, and who contemporaneously made the entries on the private books of the bank, which showed that Britton had been paid for the shares out of the general funds of the bank, and had acknowledged that he held the shares as the trustee of the bank.

The controlling question in the case is, whether Mr. Laffin is affected with constructive notice in one or the other of these modes. The solution of this question, in its turn, depends upon the nature and extent of the right of a shareholder in a national banking association to transfer his shares, and also upon the elements or requisites of a completed transfer, by which is meant such a transfer as shall release the transferor from liability to the bank, its stockholders and creditors.

In considering these questions, our first proposition

is that under the national bank act a shareholder has the unrestricted right to make an out-and-out *bona fide* and valid sale and transfer of his shares to any person or corporation, capable in law of taking and holding the same, and of assuming the transferor's liability in respect thereto.

The right to transfer shares in a corporation is usually recognized or given in express terms in the charter or constituent act, which also, not unfrequently, prescribes the manner in which the transfer shall be made. The capital stock of a corporation is invariably divided into shares of a fixed amount for the purpose, among others, of allowing it to be readily transferred. In an ordinary partnership the consent of all the partners to the admission or retirement of a member is necessary, and every such change involves the dissolution of the old and the formation of a new partnership. But in incorporated companies this is different. Indeed, it is one of the leading objects of an incorporated body to avoid the operation and effect of this doctrine of the law of partnership. Accordingly, in this country, shares in corporations are universally bought and sold without reference to the consent of the other shareholders.

The restrictions on the right *bona fide* to sell and transfer shares must be found in express legislative enactment, or in authorized by-laws. The national banking act (Rev. Stats., § 5139), by providing that shares shall "be transferable on the books of the association, in such manner as may be prescribed in the by-laws or articles of the association," recognizes the right of the shareholder to transfer his shares. There is nothing peculiar in this provision. A similar provision is found in nearly all the incorporating acts and charters in this country. The right to transfer is given or implied, in the section just referred to (Rev. Stats., § 5139), and that right, the association cannot take away or defeat. It contemplates a transfer on the books of the association, and all that the association is authorized to do is to prescribe the manner in which the transfer shall be made on its books. There is here no limitation whatever upon the right of transfer, and none exist except such as is implied from the nature of the transaction, or from other provisions of the act. Another section (Rev. Stats., § 5201) prohibits the bank from dealing in its own shares. This implies a restriction on the shareholder from selling his shares to the bank itself, or to a known trustee for the bank. And a shareholder cannot transfer his shares colorably, and thereby cease to be a shareholder as respects creditors and other shareholders, who would be injured by such a transfer. There may also be an implied prohibition against the right to transfer shares to an infant or person not capable in law of assuming the liabilities, as well as enjoying the rights of the transfer or the shares in respect thereto, but we have no occasion to determine this point. Rev. Stats., § 5139; compare *ib.*, § 5152, *Weston's case*, Law Rep., 5 Ch. App. 614, 620. And on general principles there may also be an implied prohibition against the transfer of shares to a pauper or man of straw, or insolvent person, for the fraudulent purpose of escaping liability, but this is a matter that need not be now considered.

Subject, however, to such prohibitions and limitations, the right of the shareowner to make an actual and *bona fide* sale and transfer of his shares to any person, capable in law of taking and holding the same and of assuming the liabilities of the transferor in res-

spect thereto, is plainly deducible from the national banking act itself. But if any doubt could exist on this subject, it would be removed by the judicial decisions, construing the provisions of the banking act in this regard, and similar provisions in other legislative enactments.

In the *Bank v. Lanter*, 11 Wall. 369, arising under the national banking act, it was expressly held by the Supreme Court of the United States that the owner of shares in a national bank may transfer the same by an assignment and delivery of the certificates, and the transferee may compel the bank to register the transfer on its books. The learned justice who delivered the opinion of the court in that case, after speaking of the additional value given to this species of property by reason of its *transferable quality*, says, "Whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred," even if the transferor is the debtor of the bank. The duty of the bank to make the transfer in such a case is held to be a corporate duty, in respect of which the bank is liable for the wrongful acts and omissions of its officers.

It was urged in the argument at the bar, in the present case, that the provision that the shares should "be transferable on the books of the bank," gave the directors of the bank the power to approve or disapprove of any given transfer of shares, and to register or refuse to register the same, as in their judgment the interests of the bank or of the other stockholders might require. Such, however, is not the object of this very common provision in charters and acts of incorporation. The purpose of requiring a transfer on the books of the bank, is that the bank may know who are the shareholders and as such entitled to vote, receive dividends, etc., and for the protection of *bona fide* purchasers of the shares, and of creditors and persons dealing with the bank. That such is the meaning of the provision in question, and that it does not restrict the right of the owner to transfer his stock or clothe the corporation with the power to refuse to register *bona fide* transfers, is settled beyond all question by numerous decisions in the English, and the Federal and State courts. *Black v. Zacharie*, 3 How. 483; *Union Bank v. Laird*, 2 Wheat. 390; *Webster v. Upton*, 1 Otto, 65, 71; *Bank v. Lanter*, 11 Wall. 369; *St. Louis, etc., Ins. Co. v. Goodfellow*, 9 Mo. 149; *Chouteau Spring Co. v. Harris*, 20 id. 382; *Moore v. Bank*, 52 id. 377; *Hill v. Pine River Bank*, 45 N. H. 300; *Re London, etc., Tel. Co.*, Law Rep., 9 Eq. 653.

The general subject of the right to transfer shares has been much discussed in the cases in England arising under the various Companies' Acts. Some of these acts give the directors express power to refuse to assent to or register transfers of shares, and some do not. The result of the English cases is that the directors cannot refuse to register a *bona fide* transfer of stock unless the power to do so is expressly given in the act of Parliament or the articles of association. The leading authority on this point is *Weston's case*, Law Rep., 4 Ch. App. 20. See also *Gilbert's case*, Law Rep., 5 Ch. App. 559. In *Weston's case*, Law Rep., 4 Ch. App. 20, Lord Justice Page Wood, in considering this subject, said:

"I have always understood that many persons enter these companies for the very reason that they are not like ordinary partnerships, but that they are partnership from which members can retire at once, and free

themselves from responsibility at any time they please, by going into the market and disposing of and transferring their shares without the consent of directors or shareholders, or anybody, provided only it is a *bona fide* transaction; by which I mean an out-and-out disposal of the property, without retaining any interest in them. But if it is desired by a company that such unlimited power of assignment shall not exist, then a clause is inserted in the articles by which the directors have powers of rejection of members. *Shortridge v. Bosanquet*, 16 Beav. 84, which went to the House of Lords, was a case of that kind. In the absence of any such restriction, I think it is perfectly plain that the companies act, 1862, in the 22d section gives a power of transferring shares. * * I think there is no such power given to the shareholders, and that the shares are at once transferable under the statute, unless something is found to the contrary in the articles of association. * * It would be a very serious thing for the shareholders in one of these companies, to be told that their shares, the whole value of which consists in their being marketable and passing freely from hand to hand, are to be subject to a clause of restriction, which they do not find in the articles. And I may add that if we were to hold that such powers were vested in the directors it would be a very serious thing for them, and would impose upon them much more onerous duties than any which are really imposed upon them by this clause." In *Gilbert's case*, Law Rep., 5 Ch. App. 559, 565, Lord-Justice Giffard said: "I agree that according to *Weston's case*, and according to what I have always considered to be the law, there is no inherent power in the directors, apart from the provisions of the articles of association, to refuse to register a proper and valid transfer, if that proper and valid transfer is submitted to them."

And although there is express power to the directors to refuse to assent to or register a transfer, this power must be exercised in a reasonable manner and *bona fide*, and they must have some valid and lawful reason for refusing to register. *Ex Parte Penny*, Law Rep., 8 Ch. App. 446; *Nation's case*, Law Rep., 3 Eq. 77; *Fyfe's case*, Law Rep., 9 Eq. 589; *Allin's case*, Law Rep., 16 Eq. 449; *Id.* 559; *Weston's case*, Law Rep., 5 Ch. App. 614, 620; *Ex parte Elliot*, Law Rep., 2 Ch. Div. 104.

In a case where the directors had power to approve or reject the transfer of shares, one of the vice-chancellors, speaking of the right of a shareowner to dispose of his shares, said: "One of the incidents (of this class of property) is the right to transfer it—a right to make a present and complete transfer of it. It is the duty of the directors to receive and register the transfer or to furnish some (valid and sufficient) reason for refusing to transfer." *In re Stranton, etc., Co.*, Law Rep., 16 Eq. 559, per Bacon, vice-chancellor.

Similar observations are made by the Supreme Court of the United States in the *Bank v. Lanter*, *supra*. Mr. Justice Davis then says: "The power to transfer their stock is one of the most valuable franchises conferred by Congress. * * It enhances the value of the stock. Although neither in form nor character negotiable paper, they (the share certificates) approximate to it as nearly as possible."

It would be a new, and I apprehend, a startling doctrine to proclaim that the holder of shares in a corporation, where the only provision on the subject of transfers was one requiring them to be made on its books, had no right to make a complete and effectual

disposition of them without the consent of the directors or other shareholders. No such power over the right of transfer has been given in the national banking act. Such a power is so capable of abuse and so foreign to all received notions and the universal practice and mode of dealing in these stocks that it cannot, in the absence of legislative expression, be held to exist.

For these reasons and upon these authorities the proposition must be considered as established that a shareowner in a national bank, while it is a going concern, has the absolute right in the absence of fraud to make a *bona fide* and actual sale and transfer of his shares at any time, to any person capable in law of purchasing and holding the same, and of assuming the transferor's liabilities in respect thereto, and that this right is not, in such cases, subject to the control of the directors or other stockholders.

Our second proposition is that Laffin did make a complete and effectual sale and transfer of his shares to James H. Britton individually, and that as to Laffin, it was not a sale and transfer of the stock to the bank. Laffin sold through the broker or agent, Keleher; and the latter dealt with Britton as an individual, without knowledge that Britton intended to turn over the shares to the bank, and he received in payment for the shares the personal check of Mr. Britton, and delivered to him at the same time the certificates of stock assigned, in blank, with powers of attorney in blank thereon indorsed, authorizing the transfer of the shares on the books of the bank.

As between Laffin and Britton, the transfer was complete by the sale, assignment, delivery and payment, without registration, and this whether it gave Britton before the registration, the legal title to the shares as against Laffin, or only a complete equitable title. *Union Bank v. Laird*, 2 Wheat. 390; *Webster v. Upton*, 1 Otto, 65, 71; *Black v. Zacharie*, 3 How. 483; *Bank v. Lanter*, 11 Wall. 369, 377; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *Moore v. Bank*, 52 Id. 377; *N. Y., etc., R. R. Co. v. Schuyler*, 34 N. Y. 80; *McNeill v. Bank*, 46 Id. 325; *Grimes v. Howe*, 49 Id. 17, 22; *Bank of Utica v. Smalley*, 2 Cowen. 778; *Bank of Commerce's Appeal*, 73 Penn. St. 59; *Ross v. S. W. R. R. Co.*, 53 Georgia, 514; *Hoppin v. Buffum*, 9 R. I. 513; *Bank of America v. McNell*, 10 Bush (Ky.), 54; *Davis v. Lee*, 26 Miss. 505; *German, etc., Ass. v. Sendemeyer*, 50 Penn. St. 67; *Leavett v. Fisher*, 4 Duer, 1.

That the transaction is complete as between seller and purchaser of stock by the assignment and delivery of the certificate, with the power to transfer, and the receipt of payment is fully shown by these cases, and is also evident from the fact that thereupon each of them has the legal right to have a transfer of the shares made on the books of the bank. The seller of the shares, for his protection against creditors of the bank in case of insolvency, may transfer the same on the books to the vendee, the purchase being the authority to the seller to do this. *Webster v. Upton*, 1 Otto, 65, 71.

And for like reason the seller of shares who has done all that is necessary to enable the purchaser to transfer the shares on the books, may file a bill to compel the vendee to record the transfer. *Shaw v. Fisher*, 2 DeGex & S. 11; *Cheale v. Kenward*, 3 DeGex & J. 27; *Wynne v. Price*, 3 DeGex & S. 810; *Webster v. Upton*, 1 Otto, 65, 71.

So, also, the vendee of the shares, where the vendor has done all that is necessary to enable the transfer to

be registered, may for his own protection compel the bank to register the transfer, or hold it liable in damages for a wrongful refusal. *Bank v. Lanier*, 11 Wall. 369; *Hill v. Pine River Bank*, 45 N. H. 300; *Bank of Utica v. Smalley*, 2 Cowen, 778; *Commercial Bank v. Kortright*, 22 Wend. 348.

The delivery of the share certificates and blank transfers will entitle the *bona fide* vendee to have the transfer registered. "Whoever in good faith buys the stock and produces to the corporation, the certificates regularly assigned with power to transfer, is entitled to have the stock transferred" (per Davis, J., *Bank v. Lanier*, 11 Wall. 369), unless there exists some valid and legal reason in favor of the bank for refusing to register the transfer as in the case of the *Union Bank v. Laird*, 2 Wheat. 390. In that case the charter gave the bank a lien for the shareholders' debt to it, and provided that "stock shall be transferable only on the books of the bank." Under these circumstances, the bank was held to have a lien on the shares to secure the shareowner's indebtedness to it, which was superior to the right of the unregistered transferee of the stock. *Black v. Zacharie*, 3 How. 483.

If the foregoing propositions are sound, Britton against Laffin had the right immediately on delivery and payment to register the transfer of the shares, and had the power to fill up the blank transfers, and have the transfer registered. *Re Tahle Cotton Co.*, Law Rep., 17 Eq. 278; *German Union Ass. v. Sendmeyer*, 50 Penn. St. 67; *Leavitt v. Fisher*, 4 Duer, 1; *Commercial Bank v. Kortright*, 22 Wend. 348. Nothing more was required to be done by Laffin or needed to enable Britton to make his title complete. And Laffin could have compelled Britton to register the transfer. If Laffin had proceeded against Britton he could have forced him to have accepted a transfer of the stock in his own name or in the name of some person capable of taking and holding the same. *Masfied v. Payne*, Law Rep., 6 Exch. 132. It would have been no answer to Laffin for Britton to have said: "I bought this stock, not for myself, but for the bank." Laffin could have rejoined: "You purported to act for yourself. I supposed you were so acting, and you had no authority, and could have had none, to act for the bank."

It is held in England under the companies acts that the transferor of shares is liable to be treated as a stockholder, until he transfers to one who is in law capable of holding, and liable in respect of the shares, and whose purchase is registered, unless, perhaps, where the neglect to register is entirely the fault of the corporation or its officers. *Fyfe's case*, Law Rep., 4 Ch. App. 768; *Lowe's case*, Law Rep., 9 Eq. 589; *Shropshire, etc., Ry and Canal Co. v. The Queen*, Law Rep., 7 House of Lords Cases, 496, 513; *McEwen v. West London Wharves, etc., Co.*, Law Rep., 6 Ch. App. 655; *Weston's case*, Law Rep., 5 Ch. App. 614, 620; *Gooch's case*, Law Rep., 8 Ch. App. 268; *Gibbert's case*, Law Rep., 5 Ch. App. 559; *Master's case*, Law Rep., 7 Ch. App. 292; *Nickalls v. Merry*, Law Rep., 7 House of Lords Cases, 530; *Symonds' case*, Law Rep., 5 Ch. App. 298; *Heritage's case*, Law Rep., 9 Eq. 5.

Assuming without deciding, that this principle applies in all its force under the national banking act, if Laffin had sold to an infant, his liability would remain, notwithstanding the transfer was registered.

Nickalls v. Merry, Law Rep., 7, House of Lords Cases, 530; *Symonds' case*, Law Rep., 5 Ch. App. 298. If he had sold to the bank, he would remain *prima facie* if

not actually liable, if the bank should so elect. And if the seller of shares remains liable under the national banking act until there is a registered valid transfer—that is, until some person succeeds to the stock who is capable of holding it and liable in respect to it—this principle will not make Laffin liable under the facts of the present case. Here the transfer was registered, but Britton, instead of registering it in his own name, as it was his duty toward Laffin to do, registered it in his name as "trustee," without Laffin's knowledge. But the act (Rev. Stats., § 5152) authorizes the holding of stock by a trustee. If Laffin, in order to relieve himself of liability, is bound to see the transfer of the stock registered, the registry actually made would not charge him with constructive notice that the bank was in reality the *cestui que* trust.

Britton is responsible personally, inasmuch as he had no authority to act for the bank, and as there is no *cestui que* trust who is liable. He is liable for the unauthorized investment and use of the trust moneys of the bank, and can be compelled to refund it. *Great Eastern Ry. Co. v. Turner*, Law Rep., 8 Ch. App. 149. If it becomes necessary to assess the stockholders he will be estopped to say that he is not individually responsible, since he was not acting by authority of any *cestui que* trust capable of taking and holding the shares. If the sale of this stock has been registered to Britton individually, it is clear that Laffin would not have been liable to the bank or its creditors; and as the matter now stands, the bank and its creditors have every right and remedy against Britton, which they would have had if the shares had been transferred to him individually, instead of to him as "trustee."

Our third proposition is, that Laffin is not liable, because the money received for the stock was unlawfully taken by Britton from the bank. The reason for this conclusion is that Laffin parted with value—with his shares, with his power of control over them and the right to sell them to others, and had no notice at, or prior to the consummation of the transaction that Britton was acting *ultra vires* and intended to misappropriate the funds of the bank. If he had dealt directly with the bank, or if he or his agents had known what took place inside the counter before the transaction with Britton had been completed, he would have been liable.

It is urged by the receiver's counsel that Laffin had constructive notice. Mr. Shields, in his argument, bases Laffin's liability on the proposition that, being a shareholder in the bank, he is charged with constructive notice of the condition of the bank, and of what was done by the president in violation of law and of his official duty in respect of these shares. I admit that if in a transaction directly with the bank, he had received moneys to which he was not entitled, he could be made to pay back the same irrespective of the question of knowledge on his part. *Curran v. Arkansas*, 15 How. 304; *Railroad Co. v. Howard*, 7 Wall. 392.

But it is to be remembered in this case that Laffin is sought to be made liable in respect of the sale and transfer of his shares, which sale and transfer he had the perfect right to make, if he acted *bona fide*; and he has the same right to sell his shares to another shareholder, that he would have to sell them to a person not a shareholder.

Even directors have the right to make a *bona fide* sale of their shares and thus get rid of liability, if they pursue the articles or charter, and take no advantage

of their position and commit no fraud. *Gilbert's case*, Law Rep., 5 Ch. App. 559; *Ex parte Littledale*, Law Rep., 9 Ch. App. 267.

And shareholders in the exercise of their right to transfer shares are not bound, it seems, to take notice of irregularities on the part of the directors in respect to the transfer of shares. *Bargate v. Shortridge*, 5 House of Lords Cases, 297, 323; *Taylor v. Hughes*, 2 Jones and Lat. 24; *Ex parte Bagge v. North Coal Co.*, 13 Beav. 162.

Nor are directors, much less shareholders, in the transfer of their stock bound, it seems, to take notice of the books of account of the company. *Cartmell's case*, Law Rep., 9 Ch. App. 691; *Hill v. Manchester, etc., Co.*, 2 Nev. and M. 573; 5 Barn. and Adol. 874; *Haynes v. Brown*, 36 N. H. 568.

We are of opinion, therefore, that the sale and transfer of the stock as between Laffin and Britton was complete as soon as the stock was delivered and assigned, with the power to transfer, and payment received; and that what Britton, without Laffin's knowledge, afterward did, although on the same day, in transferring the shares to himself as trustee for the bank, and in reimbursing himself out of the funds of the bank, could not retroact upon Laffin, whose status had already been fixed, and whose rights had already been acquired. *Bank of America v. McNeill*, 10 Bush (Ky.), 54, 58.

Mr. Henderson's argument for the receiver went mainly upon the ground that Laffin was chargeable through Mr. Girault, with constructive notice of Britton's wrongful acts in the purchase of these shares and in the use of the bank's money to reimburse himself therefor.

This argument rests upon these propositions: First, that the sale was not complete until the transfer was registered; that in making the transfer, Girault, although acting under Britton's directions, was solely Laffin's agent (by virtue of his inserting his name in the blank power of attorney), and that inasmuch as Girault knew of Britton's acts in directing the transfer for the benefit of the bank, and in paying himself for the purchase-money out of the general means of the bank, the law imputes this knowledge to Mr. Laffin. The first branch of this proposition is inconsistent with the one which we have above attempted to maintain, viz.: That the transaction between Laffin and Britton was complete without registration of the transfer, and that it is equally complete as to the bank, unless the bank had some valid reason for refusing to register the transfer. Britton had the right to register the purchase in his own name. He was in good credit with the bank and in the community. He was not then known to be insolvent. Indeed, it is not shown by the proofs that he is now insolvent. Laffin could have compelled him to register the transfer in his own name. In the eye of the law the transfer to Britton, as "trustee," is a transfer to Britton individually—for as above shown, Britton could not set up his *ultra vires* acts to defeat his personal responsibility. *Ashurst v. Mason*, Law Rep., 20 Eq. 225; *Ex parte Littledale*, Law Rep., 9 Ch. App. 267. If Laffin had a completed right immediately on receiving payment for the shares to have Britton register the transfer of the shares; and if immediately on such payment, Britton had the right to register the transfer to himself, and if the bank could not have resisted Laffin's application to compel a registration of the transfer to Britton, it is obvious that notice subsequent-

ly received by Laffin personally, or through an agent, would be immaterial.

If this view is sound, it is unnecessary to decide the further question whether Girault, in consequence of his relations to Britton and the fact that he acted as his servant and implicitly obeyed his directions, is to be regarded, in making the formal act of transfer on the books, as the agent of Laffin, in such sense that knowledge required by him from Britton is to be imputed to Laffin. It deserves consideration whether under the circumstances Girault was Laffin's agent so as constructively to affect Laffin with notice of what was being done, not in the necessary or lawful execution of his authority, but in violation of that authority, and in hostility to his rights as well as those of the bank. These are the positions taken by Mr. Slayback in Mr. Laffin's behalf, and they certainly have great force. For in this view, if the name of someone outside of the bank, having no knowledge of what was going on inside the bank, had been filled in by Britton as the attorney to make the transfer, or if Britton had it filled in his own name, Laffin would not be liable. It is certainly extremely narrow ground to make Laffin's liability depend upon the accident whose name shall be used to make the formal transfer, and upon what knowledge of the interior workings of the bank such person may happen to possess, especially in view of the custom to transfer stock in blank through many hands before any registry is made.

It was strongly urged at the bar by Mr. Henderson for the receiver, that the foregoing views of the right of the shareholder to transfer his shares, will have the effect to permit transfer to persons not able to respond to the double liability imposed on shareholders, and thus work an injury to the solvent shareholders and to creditors. But we must hold to the absolute right of the shareowner to transfer his stock in good faith, or the alternative that the directors may have the right to refuse their assent to such transfer, thus putting a shareholder in their power. Not a syllable can be found in the banking act giving the directors such a power; while on the other hand the right to transfer shares is expressly recognized. If it is desirable for the security of the shareholders or creditors that the existing members should, through the directors, have a veto on the right of a shareholder to transfer his shares, such a power must be plainly conferred. It has not been given and cannot therefore be held to exist.

It is proper to remark in order to preclude erroneous inferences from the views here maintained, that it is probable that the unrestricted right to transfer has reference to transfers in solvent and going concerns, and are not intended to enable shareholders to escape from liability where the association has committed an act of insolvency or has ceased to be a going concern. *Allen's case*, Law Rep., 18 Eq. 449, per Lord Chancellor Selbourne; *Chappell's case*, Law Rep., 6 Ch. App. 302. While we maintain the right of a shareholder to dispose of his shares absolutely, by an out and out sale and registered transfer, and thus escape liability, provided the sale is made *bona fide*, and the purchaser is in law capable of assuming the liabilities of the transferor, yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the transferor knows will make the transfer, if it is sustained, work a fraud on the other shareholders or on the creditors of the bank.

The result is that there must be a decree dismissing the bill as to Laffin, and as the bill is not framed for separate relief against Britton, dismissing the same as to him also, but without prejudice.

Bill dismissed.

UNITED STATES SUPREME COURT ABSTRACT.

AGENCY.

Revocation of authority of insurance agent: payment of premium to agent by one not having notice of revocation.—A policy of insurance was issued by the S. Company upon the life of C., by an agent of the company authorized to receive premiums. Subsequently the second premium due on the policy was paid to the same person, who was not then agent of the company, which fact was not known to the assured. This person rendered an account to the company of the receipt of the second premium; but the company did not notify the assured of the termination of the agency. *Held*, that the company could not, after the death of the assured, repudiate the payment of the premium; but that such payment would bind the company. Judgment of Circuit Court, S. D. Alabama, affirmed. *Southern Life Ins. Co., plaintiff in error, v. McCain.* Opinion by Field, J.

APPEAL.

Judge alone can take security required on.—The security required upon writs of error and appeals must be taken by the judge or justice.—(Rev. Stat., § 1,000.) He cannot delegate this power to the clerk. Motion to dismiss appeal from Circuit Court, S. D. Mississippi, granted conditionally. *O'Reilly, appellant, v. Edrington.* Opinion by Waite, C. J.

EVIDENCE.

1. *Burden of proof: presumption in revenue cases from failure to make proper entries.*—In a prosecution, or under the revenue law to recover taxes and penalties for the fraudulent manufacture of tobacco, the government introduced evidence showing that large quantities of tobacco were sold or removed from the defendant's premises without his making any entry of the same in the books kept as required by law for the purpose, and that no accurate account of the manufactures so removed was kept in any manner in said books; that seventeen monthly returns were furnished to the assistant assessor as true and accurate abstracts of all such sales and removals, and that they were not true nor accurate statements of the manufactured products sold and removed; and it was also shown that his annual inventories were false. *Held*, that the burden of proof was thrown upon the defendant, that the sales and removals not accounted for were not made in fraud of the internal revenue laws. Judgment of Circuit Court, S. D. New York, affirmed. *Litten thal, plaintiff in error, v. United States.* Opinion by Clifford, J.

2. *Rule as to burden of proof in criminal case: rule in civil cases.*—In criminal cases the true rule is that the burden of proof never shifts; that in all cases, before a conviction can be had, the jury must be satisfied from the evidence beyond a reasonable doubt, of the affirmative of the issue presented in the accusation that the defendant is guilty in the manner and form as charged in the indictment. *Com. v. McKie*, 1 Gray, 64; *Com. v. York*, 9 Med. 125; *Com. v. Webster*, 5 Cush. 305; *Bennet & Heard's Lead. Cr. Cas.* 299. *Com. v. Eddy*, 7 Gray, 584. But while the general rule is that the burden of proof in civil cases lies on the party who substantially asserts the affirmative of the issue, the burden may shift during the progress of the trial. (1 Blah. Cr. Law (8th ed.), § 835; *U. S. v. Three Tons of Coal*, 6 Biss. 391; *Schmidt v. Ins. Co.*, 1 Gray, 533; *Knowles v. Scribner*, 57 Me. 497.) *Ib.*

3. *Construction of revenue laws.*—Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good. (*Cliquot's Champagne*, 3 Wall. 145.) *Ib.*

FIRE INSURANCE.

1. *Construction of policy containing contradictory proposition.*—When a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. Judgment of Circuit Court, W. D. Missouri, reversed. *First National Bank of Kansas City, plaintiff in error, v. Hartford Fire Ins. Co.* Opinion by Harlan, J.

2. *Conditions as to estimate of value: contradictory provisions.*—By the terms of the application the assured was required to state separately "the estimated value of personal property and of each building to be insured, and the sum to be insured on each; * * the value of the property being estimated by the applicant." The applicant was also directed to answer certain questions and sign the same "as a description of the premises on which the insurance will be predicated." Among the questions to be answered, were: "What is the cash value of the buildings? What is the cash value of the machinery?" The answer was: "\$15,000, building; \$15,000, machinery." The application contained this: "And the said applicant hereby covenants and agrees to and with said company that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk." The policy contained this: "Special reference being had to assured's application and survey on file, which is his warranty, and a part hereof." The policy further recited: "If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this policy, and a warranty by the assured; and if the assured, in a written or verbal application, makes any erroneous representation or omits to make known any fact material to the risk, * * then, and in any such case, this policy shall be void. * * Any fraud or attempt at fraud, or any false swearing on the part of the assured shall cause a forfeiture of all claim under this policy." The policy also declared that it was made and accepted upon the above, among other, express conditions. When the policy issued, as well as at the date of the destruction of the property by fire, the cash value of the building, aside from land and water power, was \$8,000, and no more; and the cash value of the machinery, at the same dates, was \$12,000, and no more. But the court found that "the answers made by the assured to the questions contained in the application were made by him in good faith, without any intention on his part to commit any fraud on the defendant." *Held*, that the beneficiary of the policy was entitled to a judgment, notwithstanding the overvaluation of the property by the assured. *Ib.*

COURT OF APPEALS ABSTRACT.

COSTS.

Creditors of insolvent corporation intervening in aid of receiver not entitled to.—While creditors of a corporation in the hands of a receiver in proper cases may intervene and aid the receiver in the defense of individual claims made by action or petition, such intervening creditors are not, as of right, entitled to costs in proceedings to which they become parties either out of the fund or against the adverse party. Motion denied. *Matter of People, ex rel. Attorney-General, v. Security Life Insurance Co.* Opinion per Curiam.

[Decided January 22, 1878.]

DEFENSE.

Railroad aid town bonds: who cannot raise question of invalidity of.—Under the provisions of Laws of 1866, chap. 398, § 4, for the bonding of towns in aid of railroads, it is provided that the money raised by taxation for the payment of the bonds shall, when collected, be paid to the town railroad commissioners, and by them shall be applied thereon. Money was raised by taxation and paid to the railroad commissioners for the purpose of paying interest on bonds issued by a town. Held, that, in an action by the holder of the bonds against the commissioners to recover such interest, the invalidity of the bonds could not be set up as a defense. Judgment below affirmed. *First National Bank of Oxford v. Wheeler.* Opinion by Andrews, J. Folger, Miller and Earl, J.J., concur; Church, C. J., and Allen, J., dissent.

[Decided January 29, 1878.]

NEGLIGENCE.

Liability of carrier for damages from bill of lading negligently issued to wrong person.—Worthington, who had the general title to and control of wheat stored in an elevator at Buffalo, had verbally agreed to sell the same to Nims under a contract by which title and possession were not to pass until payment. He drew this order for the wheat, directed to the elevator, and gave it to Nims:

"Propellor Mohawk, or Niagara elevator: Deliver to the Erie Railroad fifteen thousand bushels Mill. wheat, more or less. Subject to order, S. K. Worthington."

Nims gave the order to defendant's agent at Buffalo, who issued to Nims a bill of lading in his own name, and took possession of the wheat and transported it to New York. Plaintiff, on the faith of this bill of lading, advanced money to Nims, and afterward took possession of the wheat and sold it to reimburse the advance it had made. The M. Bank, which had a lien on the wheat for advances to Worthington, brought action against plaintiff for the value of the wheat, and obtained a judgment against plaintiff, which was sustained on the ground that no title passed to Nims by Worthington's acts. In an action by plaintiff to recover damages claimed to have been caused by defendant's negligence in giving the bill of lading to Nims in his own name, the court, at trial, submitted to the jury the question, whether, by his dealing with Nims, Worthington intended to part with the control of the wheat and to deliver it to Nims in pursuance of the verbal contract of sale, and to authorize him to dispose of it as needed, and charged that if such was the intent they should find a verdict for the defendant, but that if it was the inten-

tion of Worthington to keep the control of the wheat and the order for the delivery of the property was given to Nims merely for the purpose of carrying it to the office of defendant to have the wheat transferred, the act of defendant's agent would be negligence and plaintiff entitled to recover. Held, that the instruction was correct. Judgment below affirmed. *Farmers and Mechanics' Nat. Bank of Buffalo v. Erie Railway Co.* Opinion by Rapallo, J.

[Decided January 22, 1878.]

LANDLORD AND TENANT.

When landlord entitled to rent of premises tenant deprived of.—Defendant, a lessee of premises, brought action against plaintiff, the lessor, for damages in being deprived of the use and occupation of such premises during a certain period, and recovered judgment for the whole value of the use and occupation of such premises, no deduction being made for rent. Held, that the lessor was thereafter entitled to recover the amount of rent agreed to be paid for such premises during such period. Order below reversed. *Knox v. Hexter.* Opinion by Andrews, J.

[Decided December 18, 1877.]

PRACTICE.

Under new Code: supplemental answer under § 574: appealable order.—The allowance of a supplemental answer, under section 574 of the New Code, is discretionary with the court below, and an order granting or refusing leave to make such answer is not applicable to the Court of Appeals. Appeal dismissed. *Spears v. Mayor of New York.* Opinion by Folger, J. [Decided February 5, 1878. Reported below, 10 Hun, 160.]

REAL ESTATE.

1. *Presumption of delivery of deed from recording: how rebutted.*—The fact that a deed was recorded more than forty years previous to an action in which it is claimed as a source of title, no possession of the premises, which were in a thickly settled place and valuable only for their use, having ever been taken by the grantee, is sufficient to repel the presumption of delivery arising from the record of the deed alone. Order below affirmed. *Knowles v. Barnhardt.* Opinion by Church, C. J.

2. *Title and obligations of widow occupying dower lands in common with heirs.*—The possession of land by a widow as doweress, and as guardian in socage of the minor children, held to be as tenant in common with all the heirs. When the land was occupied under a contract of sale to the deceased husband of the widow, held, that she could not purchase for her individual benefit the contract or a title to the land.

[Decided December 18, 1877. Reported below, 9 Hun, 443.]

SHIPPING.

1. *Lien law relating to ships: canal boat a vessel.*—A canal boat is a vessel within the meaning of the statute (Laws 1862, chap. 482) relating to the collection of demands against ships and vessels. *Mony v. Noyes*, 5 Hill, 34, contra, was under the Revised Statutes, and is not authority. Order below affirmed. *King v. Greenway.* Opinion by Miller, J.

2. *Personal judgment, execution, and supplementary proceedings does not impair lien on boat.*—The fact that a personal judgment has been obtained on the claim against the boat, execution issued and supplementary proceedings had, does not impair the lien upon the boat given by the statute. *ib.*

8. *Statute giving lien on vessels not unconstitutional: proceedings against vessel by name.*—The statute in question is not unconstitutional. The fact that the vessel proceeded against was a steamboat and proceeded against by its name could not alter the case or demand a different rule. *Ib.*

4. *Statutory construction: Laws 1863, chap. 422, § 2.*—A steamboat was constructed with a view to run on Lake Ontario, but never did run anywhere except upon the canal, Oswego river and Seneca lake. *Held*, not a vessel "navigating the western and northwestern lakes, or any of them," under the provisions of Laws 1863, chap. 422, § 2, amending the statute relating to claims against vessels. *Ib.*

[Decided December 11, 1877.]

SURETYSHIP.

Principal liable to surety for costs and expenses incurred in securing payment of debt.—While a surety cannot call upon his principal for expenses incurred in defending himself against liability or for remote or consequential damages, he may call upon him to reimburse him for reasonable expenses in enforcing the payment of the debt by the principal, or the application of his property toward it. Accordingly, where the surety made an arrangement with the creditors whereby he gave security for the payment of those demands, and received authority from them to take the necessary proceedings in their names to secure the property of the estate of the debtor and the application to the payment of the debts for which he was surety, and paid the costs and expenses of the proceedings himself, *held*, that the estate of the principal was liable for such costs and expenses. Order below affirmed. *Thompson v. Taylor, In re claim of Matleson.* Opinion by Rapallo, J. [Decided January 15, 1878. Reported below, 11 Hun, 274.]

NEW BOOKS AND NEW EDITIONS.

STEWART'S REPORTS, VOL. I.

Reports of Cases Decided in the Court of Chancery, the Prerogative Court, and on Appeal in the Court of Errors and Appeals of the State of New Jersey. John H. Stewart, Reporter, Vol. I.

THIS volume, the 28th in the series known as the New Jersey Equity Reports, is a model in every respect. The reporter has done his work in the best manner; the decisions are published promptly after their delivery, and the mechanical execution of the volume is excellent. The decisions given are those of the various terms of the courts mentioned during the year 1877, closing with the November term of the Court of Errors and Appeals. Among the cases of value we notice these: *Morris v. Hill*, p. 33: A common rumor that an injunction has been dissolved will not excuse the breach of it. *First Nat. Bank of Freehold v. Irons*, p. 43: Fraud will not be inferred from circumstances which merely indicate unusual generosity. *Camden H. R. R. Co. v. Citizens' Coach Co.*, p. 145: The public right to use a horse railroad track in the streets of a city for vehicles does not authorize a transportation company to use it in competition with the railroad company. *Stoudenger v. City of Newark*, p. 187: The streets of a city may be lawfully used for the construction of sewers, whether the public right was acquired by condemnation or dedication. *Williamson v. N. J. South. R. R. Co.*, p. 277: As between a mortgagee and execution creditor, rolling stock of a

railroad company mortgaged with the railroad is a part of the realty. *Force v. City of Elizabeth*, p. 403: The alteration of the number of a municipal bond, where different bonds of the same series are distinguished alone by numbers, will avoid the instrument as to the one making the alteration and those claiming under him. There are a number of valuable notes by the reporter subjoined to cases, among which we particularly notice these: On page 79, relating to the relative rights of surface owners and mine owners; on page 145, as to the rights of street railroad companies, and the use of their tracks by the public; on page 210, upon the subject of undue influence; on page 404, on the subject of compound interest, and on page 537, relating to the remedy for interferences with ferry franchises.

DELAWARE CHANCERY REPORTS, VOL. II.

Reports of Cases Adjudged and Determined in the Court of Chancery of the State of Delaware. Under authority of the General Assembly. By Daniel M. Bates, late Chancellor. Vol. II. Philadelphia: T. & W. Johnson & Co., 1878.

The present volume contains cases selected from the manuscript notes of the late Chancellors, Johns, Jr., and Harrington, from the year 1833 to that of 1865. The reporting is carefully done, and many of the cases involve interesting questions, which are ably discussed. Among the decisions of interest we notice these: *McDowell v. Bank of Wilmington, etc.*, p. 1: An agreement between the creditor and the principal debtor in order to discharge the surety must be such as gives time to the debtor, and it must be for a consideration. *Kilby v. Goodwin*, p. 61: A mother, on her death-bed, delivered securities and jewelry to a third person for the benefit of her minor children. *Held* a valid *donatio mortis causa*. *Logan v. Brick*, p. 206: A voluntary conveyance, though without a fraudulent intent, is void as against creditors under the statute of 18th Elizabeth. *Fraser v. Fraser*, p. 280: The party alleging insanity is bound to prove it, but general insanity being proved, the onus is upon the party setting up any act as binding to prove that it was done in a lucid interval. *Pickering v. Day*, p. 333: The consent of a collector of internal revenue that a deputy might use the public funds in his hands in his private business, uncommunicated to the sureties on the official bond given by the deputy to the collector, discharges such sureties. *Garden v. Derrickson*, p. 386: A bond under seal, though voluntary, creates a debt, is impeachable only for fraud, and is enforceable against the grantor and all claiming under him as volunteers. *State v. Griffith*, p. 392: Charitable uses are not within the rule of law as to perpetuities. The English Mortmain acts did not extend to the colonies. The volume is finely printed and bound.

COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, February 19, 1878:

Judgment affirmed, with costs—*Wilkinson v. First National Fire Insurance Co.*; *Troy and Lansingburgh Railroad Co. v. Kane*; *Von Sachs v. Kretz*; *Scotfield v. Churchill*; *Bank of Commerce v. Bissell*; *Scholey v. Halsey*.—Judgment affirmed—*People v. Brown*.—Order affirmed, with costs—*Morris v. Tuthill*.—Judgment affirmed, with costs of all parties to be paid out of the estate—*Garvey v. McDavitt*.—Motion

denied, without costs of motion—*Horn v. Pullman*. — Motion denied, without costs—*Dering v. Metcalf*. — Judgment reversed, and new trial granted, costs to abide event—*McMurry v. Noyes*; *Mowry v. Sanborn*; *Furst v. Second Avenue Railroad Co.*— Order of General Term reversed and that of Special Term affirmed, with costs—*In re petition Trustees of New York and Brooklyn Bridge v. Burr*. — Judgment reversed, and judgment for defendant, with costs, with leave to plaintiff to amend complaint, on payment of costs, within twenty days after notice of filing remittitur—*Littaner v. Goldman*. — Judgment modified, so as to affirm order without modification, and without costs to either party on the appeal; the respondents to pay \$10 costs of this motion and costs of remittitur, and subsequent proceedings—*In re petition of Hebrew Benevolent Orphan Asylum of New York*. — Judgment of Supreme Court and decree of surrogate modified, by declaring the same without prejudice to an action by the administrator for relief, and staying proceedings thereon for sixty days after filing the remittitur, to enable him to bring such action, if he shall be so advised, without costs, in this court or Supreme Court, to either party—*McNulty v. Hurd*.

CORRESPONDENCE.

A correspondent writes:

"Are you going to let Senator Sessions' bill relative to taxation of mortgaged real property pass unnoticed and become a law, virtually exempting the railroad corporations of this State from taxation, and creating the worst muddle in assessments ever conceived. Doesn't it look like a railroad job?"

We referred to the bill on page 61 of the current volume. A bill of like nature is introduced every year, but preceding legislatures have been sensible enough to refuse to pass any such foolish measure, and we presume the present body will do likewise.

BENCH AND BAR.

GEORGE W. PASCHALL, well known as a writer on law, died at Washington, D. C., on the 16th inst. He was born in Green county, Georgia, November 28, 1812. He was educated in the Georgia State College at Athens, was admitted to the bar in 1832, and removed to Arkansas in 1837. In 1841 he was elected Judge of the Supreme Court of Arkansas. In 1848 he removed to Texas. In that State he devoted himself to the practice of his profession, and in the preparation of his well-known law works. These are "An Annotated Digest of the Laws of Texas," "Annotated Constitution of the United States," five volumes of the "Texas Reports," and a "Digest of Decisions." He also wrote many pamphlets and articles upon questions of jurisprudence and political science. In 1869 he removed to Washington, D. C., and remained there until his death.

Gideon Welles, ex-secretary of the navy, who died last week, studied law in the offices of Chief Justice Williams and Judge Ellsworth, of Connecticut, and was admitted to the bar, but he was never engaged in active practice.

Sir Edward Creasy, who recently died in England, was for two years Chief Justice of Ceylon, and had occupied an inferior judicial position in England. He is best known to Americans by his works, "The Rise and Progress of the British Constitution," and "The Fifteen Decisive Battles."

NOTES.

A NOTHER law periodical has made its appearance. It is entitled *The Southern Law Journal*, and is published monthly at Tuscaloosa, Alabama. The second number, that for February, which is the only one we have received, contains interesting articles upon "Lord Jeffreys," "Executorial Duties and Personal Trusts," and "The Theory of the Election for President." There is a review of the case of *Miller v. Marx*, decided by the Supreme Court of Alabama, wherein the ruling of the court that when a homestead cannot be reduced in area so as not to exceed \$20,000 in value, there is no exemption under the Constitution, and in the absence of legislation, no authority to allot the family an equivalent in money, is criticised sharply. A syllabus of the decisions of the Supreme Court of Alabama at the December term, 1877, covers a large number of cases, and we presume gives all those decided for the term mentioned. Abstracts of decisions of the Federal Supreme Court and the highest courts of the several States are also given. The editorial notes, though brief, are well written and to the point. Our new contemporary is well worthy the support of the profession of Alabama and the adjoining States, and we trust that they will sustain it.

In the cases of *Ustll v. Hales et al.*, decided by the Common Pleas Division of the English High Court of Justice, on the 30th ult., there were three actions for libel brought by the plaintiff, a civil engineer, against the three defendants as printers and publishers of the *Daily News*, the *Standard*, and the *Morning Advertiser*. Certain persons who had been employed by the plaintiff in the construction of a railway in Ireland, applied to a metropolitan police magistrate for a criminal process against the plaintiff to recover from the plaintiff the wages due to them. The magistrate dismissed the application on the ground that he had no jurisdiction, and a report of the proceedings was printed and published in the defendants' newspapers, which was the libel complained of.

At the trial the jury found the report in the newspapers to be a fair and impartial report of what took place before the magistrate. The judge ruled the report to be privileged, and his decision was sustained by the Common Pleas Division. The *Solicitors' Journal* says that this case, though likely to be cited as a leading case, and overruling, as Lord Coleridge said, what has been over and over again laid down by great judges, is really only a return to the old lines. In 1796, in *Curry v. Walter* (1 Esp. 456; 1 B. & P. 525), an action was brought in respect of "an account published in the newspaper called the *Times*," of an application for a criminal information. It was ruled by Eyre, C. J., and afterward by the Court of Common Pleas, that the action did not lie. This ruling, which was very shortly reported, though approved in *R. v. Wright* (8 T. R. 298), soon became a mark for judicial attack. Lord Ellenborough, in *E. v. Fisher* (2 Camp. 563), and Lord Tenterden, in *Duncan v. Thwaites* (5 D. & R. at p. 479), distinctly disapproved of it. Lord Campbell, in *Lewis v. Levy* (E. B. & E. 537), with characteristic caution, expressly left the point open. Lord Chief Justice Cockburn, in *Wason v. Walter* (L. R., 4 Q. B. at p. 94), with equally characteristic boldness, predicted that, if any action or indictment founded on an *ex parte* proceeding were to be brought, it would probably be held that the true criterion of the privilege was, not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, MARCH 2, 1878.

CURRENT TOPICS.

IN the case *Matter of Allen*, reported in our present number, Judge Wallace, of the United States District Court for this district, strongly animadverted upon a kind of transaction common enough in bankruptcy proceedings, and regrets the inability of the court to interfere with it. A bankrupt firm, apprehending insolvency, began paying favored creditors and themselves out of the partnership assets; then, being unable to compromise their debts, they made an assignment to a friend, and shortly after procured a petition in bankruptcy to be filed against them, and then took proceedings for a composition. During all the time the bankrupts kept possession of the firm property under some pretext or other. The attorney who managed the proceedings for the bankrupts represented most of the creditors, and the court states that during all the transaction no step was taken to protect creditors. Judge Wallace says: "It shocks the moral sense to assist in this dishonest scheme of judicial action," and that "the bankrupt law permits just such schemes as this." We are glad to record this judicial protest against the bankrupt law, and hope it will encourage those striving in Congress to procure its repeal. As the law stands to-day it is of no advantage to any honest debtor or honest creditor, and no benefit to the legal profession generally. There is a small but active interest who derive profit from its continuance, but we hope that interest is not this year strong enough to thwart the generally expressed wish of the business community that the law be done away with.

It is proposed in England, by legislation, to abolish actions for breach of promise of marriage, a movement which the *Law Times* justly remarks "will recommend itself to the common sense of mankind." These actions are very frequently made the means of extorting money; in fact, the circumstance that one is brought is presumptive evidence that the purpose with which the plaintiff sought to enter into matrimony was a financial one. If the right of action did not exist the business of a class of scheming females would be cut off, and such persons are all who would be injuriously affected. A sensitive, high-minded woman never seeks a

court of justice to get such a wrong as this kind of action is founded upon, righted, and others ought not to be permitted to do so.

The Court of Appeals, on the 22d ult., adjourned until the 18th of the present month. The court announced its determination not to hear any arguments hereafter in appeals where the printed cases are not properly indexed; and the further requirement is made, that the names of the counsel appear in the briefs. The court has done a large business since its assembling January 14th—having decided 134 cases, many of them involving the writing of elaborate opinions. There remain over several undecided cases of considerable importance, among which are *Bertholf v. O'Rielly*, and one other case argued in December last, involving the constitutionality of the civil damage law, and *Lange v. Benedict*, where the question of the liability of a judge for false imprisonment under an erroneous sentence is raised.

A bill recently introduced in the assembly by Mr. Seebacher, for the protection of working people, is an example of a kind of legislation that ought not to meet with favor. It provides that in judgments recovered for wages, when the amount is less than \$50, if the execution issued is not paid the debtor may be arrested and put in a jail or debtor's prison for fifteen days. As a sort of compensation for this, it is provided that if, on a trial by jury, it shall be found that the plaintiff was in the wrong or intended persecution, he may be imprisoned. It was asserted that when imprisonment for debt not contracted fraudulently was abolished, we had taken a long step forward in the way of legal reform, and the common judgment of intelligent men has justified that assertion. But at this late day it is proposed to go back to the old system, and to imprison men who are unable to pay contract debts. The class of debts mentioned is undoubtedly a very meritorious one, but it is not sufficiently meritorious to call for the enactment of such a statute as is proposed. There may be cases of wrong, now and then, which the present laws do not remedy, but they furnish no excuse for the proposed statute. We hope the legislature is not yet ready to restore imprisonment for debt.

The position of a judge in England does not appear to be one of personal safety. A few months ago the papers were filled with the account of an assault upon a vice-chancellor with an egg, most of the public, however, being disposed to laugh at the incident. Sir George Jessel, Master of the Rolls, on the 22d ult., met with a much more serious peril. As he was alighting from his cab at the Rolls Court he was shot at with a pistol in the hands of a crazy minister, named Dodwell, who had previously been removed from the court by order of the Master, for

creating a disturbance. The bullet from the pistol just grazed the ear of Sir George. It is needless to say that the assailant was arrested.

The House of Representatives, on the 21st ult., passed, by the decisive vote of 169 to 87, a bill providing that when a woman shall have been a member of the bar of the highest court in any State or Territory she shall, on application, be admitted to practice before the United States Supreme Court. The Senate will probably indorse the bill, and we may expect, in the course of the coming year, to hear female counsel arguing causes before the highest tribunal in our land. The bill is, however, a partial one, in that it opens the Supreme Court to the women of those States and Territories only where no distinction is made on account of sex in admissions to the bar. The great body of female aspirants for forensic honors will be still excluded from an opportunity to place their names upon the roll of the Supreme Court. We trust this circumstance will be considered when the bill comes before the Senate. But why not leave the whole matter where it belongs—with the courts? When any considerable number of the States permit women to practice at the bar, the Federal courts will give them the same opportunity, and no objection will be raised. Because two or three States and Territories and the District of Columbia have made the experiment of admitting women to the bar is no reason why the dozen or so female lawyers who have taken advantage of the privilege shall be given a favor which is denied to their sisters residing in other parts of the country.

On the same day the House of Representatives passed bills providing for appearance in behalf of the United States, in foreclosure suits, and for exemption from seizure upon executions or attachments issued by any United States court, the same property which shall be exempted from levy and sale under the laws of the State in which the defendant shall reside. The first-mentioned bill is designed to meet cases where the United States has a subsequent lien on mortgaged property, it being now impossible to cut off such lien for the reason that the United States cannot be sued in the ordinary courts.

Among the bills introduced in the legislature during the past week, we notice one providing that all legal notices published in Sunday newspapers shall be as valid as those published in papers issued on a week day, one authorizing boards of supervisors to revise and correct all erroneous and illegal assessments within their respective counties, and one providing that no one shall hereafter be held for obtaining money or other valuable thing by means of false pretenses or representations, unless the false

representations be made in writing. The object of the latter bill is said to be to prevent the use of criminal process in the collection of debts, but its effect will be to do away with the statute relating to false pretenses, for in not one case out of twenty is the offense mentioned committed by means of a writing. While the statute, as it now is, may sometimes be used oppressively, the change proposed would open the door to the perpetration of innumerable frauds. The persons the bill is designed to protect are entitled to very little consideration, and if it should pass, the cheats, swindlers and confidence men who infest our cities and prey upon strangers, would be beyond the reach of punishment. We trust the legislature will not sanction the bill. An amendment to article 6, section 14, of the State Constitution was proposed in the assembly, which provides that the compensation of judicial officers shall be in the form of a salary, payable monthly, and that judges shall receive no fees or allowances. A bill requiring justices of the peace to give bonds has passed both houses, and the bill enacting the last nine chapters of the Code of Civil Procedure has been ordered to a third reading in both houses.

The bar association of the city of New York has been considering what action it should take in reference to the two bills for reorganizing the Federal courts, respectively introduced by Senators Conkling and Davis, and now pending in Congress. The Davis bill provides for the appointment of an additional circuit judge in each of the circuits of the United States, while the Conkling bill provides for additional district judges who are not to be assigned to any particular district, but are to hold District or Circuit Courts wherever they may be directed so to do by the circuit judge. The committee adopted the provisions of the Davis bill on this point, adding an amendment giving to all the circuit judges power to hold District Courts wherever they are assigned to duty by the senior circuit judge. The association passed a resolution approving the detailed amendments suggested by the committee, and referred the matter back to it for further consideration.

NOTES OF CASES.

IN *Thompson v. Lambert*, 44 Iowa, 239 an action was brought by a stockholder in a corporation to prevent the corporation from paying certain notes given by it and secured by a mortgage upon its real estate, for a loan of money to it, and to have the notes declared null and void on the ground that the money was borrowed for a transaction into which the corporation had no authority to enter, and that the giving of the notes and mortgage was *ultra vires*. The court held that the rule *ultra vires*

prevails in full force only when the contracts of corporations of this character remain wholly executory. In *Parish v. Wheeler*, 22 N. Y. 494, a similar doctrine is maintained, it being held that a railroad company could not defend itself against a claim for money paid at its request to one who advanced the price of a steamboat purchased for it, on the ground that the purchase was *ultra vires*, though the plaintiff when he paid the money knew all the facts; and the court says that while "contracts with corporations, made in excess of their powers, which are purely executory on both sides, and where no wrong will be done if the parties are left in their previous situation, will not be enforced, because such contracts contemplate an unauthorized division of corporate funds, and, therefore, a breach of private trust, the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith so require." See, also, *Bissell v. Mich. So., etc., R. R. Co.*, 22 N. Y. 258. It is held that the defense necessarily rests upon the violation of trust or duty toward stockholders, and is not to be entertained when its allowance will do a greater wrong to innocent third parties, and that the contracts of corporations in excess of their rightful powers, but free from any other vice, are not illegal in the sense of the maxim *ex turpi contractu non oritur actio*. See, also, *Bradley v. Bullard*, 55 Ill. 413. The general rule prevails, even as to public or municipal corporations in analogous cases. *Trask v. Davis*, 10 Cush. 252; *Fuller v. Melrose*, 1 Allen, 166; *Allegheny v. McCluakan*, 14 Penn. St. 81.

In *Leighton v. Orr*, 44 Iowa, 679, one Wolcott had lived for years in unlawful relations with a woman who shared his home, and who claimed to be a spiritualistic medium, and to have daily communications with his deceased wife, whose memory he greatly revered. During this time she acquired great influence over him, and controlled him to a large degree in the management of his business affairs, and at the same time he was addicted to the use of alcoholic liquors to such extent that he became debilitated in mind and body. Previous to his death he conveyed large portions of his property, for the considerations of "one dollar and friendship," to this woman. The court held that these conveyances should be set aside on the ground that they were procured by undue influence. This case, in one respect, resembles that of *Lyon v. Home*, L. R., 6 Eq. Cas. 455. The defendant in that action was somewhat celebrated as a spiritualist. The plaintiff sought him and thrust her gifts upon him; in consequence, however, of directions received, as she supposed, through the defendant, from her deceased husband. There were, however, no illegal or immoral relations between the parties. The court held that, owing to the confidential relations

between the parties, the burden was on the defendant to support the deeds or gifts, and that he should satisfy the court that they had not been obtained by reason of confidence reposed, or undue influence. In *Robinson v. Adams*, 62 Me. 369, the subject of spiritualism, and its effect on the validity of wills, is extensively discussed, and the conclusion reached that when a will is attempted to be impeached upon the ground that it was the result, to some extent, of assumed spiritual communications with the deceased husband of the testatrix, and of her belief that her son-in-law possessed supernatural power over his wife, and was possessed of devils, the jury must determine how far these beliefs were founded in insane delusion, or exercised undue influence in producing the will. See, also, note to this case in *Redfield's Leading American Cases on Wills*, p. 384. See, also, as to undue influence from other relations, *Dean v. Negley*, 41 Penn. St. 312; *Monroe v. Barclay*, 17 Ohio (N. S.), 302; *Rudy v. Ulrich*, 69 Penn. St. 177.

In *Force v. City of Elizabeth*, 1 Stewart (28 N. J. Eq.) 403, the alteration of the number of a municipal bond, payable to bearer, when different bonds of the same series are distinguished alone by the numbers, is held to render the instrument void in the hands of the person who made the alteration, and of those who claim under him. The ground upon which this decision is placed is that the number was the only mark of distinction of the bond, and a change in that destroyed all evidence of identity. The court cites in support of its conclusion the case of *Hunt v. Gray*, 6 Vroom, 227, where the Supreme Court of New Jersey held that even immaterial alterations are fatal, because to render any rule upon the subject efficacious it must absolutely interdict the owners of written contracts from tampering with them at all. This effect is also claimed for immaterial alterations in other cases. See *Lubbering v. Kolbricher*, 22 Mo. 598; *Turner v. Bellagram*, 2 Cal. 523. And in 1 Greenl. Ev., § 568, it is said that if the alteration be fraudulently made by the party claiming under the instrument, it does not seem important whether it be in a material or immaterial part, for in either case he has brought himself under the operation of the rule established for the prevention of fraud. But in 2 Daniel on Negotiable Instruments, 373, it is said that in none of the cases quoted by Greenleaf, "which we have seen, did it appear that the alteration was immaterial, and was held to have vitiated the instrument by reason of the fraudulent intent." If the change destroys the identity of the instrument, as in the principal case, it is material, and the rule as it is generally understood is the safer one. In *Modge v. Herndon*, 30 Miss. 120, it is said that an immaterial alteration may be treated as no alteration, and it was accordingly held that if the act was immaterial and could work no injury, it was irrelevant to inquire into the motives with which it was committed. See, however, *Adams v. Frye*, 3 Metc. 103; *Homer v. Wallace*, 11 Mass. 309; *Smith v. Dunham*, 8 Pick 246.

THE FUTURE OF THE REVISION.

THE fate of the Statutes Revision of this State, which rests in the hands of this legislature, is a matter of considerable present importance. The existing Commission will expire by limitation on the 1st of May next, unless it be given a new lease of life at this session. Of the fate of the work accomplished there is little doubt. Not only will the Code of Civil Procedure already adopted be retained, with amendments, but the nine supplemental chapters will be added. If nothing else, the inconveniences arising from a change is an argument strong enough to bring about such a result. And, perhaps, under the circumstances, this is not to be regretted, although it gives us the bulkiest Code of Procedure in the world. But what of the work undone or incompleting—the substantive law, civil and penal, and the criminal procedure? Is the Commission to go on or is it to go out? Are we to have, once for all, what we have before attempted, a thorough and complete revision and codification of our laws, or are these 3,318 sections of procedure to be the only outcome of all the treasure and years of labor expended? For our own part, we are most decidedly of the opinion that the revision ought to be continued, and the whole law and procedure reduced to a congruous, concise and perspicuous code. It is too late in this State—where the movement in favor of codification had its origin—to question the utility or desirability of a code. In the language of the Code commissioners of 1857, “If the law is a thing to be obeyed, it is a thing to be known, and if it is to be known, there can be no better, not to say no other, method of making it known than of writing and publishing it. If a written constitution is desirable, so are written laws. The same reasons which affect the one affect also the other.” The statute law of this State is contained in some eighty odd volumes, and covers about 75,000 pages; the case law in upwards of 450 volumes of reports. This law, both statute and case, every man is presumed to know—is bound to know. The purpose of a revision or a code is to “boil down” this incongruous, incomprehensible mass into a congruous, comprehensible and concise system.

The necessity of reducing “into a written and systematic Code the whole body of law of this State” was distinctly recognized and provided for in the Constitution of 1846, and in pursuance of its provisions two commissions were appointed—the Practice Commission, consisting of David Dudley Field, Arphaxed Loomis, and David Graham, and the Code Commission, consisting of Mr. Field, William Curtis Noyes and Alexander W. Bradford. These Commissions prepared and reported five Codes—only one of which (and that the incomplete and partial

work of the commission) was adopted. These Codes were the Code of Civil Procedure, of Criminal Procedure, the Civil Code, the Penal Code, and the Political Code. These Codes have been adopted in some ten or twelve of the States, and one or another of them has become the statute law of the great majority of the States of the Union. Not only this but the Code of Civil Procedure was the model upon which the revised procedure of England was founded. As concise, perspicuous and exact statements of the law, they are excelled by no codes ever prepared, and they have received unqualified commendation from sources whence undeserved commendation would not come. In 1870 Mr. Thring, parliamentary draftsman, and the ablest English authority on legislative drafting, prepared a series of instructions in statute drafting for the use of the British Parliament, wherein he used the following language: “The draftsman should read carefully Mr. Coode’s book on legislative expression, above referred to, and should study, for forms of expression, the Code of Criminal Procedure and Civil Procedure of the State of New York.” (See 2 Alb. L. J. p. 107.) Now it seems to us that we ought not longer to ignore this body of law already prepared to our hand. It was hoped, when the existing Commission was appointed, that the Commissioners would find these codes useful as the basis, at least, of their revision, and to that end the legislature expressly authorized the Commissioners to incorporate them into and make them a part of their revision. This they have not done. It is most certainly advisable in every view to continue the commission and the revision. We have gone too far, wisely to retreat, were retreat desirable. But at the same time let the commission be continued *expressly* for the purpose of taking these unadopted codes as the basis and substance of their work. Let them be required to reform or revise those codes so far as they may need change in the light of our juridical history since they were reported, but let the “amending hand” be so hedged in that there shall be no more change, for change sake only. By so doing we shall gain in time, in money, and, what is of much greater importance, in our jurisprudence.

UNITED STATES SUPREME COURT ABSTRACT.

OCTOBER TERM, 1877.

FRAUD.

Meaning of word “fraud” in § 33, Bankrupt law.—The word “fraud,” as used in the 33d section of the bankrupt law of 1867, means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. Accordingly, where a person purchased notes belonging to an estate, from an executor, at a discount, under such circumstances that rendered him guilty of a constructive fraud by being im-

plicated in a *devastavit* committed by the executor, in selling the notes, *held*, that the fraud was not such as would preclude him from setting up a discharge in bankruptcy against an action to recover the value of such notes. Judgment of Supreme Court of Appeals of Virginia reversed. *Neal, plaintiff in error, v. Scruggs*. Opinion by Harlan, J.

JURISDICTION.

Foreclosure of mortgage: parties: citizens of different States.—In an action brought by certain bondholders in the United States Circuit Court to foreclose a mortgage given to a trustee upon property belonging to a corporation, for the benefit of the bondholders, it appeared that the trustee had refused to bring action, and that the bondholders were residents of a State other than that in which the corporation was situated. *Held*, that the complainants had a right to have suit for a foreclosure in the name of the trustee, and having applied to him for that purpose and he having refused to perform his duty, the complainants, with the other parties interested in the security, might properly become the actors in such a suit against the mortgagor, impleading the trustee also as a respondent. *Held*, also, that the United States Circuit Court had jurisdiction of the action as being between citizens of different States. Judgment of Circuit Court, Nebraska, affirmed. *Omaha Hotel Company, appellant, v. Wade*. Opinion by Clifford, J.

2. Joinder of parties.—Some of the other bondholders were not joined as parties to the suit. *Held*, not to affect the jurisdiction of the court. Holders of such securities otherwise entitled to sue in the Circuit Court to foreclose the mortgage or trust deed are not compelled to join as respondents other holders of similar securities, if resident in other States, even if they refuse to unite as complainants, as the effect would be to oust the jurisdiction of the court. *Ib.*

3. When security not void on ground that lender is a trustee of borrower.—It was claimed that the bonds and mortgage were void upon the ground that the lenders of the money were also the directors of the company. The terms of the contract were sanctioned by the stockholders, and the money loaned was needed to complete the building, and it was applied to effect the purpose for which it was borrowed. *Held*, that the claim could not be sustained. (*Stark v. Coffin*, 105 Mass. 333; *Credit Association v. Coleman*, Law. Rep., 5 Ch. 568; *Troup's Case*, 20 Beav. 353; *Hoare's Case*, 30 id. 225; *Smith v. Lansing*, 22 N. Y. 526; *Busby v. Finn*, 1 Ohio St. 422.) *Ib.*

4. Usury: what does not constitute.—Most of the directors who took the bonds and advanced the money were owners of stock in the bank where the money when paid to the use of the company was deposited. Interest was not paid on the deposits, and it was insisted by the company that the transaction was usurious. *Held*, that in the absence of any evidence that any agreement was ever made that the money should be deposited in that bank, the proposition could not be sustained. *Ib.*

LIMITATION OF ACTION.

Action to enforce resulting trust.—It is an undoubted rule of law in Pennsylvania that a resulting trust in land, if not sought to be enforced for a period of twenty-one years, and is not reaffirmed, or continued, will, under ordinary circumstances, be extinguished. This rule is especially applicable where the party having the legal title has, during the required period of twenty-

one years, been in notorious and adverse possession, paying the taxes and exercising all the usual rights of ownership, and his title has, for the whole period, been on record in the proper office. *Stemler v. Roberts*, 6 Harris, 283; *Fox v. Lyon*, 9 Casey, 481; *Brock v. Savage*, 7 id. 421; *Hulsey v. Tate*, 2 P. F. Smith, 311; *Lingenfeller v. Richey*, 12 id. 123. Judgment of Circuit Court, W. D. Pennsylvania, affirmed. *King, plaintiff in error, v. Pardee*. Opinion by Bradley, J.

PRACTICE.

1. Proof of service of summons: service by publication on a non-resident: statute of Oregon.—A statute of Oregon, after providing for service of summons in an action upon parties or their representatives personally or at their residence, declares that when service cannot be thus made and the defendant, after due diligence, cannot be found within the State, and "that fact appears, by affidavit, to the satisfaction of the court or judge thereof, and it, in like manner, appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in the State, such court or judge may grant an order that the service be made by publication of summons * * when the defendant is not a resident of the State, but has property therein and the court has jurisdiction of the subject of the action"—the order to designate a newspaper of the county where the action is commenced in which the publication shall be made—and that proof of such publication shall be "the affidavit of the printer, or his foreman, or his principal clerk." *Held*, that defects in the affidavit for the order can only be taken advantage of on appeal or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally; and that the provision as to proof of the publication is satisfied when the affidavit is made by the editor of the paper. Judgment of Circuit Court of Oregon affirmed. *Penmoyer, plaintiff in error, v. Neff*. Opinion by Field, J.

2. Effect of personal judgment on non-resident: when no title passes upon sale under—A personal judgment rendered in a State court in an action upon a money demand against a non-resident of the State, without personal service of process upon him within the State, or his appearance in the action, upon service by publication, is without any validity; and no title to property passes by a sale under an execution issued upon such a judgment. *Ib.*

3. When State tribunals may and may not adjudicate claims against non-residents.—The State having within its territory property of non-residents may hold and appropriate it to satisfy the claims of its citizens against them, and its tribunals may inquire into their obligations to the extent necessary to control the disposition of the property. If non-residents have no property in the State, there is nothing upon which the tribunals can adjudicate. *Ib.*

4. Substituted service, when sufficient: when not sufficient.—Substituted service by publication, or in any other authorized form, is sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent, and proceeds upon the theory that its seizure will inform him that it is taken into the custody of the court, and that he must look to any proceedings authorized by law upon such seizure for its

condemnation and sale. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. *Ib.*

5. *Process of State tribunals not valid out of State; publication.*—Process from the tribunals of one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them; and publication of process or notice within the State in which the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State and process published within it are equally unavailing in proceedings to establish his personal liability. *Ib.*

6. *When substituted service not effectual: property in State essential.*—Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, the substituted service of process by publication, allowed by the law of Oregon, and by similar laws in other States, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court and subjected to its disposition by process adapted for that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*. *Ib.*

7. *Relation of Federal tribunals to State tribunals.*—Whilst the courts of the United States are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them. *Ib.*

8. *Meaning of "due process of law": essentials to constitute it.*—The term, "due process of law," when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution to pass upon the subject-matter of the suit, and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance. *Ib.*

REMOVAL OF CAUSE.

Removal under act of 1875, § 2: when not allowed.—In order to entitle a party to a removal of a case from a State to a United States court under section 2 of the act of 1875, providing for the removal of suits arising under the Constitution or laws of the United States, the decision of the case must depend upon the construction of the law or Constitution. A cause cannot be removed from a State court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. Accordingly, where in an action brought to restrain defendants below from depositing the debris from their mines in the channel of a river, the petition for removal set forth defendants'

ownership, by title derived under the laws of the United States, of certain valuable mines that could only be worked by the hydraulic process, which necessarily requires the use of the channels of the river and its tributaries in the manner complained of, and they alleged that they claimed the right to this use under the provisions of certain specified acts of Congress and also alleged that the action arose under, and that its determination would necessarily involve and require the construction of the laws of the United States specifically enumerated, as well as the pre-emption laws, but stated no facts to show the right they claim or to enable the court to see whether it necessarily depended upon the construction of the statutes. *Held*, not sufficient to entitle defendants to a removal of the cause. Judgment of Circuit Court, California, affirmed. *Little York Gold Washing and Water Company et al., plaintiffs in error, v. Keyes*. Opinion by Waite, C. J. Bradley, J., dissented.

SPECIFIC PERFORMANCE.

Defense in action for: title: parties plaintiff.—W., by will made in 1852, devised certain real estate to H. for life, then to B., in trust, to apply the income to the use of his brother during life, and thereafter to H., Jr. Before his death W. contracted to sell the estate to defendant below, defendant taking possession and paying part of the purchase-money. In an action brought by H. and B. to compel specific performance by defendant of his agreement to purchase, it was objected that there was a defect of parties plaintiff on the ground that H. and B. were not able together to make a title that ought to be satisfactory to defendant. *Held*, that the objection was not well taken. The execution of the contract (with the partial payment thereon) was a transfer in equity of the title of the land to defendant, leaving in the representatives of W. simply a naked title as trustee for defendant, to be conveyed upon performance on his part. By the terms of the will this legal title was vested in B., the trustee, to preserve remainders. Judgment of Circuit Court, South Carolina, affirmed. *Bissell, appellant, v. Heyward*. Opinion by Hunt, J.

2. *Tender: must be kept good to stop interest and costs.*—To have the effect of stopping interest or costs a tender must be kept good, and when used by the debtor for other purposes it ceases to have that effect. (*Rouell v. Bull's Head Bank*, 55 Barb. 574; *Giles v. Hart*, Salk. 622; *Smallwood v. Squire*, id. 623.) *Ib.*

3. *Contract made with reference to Confederate currency: measure of value.*—The contract was made with reference to Confederate currency, which was the only currency in circulation at the place where it was made (South Carolina) at the time. The master found the balance due upon the contract to be \$28,353.50, and in reaching this result he compared the value of the Confederate currency, in which the contract was payable, with United States paper currency at the dates of the contract and of the tender. The defendant insisted that the value of the Confederate notes should be reduced to gold or sterling exchange, which would still further depreciate their value. *Held*, that this objection could not be sustained. By the laws of the United States all contracts between individuals could then be lawfully discharged in the legal-tender notes of the United States. These notes, and not gold or silver sterling exchange, were the standard of value to which other currencies are to be reduced to ascertain their value. (*Knox v. Lee*, 12 Wall. 457; *Thorington v. Smith*, 8 id. 14; *Dooley v. Smith*, 13 id. 604; *Rev. Stat. So. Car.*, p. 285.) *Ib.*

CONDITIONS IN INSURANCE POLICIES AS TO OWNERSHIP.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

LYCOMING FIRE INSURANCE CO., plaintiff in error, v. Haven *et al.*

In a fire insurance policy on buildings, issued to plaintiff below, it was provided that "if the interest of the insured in the property be any other than the entire unconditional and sole ownership of the property for the use and benefit of the insured, or if the buildings insured stand on leased ground, it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy shall be void." The plaintiff owned the land upon which the buildings were erected in fee simple, and the premises were leased to another party for a term of years. Nothing was expressed in the policy to indicate that the interest of the insured was other than the entire unconditional and sole ownership of such property, or indicating that most of the buildings stood on leased ground. *Held*, that the condition of the policy was not violated, and plaintiff was entitled to recover thereon in case of loss.

IN error to the Circuit Court of the United States for the Northern District of Illinois. The facts are contained in the opinion.

Mr. Justice CLIFFORD delivered the opinion of the court.

Policies of fire insurance are contracts whereby the insurers undertake for a stipulated sum to indemnify the insured against loss or damage by fire, in respect to the property covered by the policy, during the prescribed period of time, to an amount not exceeding the sum specified in the written contract. Angell on L. and F. Ins. 43.

Insurance was effected by the plaintiffs, on the ninth of May, 1870, in the company of the corporation defendants, for the term of one year, against loss or damage by fire, to the amount of three thousand dollars, covering the ten buildings therein described, each of which being insured in the sum of three hundred dollars.

It appears by the bill of exceptions that the policy was in the usual form of policies issued by the defendants, and that it provided that "if the interest of the insured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the insured, or if the buildings insured stand on leased ground, it must be so represented to the company, and be so expressed in the written part of the policy, otherwise the policy shall be void."

Two other stipulations are contained in the policy, which it is important to notice: 1. That "the use of general terms, or any thing less than a distinct specific agreement clearly expressed and indorsed on the policy, shall not be construed as a waiver of any printed or written condition or restriction therein." 2. That the policy is made and accepted in reference to the foregoing terms and conditions, which are declared to be a part of the contract, and may be used and resorted to in order to determine the rights and obligations of the parties to the policy.

Nothing was expressed in the written part of the policy indicating or tending to indicate that the interest of the insured in the property purporting to be insured was any other than the entire, unconditional, and sole ownership of such property for the use and benefit of the insured, or indicating or tending to indicate that the buildings insured stood on leased ground.

Payment of the alleged loss being refused, the plaintiffs instituted the present suit in the State court, which was subsequently removed into the Circuit Court of the same district, the parties agreeing that the plaintiffs might prove any claim they have under the common counts as if they should add special counts, and that the defendants might prove any defense they have to the action under the general issue, the same as if it was set up in a special plea.

Pursuant to that stipulation the parties went to trial and the verdict and judgment were for the plaintiffs in the sum of thirty-seven hundred and thirty dollars damages, with costs of suit. Exceptions were taken by the defendants to the charge of the court, and they sued out a writ of error and removed the cause into this court.

Neither title deeds nor evidence of the same was introduced by the plaintiffs, but the defendants admitted at the trial that "the plaintiffs were owners in fee of the land on which the buildings insured stood" at the time of the fire, as appears by the bill of exceptions. Proofs were introduced by the plaintiffs, admitted by the defendants to be in due form, which showed that the buildings described in the policy were, on December 31, 1870, destroyed by fire, and that the property insured belonged to the plaintiffs, subject to the lease mentioned in the proofs so introduced, to which more particular reference will presently be made. Other evidence was introduced by the plaintiffs, but the defendants offered no evidence, and the court directed the jury to return a verdict in favor of the plaintiffs for the amount of the policy, with interest from the expiration of sixty days subsequent to the time the proof of loss was exhibited.

Seasonable exceptions were filed to the charge of the court, upon the ground that the lease mentioned in the proofs of loss show that the plaintiffs were not at the time of the loss the entire, unconditional, and sole owners of the property for their own use and benefit.

Sufficient appears to show that the fee-simple title of the land was in the plaintiffs and that they were the entire owners of the property destroyed, subject to the lease mentioned in the proofs of loss, and it was admitted by the defendants that the fire caused a total loss of the property and that the value of the buildings exceeded the amount of the insurance.

By the terms of the lease referred to in the proofs of loss it appears that the instrument was for a term of ten years, from May 1, 1868, to May 1, 1878, and that it covered the land on which the insured buildings stood and the buildings and improvements to be built thereon, having been executed before the buildings were erected, at a rental of three thousand five hundred dollars per annum for the first five years, and five thousand nine hundred and seventy-six dollars per annum for the second five years.

Ten buildings were to be erected, to cost not less than twenty-four thousand dollars, and the lesser was to pay one-half the amount in installments, each installment to be one thousand dollars, and to be paid when the lessee had expended twice that amount in the prosecution of the work. Arrangements of a contingent character are also prescribed in case the lease is continued or determined, and for the basis of adjustment in either event and for payment or repayment as the case may be, which it is not necessary to reproduce in the present case.

Errors assigned material to be noticed are as follows:

1. That the court erred in directing the jury to return a verdict in favor of the plaintiffs for the amount of the policy and interest. 2. That the court should have directed the jury to return a verdict the other way, as the law of the case was with the defendants. 3. That the court erred in not submitting the questions of fact to the jury whether the plaintiffs were so far the sole, entire, and unconditional owners of the property insured as to be entitled to recover in view of the evidence.

Authorities to prove that a fee-simple estate is the highest tenure known to the law is quite unnecessary, as the principle is elementary and needs no support, nor is any argument necessary to show that the title of the plaintiffs to the land where the buildings stood was of that character, as that is admitted in the bill of exceptions, which constitutes a part of the record.

Concede that, and it follows that the plaintiffs were, within the meaning of the policy, the entire, unconditional, and sole owners of the land where the buildings stood, for their own use and benefit, at the time of the fire; and if so, the *prima facie* presumption must be that they held the title of the buildings by the same fee-simple title, in the absence of any evidence in the case to controvert that conclusion. None certainly was introduced by the defendants and it is not pretended that there is anything in the proofs introduced by the plaintiffs to support any different theory, except the lease referred to in the evidence offered to prove the loss.

Land-owners under a fee-simple title, in the absence of any proof to the contrary, are certainly presumed to be the owners of the buildings erected and standing on the premises, the rule being that the buildings and the lands together are known as real estate, and the buildings, where nothing is shown to the contrary, are presumed to be held by the fee-simple owner of the land by the same title as the land on which the buildings are situated, from which it follows that the plaintiffs being the owners in fee of the same are also the owners in fee of the buildings, unless there is something in the terms of the lease to disprove that theory; and it is equally clear that if they are the entire, unconditional, and sole owners of the buildings as well as of the land, the assignment of error must be overruled.

Nor is any thing contained in the lease to support any different theory. Instead of that the lease shows that the plaintiffs were the owners of the land and that the contractor agreed to erect the ten buildings on the land for the owners; nor does it make any difference that the owners of the land contracted with the builder that they, when the buildings were erected, would lease the same to him for the term of ten years.

Buildings of every kind are frequently erected by land-owners to be rented, nor is it any thing uncommon that the contract for lease should be made before the buildings are erected or that the contract for a lease should be blended with the contract for erecting the building, as in this case. Leases of the kind are not uncommon, nor is there any thing in the terms of the instrument to countenance the theory that the title of the plaintiffs did not remain as before—a fee-simple title, as described in the admission of the defendants.

In the words of the contract the lessee agreed to proceed at once to erect ten buildings on the land therein described, to cost not less than twenty-four thousand

dollars, for the other party to the instrument, and "to receive payment for the same at the times and in the manner therein described," which of itself shows to a demonstration that the buildings when erected became the property of the plaintiffs, as the terms of the instrument, called a lease, show that the buildings were erected for the plaintiffs on their land, and that they paid the agreed price for their erection. Decided support to that theory is also derived from another clause of the lease, by which the lessee bound himself to insure the buildings during the time employed in their erection, in the name and for the benefit of the plaintiffs, and to deposit the policies in their keeping and possession. Policies were to be taken out and kept in force in the sum of thirteen thousand dollars, in the name and for the benefit of the lessors, during the continuance of the lease, in companies to be approved by the plaintiffs, and the stipulation was that the policies should be deposited with the lessors of the property. Other evidence to support the theory of the defendants is entirely wanting, the record showing that they offered no evidence at the trial, and inasmuch as the terms of the lease show that the plaintiffs owned the land in fee simple and that they contracted to have the buildings erected and paid for their erection and caused them to be insured in their own name and for their own benefit, it is clear that the supposed defense that the plaintiffs were not the entire, unconditional, and sole owners of the buildings, utterly fails, and that the charge of the court directing a verdict for the plaintiffs is correct.

Attempt is made in this case to maintain the theory that the plaintiffs are not the entire owners of the property, because it was under lease both when the policy was issued and at the time of the loss, but it is clear that the theory has no foundation in law or justice. Nor can the theory be sustained which attempts to separate the ownership of the buildings from the land, which it is admitted is vested in the plaintiffs by a fee-simple title. Such an assumption is contrary to the facts exhibited in the record and can no more be supported than that the lessees of stores, tenement-houses, or other buildings in our large cities own the same by mere possession or occupancy of the particular store, tenement, or building included in the lease they hold from the owner.

Thousands of cases arise where dwelling-houses, stores, and other buildings of every kind, are leased to occupants, for longer or shorter periods of time and upon still more varying conditions and stipulations, and yet the owners procure insurance upon the same without mentioning the names of the lessees in the policies, or ever suspecting that they have omitted any duty, or been guilty of any concealment or neglect. Insurance companies set up no such pretense, and if they should do so, they would find no support to such a theory in the courts of justice.

Stores and other buildings are sometimes erected by their owners upon leased lands, without any other title than what is derived from their lease, which is a very different thing from the case where the owner, both of the land and the building, leases the estate to the occupant for a term of years, without parting with the fee-simple title to the land or the building. Fee-simple ownership in such a case is matter of importance to the insurer, especially if the company is a mutual one, as such companies usually have a lien on the premises for the payment of the premium; nor is the ownership of the land an immaterial matter even

if no such lien arises as it furnishes an important element to enable the company to determine whether it is expedient to take the risk.

Considerations of the kind, it may be presumed, induced the defendants to insert the condition in the policy of the plaintiffs, "that if the buildings stand on leased ground it must be so represented to the company, and must be so expressed in the written part of the policy, otherwise the policy shall be void." Nothing of the kind is pretended in this case, and if it were, it could not be sustained for a moment, as it is admitted in the record that the plaintiffs were the owners in fee of the land where the buildings stood at the time of the fire.

Adjudged cases are invoked to sustain the theory of the defense, but none of those cited support the proposition involved in the theory. Examples of the kind are *Gahagan v. Ins. Co.*, 43 N. H. 177, and *Warner v. Ins. Co.*, 21 Conn. 444, both of which are cases where the insured represented that the property covered by the policy was free and unincumbered, when in fact it was incumbered by mortgage. *May on Ins.*, § 280; *Towne v. Ins. Co.*, 7 Allen, 51.

Cases are also cited where the insured had only a bond for a deed, or only a leasehold interest, and where the insured procured a policy as the absolute owner of the property in the face of those facts. *Ins. Co. v. Wright*, 22 Ill. 474; *Smith v. Ins. Co.*, 6 Cush. 448; *Brown v. Williams*, 28 Me. 262; *Hinman v. Ins. Co.*, 36 Wis. 167.

Much discussion of such authorities is not required, as it is clear they do not favor the theory of the defendants. Nor does the case of *Smith v. Ins. Co.*, 17 Penn. St. 253, aid the defendants, as it is clear that if a mortgagee insures his interest in the premises, he is bound, under a provision, calling for incumbrances, affecting his interest, to state prior mortgages on the same premises. *May on Ins.*, § 293.

Misrepresentations of material facts of course avoid a policy, but there were none such in the case before the court. *Ins. Co. v. Lawrence*, 10 Pet. 516, cited by the defendants.

Where the policy contained the provision that if the property to be insured is held in trust, or on commission, or is a leasehold interest, or an equity of redemption, or if the interest of the insured in the property is any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the insured, it must be so represented to the company and be so expressed in the written part of the policy, otherwise the policy shall be void, the Supreme Court of Illinois held, in a case where it appeared that the property had been sold under judgment and execution against the insured, that the non-disclosure of the sale and purchase avoided the policy, though the period allowed for redemption had not expired. *Ins. Co. v. Brennan*, 58 Ill. 158.

By the sale and purchase in that case nothing was left in the insured but the right of redemption, which would expire in one year from the sale, and it was well held by the court that the paramount title being in a third person, it could not be truthfully said that the insured had, at the date of the insurance, "the entire, unconditional, and sole ownership of the property."

Beyond all doubt the property in the case under consideration vested in the lessors, and if so, the two cases cited by the defendants, of *Mayor v. Ins. Co.*, 10 Bow. 545, and *Mayor v. Ins. Co.*, 9 id. 424, are au-

thorities in favor of the plaintiffs, as the facts in this case show that the property, in the true sense of insurance law, belonged to the insured at the date of the policy. *Ins. Co. v. Kelly*, 32 Me. 488; *Hubbard v. Ins. Co.*, 33 Iowa, 333.

Unless the true ownership or interest in the property is required by the conditions of the policy to be specifically and with particularity and accuracy set forth, it will in general be sufficient if the insured has an insurable interest under any *status* of ownership or possession, in cases where no inquiries are made at the time the application is presented or the policy is executed. *May on Ins.*, § 284.

No inquiry was made in this case, although it appears that the agent of the company who took the insurance resided in Chicago, where the buildings were situated; nor did the defendants offer any evidence at the trial to show that the unincumbered fee-simple title was not in the plaintiffs at the time the buildings were destroyed by the fire; nor did the defendants request the court at the trial to give the jury any instructions upon the subject. On the contrary, they admitted at the trial that the plaintiffs were the owners in fee of the land on which the buildings insured stood, leaving it to be inferred by the jury that the plaintiffs were also the owners in fee of the buildings.

Enough appears in the terms of the instrument, called the lease, to show that both the lessee and lessors treated the buildings "during the process of erection" as the property of the plaintiffs, and to show beyond controversy that the buildings when completed vested in the plaintiffs as their absolute property, subject only to the right of the builder to occupy and use the same, just as in the ordinary case where the owners of property agree to lease the same to be used by the lessee for a stipulated rent.

Lessees holding under an ordinary parol lease do not acquire such an interest in real estate so leased as to avoid a policy issued to the lessor, even though the insured failed to represent the matter to the company in a case where no inquiries were made of the applicant, at the time the policy was issued, as to the true character of the title or occupancy of the insured premises, and where no pretense is shown that the insured has been guilty of any fraud or misrepresentation.

Such a lease is a mere chattel interest, being reckoned as part of the personal estate of the lessee, and in case of the death of the lessee goes to his executors and not to the heirs-at-law, as appears by all the authorities. 2 Bl. Com. (Cooley's ed.) 143. *Ex parte Gay*, 5 Mass. 419; *Brewster v. Hill*, 1 N. H. 351; *Bisbee v. Hall*, 3 Ohio, 463; *Dillingham v. Jenkins*, 7 S. & M. 487; *Spangler v. Stanler*, 1 Md. Ch. Decs. 36.

Leases for years, says Taylor, are considered chattel interests arising out of a contract between the parties, and pass only a transient interest in the land, which is not a freehold, and might originally be made at common law by parol for any certain period. Taylor's L. & T. (6th ed.), 22; *Moshier v. Reding*, 12 Me. 482; *Maverick v. Lewis*, 3 McCord, 216; *Carisell v. Dietrich*, 15 Wend. 379; *Chapman v. Black*, 5 Scott, 533; *Waller v. Morgan*, 18 B. Monr. 141.

Two requisites, says Blackstone, were necessary to make a fief or feud: 1. Duration as to time. 2. Immobility as to place; and he adds that whatever was not a feud was accounted a chattel.

Chattels real, says the same commentator, are such

as concern or savor of the realty, including terms for years, and are called real chattels, as being interests arising out of, or being annexed to, real estate, of which they have one quality, to wit, immobility, but want the quality of indeterminate duration, the want of which constitutes them chattels. 2 Bl. Com. 386; 2 Kent's Com. (12th ed.) 342; 5 Bacon's Abr. (Bouvier ed.) 434; 2 Comyn's Dig. *Biens* a.; 1 Chitt. Gen. Prac. 244; Co. Litt. 46, 118 b.

Terms of years belonging to a testator or intestate vest in his executor or administrator without any entry, for the reason that in contemplation of law such interests are chattels. Woodfall's L. & T. (9th ed.) 239; *Watterton v. Hakewell*, 3 Man. & Gr. 297; *Atkinson v. Humphrey*, 2 C. B. 644; *Ins. Co. v. Kelly*, 32 Md. 438.

Insurers, if they desire to object to such a risk, should make inquiries of the applicant and should not admit at the trial, without qualification, that the insured was the owner *in fee of the land*, in a case where they offer no evidence in defense.

Judgment affirmed.

INJURIES TO PASSENGER TRAVELING FREE PASS.

SUPREME COURT OF THE UNITED STATES — OCTOBER TERM, 1877.

GRAND TRUNK RAILWAY Co., plaintiff in error, v.
STEVENS.

Plaintiff below was negotiating, at Portland, Me., with defendant below, a railroad company, for the introduction on its road of a patent car-coupling, and was requested by defendant to go to Montreal and see one of its officers there, defendant agreeing to pay his expenses. He was given a pass directing conductors to pass him from Portland to Montreal. The pass contained this condition: "The person accepting this free ticket in consideration thereof assumes all risk of all accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or injury to the property of the passenger using the ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket and collect fare." While traveling from Portland to Montreal, on this pass, on one of defendant's trains, plaintiff was injured by defendant's negligence. Held, that plaintiff was carried for hire, in pursuance of an agreement, and not as a gratuitous passenger; (2) that it was not competent for defendant to stipulate against liability for its own negligence in such a case, and it was liable for the injury.

IN error to the Circuit Court of the United States for the district of Maine. The facts appear in the opinion.

Mr. Justice BRADLEY delivered the opinion of the court.

This was an action on the case for negligence, brought to recover damages for injuries received by the plaintiff (now defendant in error) whilst a passenger in the defendant's cars. The plaintiff, being owner of a patented car-coupling, was negotiating with the defendant at Portland, Maine, for its adoption and use by the latter; and was requested by the defendant to go to Montreal to see the superintendent of its car department in relation to the matter, the defendant offering to pay his expenses. The plaintiff consented to do this, and in pursuance of the arrangement, he was furnished with a pass to carry him in the defendant's cars. This pass was in the usual form of free passes, thus: "Pass Mr. Stevens from Portland to Montreal," and signed by the proper officer. On its back was the following printed indorsement:

"The person accepting this free ticket in consideration thereof assumes all risk of all accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or injury to the property of the passenger using the ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket and collect fare."

The plaintiff testified that he put the pass into his pocket without looking at it, and the jury found specially that he did not read the indorsement previous to the accident, and did not know what was indorsed upon it. He had been a railroad conductor, however, and had seen many free passes, some with a statement on the back, others without.

During the passage from Portland to Montreal, the car in which the plaintiff was riding ran off the track and was precipitated down an embankment and the plaintiff was much injured. The direct cause of the accident, according to the proof, was that at the place where it occurred, and for some considerable distance in each direction, the bolts had been broken off the fish-plates which hold the ends of the rails together so that many of these plates had fallen off on each side, leaving the rails without lateral support. The consequence was that the track spread and the cars ran off as before stated. There was also evidence that at this place the track was made of old rails patched up.

The above facts appeared on the plaintiff's case, and the defendant offered no evidence, but requested the court to instruct the jury as follows:

1. That if the plaintiff at the time of sustaining the injury was traveling under and by virtue of the pass produced in evidence in the case, he was traveling upon the conditions annexed to it.

2. That if the plaintiff at the time of sustaining the injury was traveling under and by virtue of the pass produced in evidence in the case, the defendants are not liable.

3. That if the plaintiff at the time of sustaining the injury was traveling as a free passenger, the defendants are not liable.

4. That if the plaintiff at the time of sustaining the injury was traveling as a gratuitous passenger, without any consideration to the defendants for his transportation, the defendants are not liable.

The court refused these instructions as inapplicable to the evidence produced, and instructed the jury as follows, viz.:

That if the jury find that in May, 1873, the plaintiff was interested in a car-coupling, which had been used on the cars of the defendant since December previous, and that the officers of the company were desirous that the plaintiff should meet them at Montreal, to arrange about the use of such couplings on their cars by defendant, and they agreed with him to pay his expenses if he would come to Montreal, and he agreed so to do, and took passage on defendants' cars, and was by the reckless misconduct and negligence of the defendant, and without negligence on his part, injured whilst thus a passenger in defendants' car, the defendants are not exonerated from liability to plaintiff for his damages occasioned by such negligence, by reason of the indorsement upon the pass produced in evidence.

It is evident that the court below regarded the case as one of carriage for hire, and not as one of gratui-

tous carriage, and that no sufficient evidence to go to the jury was adduced to show the contrary; and hence, that under the ruling of this court in the case of *Railroad Company v. Lockwood*, 17 Wall. 357, it was a case in which the defendant, as a common carrier of passengers, could not lawfully stipulate for exemption from liability for the negligence of its servants. In taking this view, we think the court was correct. The transportation of the plaintiff in the defendant's cars, though not paid for by him in money, was not a matter of charity nor of gratuity in any sense. It was by virtue of an agreement, in which the mutual interest of the parties was consulted. It was part of the consideration for which the plaintiff consented to take the journey to Montreal. His expenses in making that journey were to be paid by the defendant, and of these, the expense of his transportation was a part. The giving him a free pass did not alter the nature of the transaction. The pass was a mere ticket, or voucher, to be shown to the conductors of the train, as evidence of his right to be transported therein. It was not evidence of any contract by which the plaintiff was to assume all the risk; and it would not have been valid if it had been. In this respect it was a stronger case than that of *Lockwood's*. There the pass was what is called a "drover's pass," and an agreement was actually signed, declaring that the acceptance of the pass was to be considered as a waiver of all claims for damages or injury received on the train. The court rightly refused, therefore, in the present case, to charge that the plaintiff was traveling upon the conditions indorsed on the pass; or that, if he traveled on that pass, the defendant was free from liability. And the court was equally right in refusing to charge, that if the plaintiff was a free, or gratuitous passenger, the defendant was not liable. The evidence did not sustain any such hypothesis. It was uncontradicted, so far as it referred to the arrangement by virtue of which the journey was undertaken.

The charge actually given by the court was also free from material error. It stated the law as favorably for the defendant as the latter had a right to ask. If subject to any criticism, it is in that part in which the court supposed that the jury might find that the plaintiff was injured by the reckless misconduct and negligence of the defendant. If this degree of fault had been necessary to sustain the action, there might have been some difficulty in deducing it from the evidence. However, the condition of the track where the accident took place, without any explanation of its cause, was perhaps sufficient even for such an inference. If the defendant could have shown that the injury to the rails was the result of an accident occurring so shortly before the passage of the train as not to give an opportunity of ascertaining its existence, it did not do so; but chose to rest upon the evidence of the plaintiff. In fact, however, negligence was all that the plaintiff was bound to show; and of this there was abundant evidence to go to the jury. On the whole, therefore, we think that the charge presents no sufficient ground for setting aside the verdict. The charge, if not formally accurate, was not such as to prejudice the defendant.

It is strongly urged, however, that the plaintiff, by accepting the free pass indorsed as it was, was estopped from showing that he was not to take his passage upon the terms therein expressed; or, at

least, that his acceptance of the pass should be regarded as competent if not conclusive evidence that such a pass was in the contemplation of the parties when the arrangement for his going to Montreal was made. But we have already shown that the carrying of the plaintiff from Portland to Montreal was not a mere gratuity. To call it such would be repugnant to the essential character of the whole transaction. There was a consideration for it, both good and valuable. It necessarily follows, therefore, that it was a carrying for hire. Being such, it was not competent for the defendant, as a common carrier, to stipulate for the immunity expressed on the back of the pass. This is a sufficient answer to the argument propounded. The defendant being, by the very nature of the transaction, a common carrier for hire, cannot set up, as against the plaintiff, who was a passenger for hire, any such estoppel or agreement as that which is insisted on.

Since, therefore, from our view of the case, it is not necessary to determine what would have been the rights of the parties if the plaintiff had been a free or gratuitous passenger, we rest our decision upon the case of *Railroad Company v. Lockwood*. We have no doubt of the correctness of the conclusion reached in that case. We do not mean to imply, however, that we should have come to a different conclusion, had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case; and it is often asked with apparent confidence, "May not men make their own contracts, or in other words, may not a man do what he will with his own?" The question, at first sight, seems a simple one. But there is a question lying behind that: "Can a man call that absolutely his own, which he holds as a great public trust, by the public grant, and for the public use as well as his own profit?" The business of the common carrier, in this country at least, is emphatically a branch of the public service; and the conditions on which that public service shall be performed by private enterprise are not yet entirely settled. We deem it the safest plan not to anticipate questions until they fairly arise and become necessary for our decision.

The judgment of the Circuit Court is affirmed.

EXAMINATION OF DEBTOR IN COMPOSITION PROCEEDINGS.

UNITED STATES DISTRICT COURT, MASSACHUSETTS, FEBRUARY, 1878.

RE WALTER PROBY.

In proceedings for composition under the bankrupt law the register has power to conduct the inquiries allowed to be made of the debtor, to take down the substance of the answers, and to adjourn the meeting with and sometimes without the consent of parties, but he has not power to conduct a written examination of great length, nor to extend the inquiries to the extent that would be proper in bankruptcy.

PROCEEDINGS for composition. Application for certificate whether examination of debtor shall be continued. The opinion states the case.

W. P. Fowler, for the debtor.

Bicknell & Stacy, for the creditor.

LOWELL, J. The bankrupt offered a composition, and a meeting was called to consider it. A creditor wished to examine the debtor, and, no objection being

made, he has been examined from time to time, in writing, at sundry adjournments of the meeting. At the last hearing the debtor objected that the examination was being carried on at great and unnecessary length, and asked for a certificate whether it should proceed further, and this question has been argued.

The statute says the debtor, unless prevented by sickness or other cause, satisfactory to the meeting, shall be present at the same, and shall answer any inquiries made of him. This is taken from the law of England; and in that law the proceeding is not one in bankruptcy, and the inquiries are not answered on oath, and there is no power to adjourn a meeting excepting by such a vote as would be sufficient to adopt a resolution for composition; but the creditors may obtain an order for examination afterward upon making out a *prima facie* case of fraud. See *Ex parte Levy*, L. R., 11 Eq. 619; *Ex parte Jones*, L. R., 16 Eq. 386; *Ex parte Tull*, L. R., 10 Ch. 631. We have copied the words, but have varied the practice somewhat. Our courts have held that the debtor should answer on oath, and that the register has power to adjourn a meeting. See *Re Holmes v. Lisberger*, 12 N. B. R. 86. Notwithstanding these differences, our statute does not, in my opinion, intend that the debtor, as it carefully calls him, should undergo a regular written examination, upon things in general, like one in bankruptcy. In the first place the meeting may excuse his attendance altogether, which will effectually defeat all inquiry; in the next, the proceeding is plainly intended to be summary, and to settle, so far as the voting is concerned, whether the creditors will accept the propositions made them. In theory the creditors are attending all this time, waiting to vote, and they must attend each adjournment or lose their vote. No doubt the attendance may be and, perhaps, almost always is by proxy, but that does not help me to construe the statute.

Suppose after days or weeks of examination the creditors should vote against the acceptance of the composition, not on the strength of any thing contained in the answers to the inquiries, but because there had never been a sufficient number ready to vote affirmatively. Many other cases might be put, which would exhibit reasons of convenience, besides those which the language of the statute suggests.

Our practice has been to permit any creditor to file objections to the recording of the resolutions and to take evidence on the matter before the final order. Even this is inconvenient and expensive, but we have found that by postponing the formal examinations until that time, no injustice is done to the objectors, and many of the cases are disposed of one way or the other with the consent of all parties, without the examinations.

I appreciate the difficulties which a creditor has to meet if the debtor is fraudulent. I have often thought it would be well to make a rule that any creditor should be at liberty to examine the bankrupt before the meeting. This would remove some of the inconveniences. I do not think the statute positively intends this, and, therefore, I have refused to grant such orders; but it does not follow that this court, in the absence of any rule by the Supreme Court, has not power to establish it as a general rule of practice, applicable to all cases.

As the law stands, I think the register must have the power, subject to the reviewing power of the court, to conduct the inquiries, and to take down the sub-

stance of the answers, and to adjourn the meeting by consent of parties, and even, in some cases, against the wishes of one or the other; but not to conduct a written examination of the length which this appears to threaten, nor to permit all the inquiries and investigation which would be proper in bankruptcy; and in most cases, I think he would be justified in refusing to permit the inquiries to extend beyond the day of the meeting.

VALIDITY OF STATE LAWS REGULATING THE TRANSPORTATION OF CATTLE.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

HANNIBAL AND ST. JOSEPH RAILROAD Co., Plaintiff
in Error, v. HUSEN.

1. A statute of a State which prohibits driving or conveying any Texas, Mexican, or Indian cattle into the State between the first day of March and the first day of December in each year, is in conflict with the clause of the Constitution of the United States that ordains "Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes." *Ib.*
2. Such a statute is not a legitimate exercise of the police power of the State. It is more than a quarantine regulation. *Ib.*
3. The police power of a State cannot be exercised over a subject, such as interstate transportation of subjects of commerce, confided exclusively to Congress by the Federal Constitution. *Ib.*
4. While a State may enact sanitary laws, while, for the purpose of self-protection, it may establish quarantine and reasonable inspection regulations, while it may prevent persons and animals suffering under contagious or infectious diseases from entering the State, it cannot interfere with transportation into or through its borders, beyond what is absolutely necessary for its self-protection. *Ib.*
5. Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers conferred by the Constitution upon Congress. *Ib.*
6. Since the range of a State's police power comes very near to the field committed by the Constitution to Congress, it is the duty of courts to guard vigilantly against any needless intrusion.

IN error to the Supreme Court of the State of Missouri. The facts appear in the opinion.

Mr. Justice STRONG delivered the opinion of the court.

Five assignments of error appear in this record; but they raise only a single question. It is whether the statute of Missouri, upon which the action of the State court was founded, is in conflict with the clause of the Constitution of the United States that ordains "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The statute, approved January 23d, 1872, by its first section, enacted as follows: "No Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into, or remain in any county in this State between the first day of March and the first day of November in each year, by any person or persons whatsoever." A later section is in these words: "If any person or persons shall bring into this State any Texas, Mexican, or Indian cattle, in violation of the first section of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by said cattle." Other sections make such bringing of cattle into the State a criminal offense, and provide penalties for it. It was, however, upon the provisions we have quoted that this action was brought against the railroad company that had conveyed the cattle into the country. It is noticeable that the statute interposes a direct prohibition against the introduction into the State of

all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not. It is true a proviso to the first section enacts that "when such cattle shall come across the line of the State, loaded upon a railroad car or steamboat, and shall pass through the State without being unloaded, such shall not be construed as prohibited by the act; but the railroad company or owners of a steamboat performing such transportation shall be responsible for all damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line of transportation; and the existence of such disease along the line of such routes shall be *prima facie* evidence that such disease has been communicated by such transportation." This proviso imposes burdens and liabilities for transportation through the State, though the cattle be not unloaded, while the body of the section absolutely prohibits the introduction of any such cattle into the State, with the single exception mentioned.

It seems hardly necessary to argue at length, that, unless the statute can be justified as a legitimate exercise of the police power of the State, it is an usurpation of the power vested exclusively in Congress. It is a plain regulation of interstate commerce, a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one State to another is a branch of interstate commerce is undeniable, and no attempt has been made in this case to deny it.

The Missouri statute is a plain interference with such transportation, an attempted exercise over it of the highest possible power—that of destruction. It meets at the borders of the State a large and common subject of commerce, and prohibits its crossing the State line during two-thirds of each year, with a proviso, however, that such cattle may come across the line loaded upon a railroad car or steamboat, and pass through the State without being unloaded. But even the right of steamboat owners and railroad companies to transport such property through the State is loaded by the law with onerous liabilities because of their agency in the transportation. The object and effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between the property of citizens of one State and that of citizens of other States. This court has heretofore said that interstate transportation of passengers is beyond the reach of a State legislature. And if, as we have held, State taxation of persons passing from one State to another, or a State tax upon interstate transportation of passengers, is prohibited by the Constitution because a burden upon it, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State. Transportation is essential to commerce, or rather it is commerce itself, and every obstacle to it, or burden laid upon it by legislative authority, is regulation. *State Freight Tax Cases*, 15 Wall. 281; *Welton v. The State of Missouri*, 91 S. C. 275; *Ward v. Maryland*, 12 Wall. 418; *Henderson v. Mayor of New York*, 92 S. C. 239; and *Chy Lung v. Freeman*, *id.* 275. The two latter of these cases refer to obstructions against the admission

of persons into a State, but the principles asserted are equally applicable to all subjects of commerce.

We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the State. We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. As was said in *Thorp v. The Rutland and Burlington Railroad Company*, 27 Vt. 149, "It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim, *Sic utere tuo ut alienum non laedas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may use his own as not to injure others." It was further said that by the general police power of a State "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles, ever can be made, so far as natural persons are concerned." It may also be admitted that the police power of a State justifies the adoption of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime, or pauperism, or disturbances of the peace. It may exclude from its limits convicts, paupers, idiots, lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in the *Passenger Cases* (7 How. 283), by Grier, J., in the sacred law of self-defense. *Vide* 3 Sawyer, 281. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases. All these exertions of powers are in immediate connection with the protection of persons and property against noxious acts of other persons, or such an use of property as is injurious to the property of others. They are self-defensive.

But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the National government. It was said in *Henderson et al. v. The Mayor of New York et al.*, 92 S. C. 272, to "be clear, from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the States." Substantially the same thing was said by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 210. Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. Many acts of a State may, indeed, affect commerce without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely af-

fects or influences, and that which regulates or furnishes a rule for conduct. There is no such difficulty in the present case. While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Upon this subject the cases in 91st U. S. Sup. Court Reps., to which we have referred, are very instructive. In *Henderson v. The Mayor, etc.*, the statute of New York was defended as a police regulation to protect the State against the influx of foreign paupers, but it was held to be unconstitutional, because its practical result was to impose a burden upon all passengers from foreign countries. And it was laid down that "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." The reach of the statute was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of Congress. So in the case of *Chy Lung v. Freeman*, where the pretense was the exclusion of lewd women, but as the statute was more far-reaching, and affected other immigrants, not of any class which the State could lawfully exclude, we held it unconstitutional. Neither of these cases denied the right of a State to protect herself against paupers, convicted criminals, or lewd women, by necessary and proper laws, in the absence of legislation by Congress, but it was rumored that the right could only arise from vital necessity, and that it could not be carried beyond the scope of that necessity. These cases, it is true, speak only of laws affecting the entrance of persons into a State; but the constitutional doctrines they maintain are equally applicable to interstate transportation of property. They deny validity to any State legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the Federal government.

Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, "you shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle between March 1st and December 1st, in any year, no matter whether they are free from disease or not; no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities." Such a statute, we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure.

In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us have been sustained. *Yeazel v. Alexander*, 53 Ill.

254. Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion.

The judgment of the Supreme Court must, therefore, be reversed, and the record remanded with instructions to reverse the judgment of the Circuit Court of Grundy county and to direct that court to award a new trial.

COMPOSITIONS IN BANKRUPTCY.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT NEW YORK.

IN THE MATTER OF ALLEN.

When upon looking at the assets of a bankrupt's estate it is evident that the interests of the creditors will be better promoted by a proposed composition than by administering the estate in bankruptcy, the court has no alternative but to confirm the resolution of composition, notwithstanding previous acts of the bankrupt in disregard of the interests of his creditors.

APPPLICATION for confirmation in bankruptcy. The facts sufficiently appear in the opinion.

Fanning and Williams, for opposing Creditors.

John Van Voorhts and E. S. Jenney, for Bankrupts.

WALLACE, J. The requisite quorum of creditors having assented to the resolution for composition, confirmation is opposed by dissenting creditors on the ground that the interests of creditors will not be promoted by the composition.

The evidence presented discloses the common case of a composition conceived in the interest of the bankrupts. When insolvency was apprehended the bankrupts began paying themselves and their favored creditors out of the firm assets, then attempted to compromise with their creditors; failing in this, made an assignment to a favored creditor, and shortly after procured a petition in bankruptcy to be filed against themselves, and thereupon took proceedings to effect a composition. In the meantime the bankrupts have had charge of their property, ostensibly as agents for the assignee and the purchaser from the assignee. The attorneys who advised the assignment and prosecuted the petition in bankruptcy now represent most of the creditors.

From the beginning to the end of the transactions not one step has been taken to protect the interests of creditors.

It shocks the moral sense to assist this dishonest scheme by judicial action; but this court is only an instrument to administer the law as it finds it. The bankrupt law permits just such schemes as this, and if the requisite number of creditors consent the court is powerless, unless it shall appear that the interests of the creditors will not be promoted by the terms of

composition. If, looking at the assets of the estate in their present condition, it is apparent that the pecuniary interests of the creditors will be better promoted by the composition than by administering the estate in bankruptcy, there is no alternative but to confirm the resolution of composition.

I am constrained to agree with the Register that the interests of the creditors here will be promoted by confirming the resolution. I cannot say that there are any circumstances to show that the assenting creditors have been actuated by any motive other than to promote their own interests as well as those of all the creditors.

All the assets of the estate rest in litigation, and, it seems to me, a prudent consideration of the contingencies dictates the acceptance of the offer of the bankrupts. It is probable the bankrupts will profit by the composition, but this by no means proves that it will not be advantageous to the creditors.

RECENT AMERICAN DECISIONS.

SUPREME COURT AND COURT OF ERRORS AND APPEALS, NEW JERSEY.*

ACTION.

1. *For seduction of daughter.*—An action for the seduction of the daughter, in the life-time of the father, may be maintained by his personal representative. *Noice, administratrix, v. Brown.*

2. *For enticing away servant.*—An action will lie for enticing away a servant at will, where a subsisting service is interrupted by the act of the defendant. *Ib.*

AGENCY.

1. *Notice to agent, notice to principal.*—Notice to the agent is notice to the principal, if the agent comes to the knowledge of the fact while he is acting for the principal, in the course of the very transaction which becomes the subject of the suit. Such knowledge of the agent is imputed to the principal for the benefit of an innocent third party who has dealt with the agent in good faith. *Stanley v. Chamberlin.*

2. *When notice of immoral acts of agent not imputed to principal: renting house for gambling.*—The law will not impute turpitude to a principal by charging him with constructive notice, when he had no actual knowledge, for the benefit of one who sets up his own wrongful act in his defense. An agent rented premises to the defendant, knowing that he intended to use them for gaming purposes; held, that the principal, who had no actual knowledge of such intended unlawful use, could disown the agent's contract, and recover, on a *quantum valebat*, for the use of her premises. *Ib.*

ALTERATION.

Presumption as to: guarantee.—Under ordinary circumstances, alterations appearing on the face of a sealed instrument need not be explained in order to render such instrument admissible in evidence. The words of a guarantee will be read most strongly against the guarantor. *Hoey, plaintiff in error, v. Jarman.*

CRIMINAL LAW.

1. *Accomplice in abortion.*—A woman who voluntarily takes a potion administered to her for the purpose of causing an abortion is not an accomplice in the

crime of the person administering it, the law making it no crime in her to take the potion. *State v. Hyer.*

2. *Conviction on unsupported evidence of accomplice.*—Although the practice of courts is to advise juries not to convict a defendant on the uncorroborated testimony of an accomplice, yet a conviction founded on such evidence is strictly legal. *Ib.*

EMINENT DOMAIN.

1. *Compensation for land taken must be in money.*—The act of 1875 (Pamph. Laws, p. 621), for the condemnation of lands for the construction of a sewer, provided the following method of compensation to the owner of condemned lands: The commissioners appointed to make the award were empowered to issue improvement certificates, in their own names, in payment of the award, payable at such times as they might therein designate, not exceeding two years. Held, that the act did not provide a constitutional method of securing compensation to the land-owner. There is no power in the legislature to provide for the payment of the award in any thing but money, nor to postpone the right of the land-owner to receive the same after the award becomes a finality. *State, Butler, prosecutor, v. Ravine Road Sewer Commissioners.*

2. *Election to pursue or abandon proceedings.*—Where the power of eminent domain is conferred upon a merely public agent, and the compensation to be made is to be ascertained by another body, as commissioners or a jury, the agent has an election, whether to pursue or abandon the condemnation, after the price is fixed, unless a contrary legislative intent is clearly indicated. *State, Mabon, relator, v. Halsted.*

3. *Reconsideration of election not permitted.*—If such an election has been once made, no right of reconsideration remains. *Ib.*

4. *Statutory construction.*—A legislative power to take by condemnation, at a price to be fixed by another body, does not include a power to contract for purchase. *Ib.*

EVIDENCE.

Quantum of proof to support defense of willful burning in action on fire insurance policy.—In an action, on a policy of insurance against loss by fire, where the defense is that the property insured was willfully burned by the assured, the rule in civil, and not in criminal cases, as to the quantum of proof, applies, and a charge to the jury that the defendant is bound to establish the defense beyond a reasonable doubt, and by the same measure of testimony that would be necessary to convict the plaintiff if he was on trial upon an indictment charging that offense, is erroneous. *Kane v. Hibernia Ins. Co. (Court of Errors and Appeal.)*

LEASE.

Effect of assignment of.—A plea setting up that a lessee assigned his lease, and that the lessor accepted such assignee as his tenant, does not show a bar to an action of covenant for rent on the lease, against the original tenant. *Hunt v. Gardner.*

STATUTE.

Statute requiring township to pay debt morally but not legally due.—A statute is valid that requires a township to pay a debt that is morally, but not legally due from it to an individual, for work done upon the public streets. *Rader v. Township of Union.*

SURETYSHIP.

Sureties on official bond: how far liable.—Sureties on the bond of the State treasurer are liable for moneys

* Appearing in 30 N. J. Law Rep. (10 Vroom)

received by him during the continuance of their suretyship, and used by him in payment of arrears due from him to the State at the time the bond was given. S. was treasurer of the State from January, 1873, to September, 1875. In April, 1875, he gave a new bond, with new sureties. He was then a defaulter to the State. After April, 1875, he received a large sum of public moneys, part of which he applied to discharge his prior defalcation, and part he failed to account for. *Held*, in an action on the new bond, that his sureties were liable for both amounts. *State v. Sooy*.

TAXATION.

1. *Must extend over whole of district benefited.*—While the burthen of a particular tax may be placed exclusively upon any political district to whose benefit such tax is to inure, the legislature has no power thus to impose it upon any territory narrower in bounds than the political district of which it is a part, without having regard to the special benefits which may accrue to those upon whom it is made to fall. *State, Baldwin, prosecutor, v. Fuller*.

2. *Recovery back of tax voluntarily paid.*—Where an owner of lands assessed for a city improvement has paid the amount assessed, and the assessment is afterward set aside on *certiorari*, he may, after such reversal, and demand made, recover back the amount paid, in an action of *assumpsit*, though the assessment was voluntarily paid. *City of Elizabeth v. Hill*.

USURY.

What does not constitute.—Where, on a loan of money, the borrower agreed to repay at a certain time the amount of the money loaned, with lawful interest, and further agreed, upon default made in such payment, to perfect and surrender to the lender certain shares of stock pledged as collateral security for the loan, *held*, not to be usurious. *Ramsey v. Morrison*.

NOTES OF RECENT DECISIONS.

Action: interference with lery by railroad agent.—That the agent of a railroad company obstructed an officer in levying an attachment upon goods loaded upon one of the trains of the company, and that he removed the goods out of the State, by running out the train, will not furnish a cause of action against the company, at the instance of the plaintiff in attachment. Sup. Ct., Georgia, Jan. 31, 1878. *Western R. R. Co. v. Thomas*.

Bill of exchange: custom as to, not invalid.—A custom to allow a fixed sum by way of liquidated damages in lieu of re-exchange upon bills returned dishonored is not invalid in law. English Priv. Council, Dec. 10, 1877. *Willans v. Ayers* (37 L. T. Rep. [N. S.] 732).

Corporate stock: transfer of rights and liabilities of parties and corporations: when stock wrongfully transferred.—Where a plaintiff by his own negligence furnishes a third person with the means of perpetrating a wrongful act, whereby the plaintiff incurs a loss, he cannot recover, even though the exercise of due diligence and proper care on the part of the defendant might have prevented the occurrence of the loss. A corporation is not justified in transferring stock on its books upon a blank power of attorney, signed by the owner many years previously (in this case thirteen), without making due inquiry as to whether the power has been revoked. But where, in such case, the owner of stock had intrusted the certificates, with blank

powers of attorney to transfer the same, to an agent for safe-keeping, by whose fraudulent transfers the loss was incurred, the plaintiff cannot recover from the corporation. Sup. Ct., Pennsylvania, Jan. 11, 1878. *Pennsylvania R. R. Co.'s appeal* (W. Not. Cas.).

Counter-claim: against United States.—The act of March 3d, 1797, does not contemplate the adjudication of any sum against the United States. A defendant who is sued by the United States is not entitled to a finding in any form of a sum due him by the United States in excess of the claim for which he was sued. U. S. Circ. Ct., E. D. Pennsylvania, Jan. 8, 1878. *Schaumburg v. United States*.

Nuisance: claim that it is necessary to enable performance of duty imposed by law.—In an action to restrain a gas company from creating a nuisance at their gas manufactory, *held*, that the Gasworks Clauses Act, 1847, is incorporated with the Metropolis Gas Act, 1860, except so far as its provisions are inconsistent with that act; and a company performing the obligations of the act of 1860 cannot justify creating a nuisance by setting up incapacity to make or supply gas without so doing. Eng. High. Ct. of Justice, Chanc. Div., Nov. 16, 1877. *Attorney-Gen. v. Gas L. & Coke Co.* (37 L. T. Rep. [N. S.] 740).

Receiver: action against foreign, not maintainable.—The defendant was appointed by a decree of the Circuit Court of Alexandria, Virginia, receiver of a railroad in that State. The plaintiff was injured while a passenger on such road and brings this action against the receiver for damages; and it was *held* that the action would not be maintained in this jurisdiction without leave of the court which appointed defendant such receiver. Sup. Ct., Dist. Columbia, General Term, Jan., 1878. *Barton v. Barbour, receiver* (Wash. L. Rep.).

Respondent superior: when rule applies: blasting.—The city employed one to construct a sewer; in doing which it was necessary to blast rocks, by which a building was damaged in consequence of insufficient protection to the blasting. It was claimed that the contractor, and not the city, was responsible. *Held*, that the rule of *respondent superior* applies, in all cases, where the contract directly requires the performance of work intrinsically dangerous, however skillfully performed. In such case, the party authorizing the work is regarded as the author of the mischief resulting from it, whether he lets the work out by contract, or does it himself. Sup. Ct., Illinois, Jan. 21, 1878. *City of Joliet v. Harwood*.

Stock exchange: notice of right of member to seat.—The right of a member of the Philadelphia Stock Exchange to seat in that body is not such property as can be attached at the suit of a creditor of the member. Philadelphia Ct. Com. Pleas, Dec. 20, 1877. *Pan-coust v. Houston*.

Suretyship: construction of contract: agreement to supply goods: past debts.—A merchant was in the habit of supplying C., a retail trader, with goods on credit. An acceptance given by C. having been dishonored, M. (the merchant) refused to supply more goods. C.'s wife, who was entitled to separate estate, thereupon gave the following guaranty: "In consideration of you, the said M., having, at my request, agreed to supply and furnish goods to the said C., I do hereby guarantee to you, the said M., the sum of £500. This guaranty is to continue in force for the period of six years and no longer." *Held* (reversing the de-

cision of Fry, J.) that the guaranty extended only to the price of goods supplied subsequently to its date by M. on the faith of the guaranty, and not to moneys due for goods supplied before the date of the guaranty. Eng. Ct. of Appeals, Dec. 3, 1877. *Morrell v. Cowan* (37 L. T. Rep. N. S. 586).

RECENT BANKRUPTCY DECISIONS.

COMPOSITION.

1. *Enjoining creditors from harassing bankrupt pending proceedings for.*—The Bankrupt Court has a right to, and will on application enjoin creditors from harassing the debtor as long as his composition proceeding is pending. An injunction in such case can extend only to unsecured debts or debts in respect to which any security has been surrendered. The proceeding is pending until the time allowed by the resolution for making the last payment has expired. U. S. Dist. Ct., S. D. New York. *In re Hinsdale*, 16 Nat. Bankr. Reg. 550.

2. *Terms of: contempt of creditor: payment: tender.*—A general provision in a resolution of composition that a payment of so much money, at such time or times, to be evidenced by such and such notes, shall be accepted by the creditors in satisfaction of the debts due them, is not, as respects the creditors, an executing provision which the court is authorized to enforce. A tender of the money according to the terms of such composition is equivalent to payment, but the court cannot imprison the creditor for contempt unless he will physically take the offered money. *Ib.*

CONTRACT.

With third party to forbear proceedings against debtor not forbidden by bankrupt law: validity of.—The Bankrupt Act does not forbid a creditor to take any contract, covenant or security from a third party as an inducement to forbear instituting proceedings against his debtor. But to constitute the forbearance a valid consideration for such contract, covenant or security, the creditor must, at the time of receiving it, have a right to proceed in bankruptcy against his debtor. Ct. of Appeals, Maryland. *Ecker v. Bohn*, 16 Nat. Bankr. Reg. 544.

EXEMPTION.

1. *Homestead: when claim must be made: title to property sold by assignee: power of State court.*—A claim to a homestead exemption, under the laws of Alabama, must be asserted before a sale. The validity of a sale of property by an assignee in bankruptcy cannot be questioned in a collateral proceeding in the State courts. If a bankrupt fails to claim such exemption in his schedules, he must be deemed to have waived it. If the bankrupt has, from inadvertence, misdescribed in his schedules the land claimed by him as exempt the Bankrupt Court alone has power to correct such error. A State court cannot receive mere parol evidence to cure such mistake. Sup. Ct., Alabama. *Steele v. Moody*, 16 Nat. Bankr. Reg. 558.

2. *When the sale by the assignee took place more than two years after the assignment to him, the limitation of suits by and against assignees prescribed by the Bankrupt Act cannot be set up as a defense to a collateral action brought against the bankrupt by one claiming title under such sale. The bankrupt should avail himself of it on application to vacate the sale. *Ib.**

JURISDICTION.

Of Bankrupt Court to relieve from judgment: laches.—The Bankrupt Court has no jurisdiction to relieve against a judgment obtained against a bankrupt in a suit brought against him after his adjudication, in which for any cause he has failed to plead his discharge. Even if the court had such jurisdiction, it would not interfere to relieve the bankrupt against the laches of his counsel and himself. U. S. Circ. Ct., E. D. Virginia. *In re Ferguson*, 16 Nat. Bankr. Reg. 530.

PREFERENCE.

One taking cannot prove debt: what constitutes.—A creditor who has received a preference contrary to the provisions of section 5084 of the Revised Statutes cannot prove his debt after the preference has been recovered from him by the assignee. Where M., in pursuance of a scheme to obtain a preference for H., a creditor of the bankrupt, purchased logs of the bankrupt and subsequently took a transfer of a note held by H., held, that he held such note as trustee for H., and that the acceptance of the logs was a preference. U. S. Dist. Ct., S. D. New York. *In re Stein*, 16 Nat. Bankr. Reg. 560.

SURETYSHIP.

Mortgage to secure surety afterward becoming insolvent: rights of creditors of principal as to.—If a mortgage, pledge or lien is given by a principal debtor to secure his surety, and both become insolvent, the holders of the debts for which the surety is bound have an equity to require the property to be applied to the discharge of their debts specifically. But if the surety has been discharged by the negligence of the creditors, or if the state of the accounts between the parties is such that the surety has lost his lien, the creditors have no equity. The creditors must apply their security so as to prove against either estate for the deficiency only. If the creditors prove in full, they waive their security. U. S. Dist. Ct., Massachusetts. *Ex parte Morris*, *In re Foye*, 16 Nat. Bankr. Reg. 572.

COURT OF APPEALS ABSTRACT.

APPEAL.

1. *When amount in controversy is less than \$500 no appeal to this court, even if judgment is for more.*—A judgment appealed from was for \$543.84 damages. An item of \$140.50, about which there was no controversy at the General Term, although it was put at issue in the pleadings and was in controversy at the Circuit up to the time the case was submitted to the jury, entered into the judgment. Held, that the case was not appealable to the Court of Appeals. Appeal dismissed. *Brown v. Sigourney*, appellant. Opinion by Folger, J.

2. *Amount of judgment docketed does not govern, but amount in controversy.*—Under the act of 1874 (chap. 322), the judgment is not appealable, and the Court of Appeals has no jurisdiction to review it if the amount in controversy is less than \$500, whatever may be the amount at which the judgment is docketed. *Ib.* [Decided January 15, 1878.]

COLLISION.

1. *Facts constituting negligence in management of boat.*—In an action for the loss of a canal boat, caused by defendant's tugs being forced against it by floating ice, it appeared that the boats were moored to a dock near by each other; that a movement of the ice was to be expected and was feared; that one of the tugs was

fastened to the dock; that the other lay outside and abreast of the first, and made fast to it, and had only one line fast to the dock, which, it was testified, was insufficient under the circumstances, and there was no watch kept on the tugs; that the accident took place in the night, and was caused by the breaking away of the tugs from the wharf. *Held*, that there was evidence sufficient to support a finding by the jury that the accident was caused by defendant's negligence. Judgment below affirmed. *Carpenter v. Eastern Transportation Line*, appellant. Opinion by Rapallo, J.

2. *Evidence: expert witness testifying to facts.*—An expert witness was asked this question, "Did Mr. Carpenter, in your opinion as a canal boatman, in any way omit or neglect to do any thing which he might have done to save his boat?" *Held*, improper. An expert may be asked whether certain acts which are proven are seamanlike and proper under a given state of circumstances, but he cannot be allowed to express an opinion as to what was or was not done as matter of fact. *Id.*

3. *Collection of insurance money no defense to action for loss by negligence.*—The court below refused to allow defendant to show that the plaintiff was insured and had received the amount of his loss from the insurance company. *Held*, proper. *Id.*
[Decided January 15, 1878.]

DEFENSE.

Motives of bringing foreclosure suit: when not.—Where, in an action to foreclose mortgage, it was claimed that the owner of the mortgage bought it from motives of malice toward defendant, and solely with a view to sue upon it, and that the former owner of the mortgage, from like motives, transferred the mortgage without consideration. *Held*, not to constitute an equitable defense to the action. Order below affirmed. *Morris v. Tullihill*, appellant. Order per Curiam.

[Decided February 19, 1878.]

FRAUD.

In obtaining assessment of damages by referee: evidence of.—An assessment of damages for keeping a party out of the use of premises by means of an injunction which was not sustained, was made by a referee in proceedings of which the sureties of the party procuring the injunction had no notice, and at which the principal did not attend, *held*, not reviewable in an action on the undertaking simply on the ground that it was *ex parte* and that the damages were fixed too high. But it would be open to attack on the ground of fraud; and the circumstance that the rental value of the premises was fixed at \$4,000 per annum in the assessment, when it was in fact worth only \$500, would, in connection with the fact that the adverse party was absent, be sufficient evidence of fraud to invalidate the assessment. Judgment below reversed. *Jordan v. Volkenning*, appellant. Opinion by Rapallo, J.

[Decided January 29, 1878.]

NEGLECT.

Setting fire to neighboring building by sparks from stove: evidence in.—In an action for setting fire to plaintiff's building by a negligent use of a stove in a switch house belonging to defendant, it was shown that a pipe from the stove came within fifteen feet of plaintiff's wooden building, that wood was burned in the stove, and that on the day of the fire, and before, large sparks had been seen to come out of the pipe.

and at the time the fire took place, a strong wind was blowing from the switch house toward plaintiff's building, and the fire began in a point near by the pipe. *Held*, sufficient to submit to the jury the question whether the fire was caused by sparks from the stove. Judgment below affirmed. *Briggs v. New York Central, etc., R. R. Co.*, appellant. Opinion by Rapallo, J.

2. *What constitutes negligence.*—The pipe led from the top of stove in the switch house perpendicularly without elbow or crook to the outer air. It was only about eight feet long and without any spark arrester. *Held*, that it was proper to submit to the jury whether it was not negligent to use a stove thus constructed with wood as a fuel. *Id.*

[Decided January 15, 1878.]

STATUTORY CONSTRUCTION.

Laws 1855, chap. 6: adjoining owners: damage done to buildings by adjoining excavations.—The provision of Laws 1855, chap. 6, designed to protect the owners of buildings in New York and Brooklyn against damages from excavations of adjoining premises, that parties intending to carry excavations to the depth of more than ten feet below the curb shall shore up and protect adjoining walls "if afforded the necessary license to enter the adjoining land, and not otherwise," does not require that the owner of the adjoining land shall tender to the person making the excavation a license to enter his land, but that the person shall apply for such license before making the excavations. Order below reversed. *Dorrity*, appellant, v. *Rapp*. Opinion by Andrews, J., Allen, Rapallo and Earl, JJ., concurred; Church, C. J., Folger and Miller, JJ., dissented.

[Decided January 29, 1878. Reported below, 11 Hun, 374.]

NEW BOOKS AND NEW EDITIONS.

BARBOUR'S REPORTS, VOLUME 67.

Reports of cases in Law and Equity in the Supreme Court of the State of New York. By Oliver L. Barbour, LL.D. Vol. LXVII. To which are added a table of cases reported in the 67 volumes of the series, which have been affirmed, reversed, approved, overruled, etc. Albany: W. C. Little & Co., 1878.

THOSE who possess the sixty-six volumes of the series to which the book before us belongs, and they are many, will of course want this volume to complete their set. Of the manner in which the reporter has done his work we need say no more than that the present volume detracts nothing from the reputation achieved by Mr. Barbour in the course of his long and successful career in connection with legal publications. The cases contained in the present volume extend over a period of seventeen years, embracing those decided in February, 1860, and in intervening years up to July, 1877. Among the cases of interest appearing we will mention these: *Nolan v. Bank of New York Nat. Banking Assoc.*, p. 24: A check on a bank drawn January 21, 1865, and certified, held not deemed dishonored in June, 1865, in the hands of a *bona fide* holder for value so as to discharge the bank. *Campbell v. Page*, p. 113: One letting a horse for hire is bound to inform the hirer of its vicious qualities, otherwise he will be liable for damages resulting to the hirer from such qualities. *Patrick v. Excelsior Life Insurance Co.*, p. 202: Suicide, though it has been called a felony, will not avoid a life insurance policy under a condition that the policy be void if the assured die "in the known violation of the law of the State." *People ex rel. Bizby*, p. 221: A room in a house of prostitution not open to the general public, but only

to those permitted, and paying money to enter, held a "public place" under the provisions of the statute forbidding indecent exposure of the person in a public place. *United States v. Graff*, p. 304: The United States may sue in the State courts for duties due on imported articles. *Johnson v. Utica Water Works Co.*, p. 415: A water-works company had power under its charter to take real estate for the purpose of supplying water to a city; held, that it was not limited to a single proceeding or acquisition of real estate, but might take successive proceedings. *Monell v. North. Cent. R. R. Co.*: Where one of several connecting lines of carriers contracts with a shipper to transport goods to a place of destination, service in transportation performed by the connecting lines is presumed to be performed by them as agents of the contracting carrier. The table of cases in the various volumes of Barbour's Supreme Court Reports, affirmed, reversed, approved, overruled, etc., will prove very valuable to those who have occasion to consult these volumes. The volume is finely printed and bound.

HOMANS' BANKERS' ALMANAC FOR 1878.

The Bankers' Almanac and Register for 1878. Twenty-seventh annual volume, containing full and carefully corrected lists of the National banks, State banks and private bankers of the United States, etc., the Savings banks, Trust companies and Safe deposit companies, etc., the banks and bankers of Canada, Europe, Asia, Africa, South America, West Indies, etc., a summary of the Statute of Limitations, Interest laws and the laws of grace on sight bills in each of the States, etc. With Calendar of important events, etc. Edited by Benjamin Homans. Copyright 1878 by J.S. Homans, publisher, New York. Published at the office of the Bankers' Magazine.

This annual has become an almost indispensable part of the library of every bank and banker, as it contains a summary of matters that are gathered in no other shape. The information given, every fact of which is liable to be of essential importance to those doing financial business, can be depended upon as reliable. The summary of the Statutes of limitation, the interest laws, and laws of grace on sight bills in the States and Territories is the best brief statement of law upon those subjects that we have met with. The volume is well indexed and is in every respect equal to the preceding numbers of the series, which are familiar to all business men.

LAW OF LIMITED PARTNERSHIPS.

The Law of Limited Partnerships and Compromises by Joint Debtors in the State of New York, with an Appendix of Forms. New York. Wright & Schondelmeyer, 1878.

This brochure is made up of chapter XVII of Cray's Law and Practice in Special Proceedings, with forms. In form it is convenient, in cost small, and in all respects it is desirable, we should suppose, to those interested in the subjects of which it treats.

COURT OF APPEALS DECISIONS.

THE following decisions were handed down Friday, February 22, 1878:

Motion for reargument denied with \$10 costs—Coe v. Cassidy; *Dorrity v. Rapp*.—Judgment affirmed with costs—Bruce v. Carter; *Davis v. Van Buren*; *Vilas v. New York Central Insurance Company*; *Mason v. Decker*; *Driggs v. Bliss*.—Judgment reversed and judgment for defendant dismissing complaint with costs—*Hagadorn v. Raux*.—Orders handed down—Ordered that the court take a recess until Monday, the 18th day of March, 1878. No argument will hereafter be heard unless the printed cases are properly indexed. The names of counsel arguing case must appear on the brief.

CORRESPONDENCE.

ADJOURNMENTS OUT OF COURT.

To the Editor of the Albany Law Journal:

SIR—At the last term of the Circuit Court, Oyer and Terminer, and Special Term of the Supreme Court of Chautauqua county, several interesting questions were raised relative to the power of a judge out of court to adjourn a term thereof, under section 86 of the Code. It appears that Judge Barker, the judge designated to hold the term, by reason of illness, was unable to attend at the time and place fixed for holding the court.

On the morning of the first day of court Judge Barker made an order, of which the following is a copy:

STATE OF NEW YORK, } ss.
CHAUTAUQUA COUNTY, }

I, George Barker, one of the justices of the Supreme Court appointed to hold a Circuit Court, Special Term, and Oyer and Terminer, in and for the county of Chautauqua, on the 7th day of January, 1878, being unable to attend and hold the said court on account of illness, do hereby order and direct that the said courts be and the same are adjourned over to Monday next, the 14th inst., at 10 A. M.

This order to be entered in the minutes of the court.

Witness my hand this 7th day of January, 1878.

GEORGE BARKER.

To the Sheriff of Chautauqua county, the Clerk of Chautauqua county.

This order was delivered to the sheriff, who, on the morning of the first day of court, attended at the courthouse in Mayville and adjourned the court in pursuance thereof. On the 14th day of January, Judge Barker, being still unable to hold the court, made another order, of which the following is a copy:

STATE OF NEW YORK, } ss.
CHAUTAUQUA COUNTY, }

I, George Barker, one of the justices of the Supreme Court appointed to hold a Circuit Court, Special Term, and a Court of Oyer and Terminer, in the village of Mayville, in and for the county of Chautauqua, on the 14th day of January, 1878, being unable to attend and hold the same on account of illness, do hereby adjourn the same to the 16th day of January, 1878, 10 A. M.

This order to be entered in the minutes of the court by the clerk.

Dated January 14th, 1878.

GEORGE BARKER.

To the Sheriff of Chautauqua county, the Clerk of Chautauqua county.

By virtue of this order the sheriff attended at the court-house on the morning of the 14th of January, and further adjourned the court to the 16th day of January, 1878, at 10 A. M. On the second adjourned day Judge Haight, of the Supreme Court, attended, and opened a Circuit Court, Special Term, and Oyer and Terminer. The legality of the two adjournments are raised during the court, upon several motions, and Judge Haight held the adjournments were regular and valid.

These two adjournments were made under section 86 of the Code, which is new. There was no adjournment had pursuant to the provisions of section 85, for that provides only for an adjournment by the sheriff or clerk to nine o'clock of the next day, in case the judge authorized to hold the term does not come the first day; and if the judge does not attend by four o'clock of the second day, then the sheriff or clerk must adjourn the court without day. The 36th section contemplates an adjournment to some future day certain, by the sheriff or clerk, if before four o'clock of the second day the sheriff or clerk receives from a judge authorized to hold the term, a written direction to so adjourn, instead of adjourning it as prescribed

in section 35, that is, without day. Prior to the new Code there was no authority in a judge out of court to adjourn, or direct an adjournment of the court. The clerk or sheriff was the only person authorized to adjourn, and now a judge out of court can, under the circumstances provided for by the Code, direct an adjournment. There is no provision for a second or further adjournment upon the written direction of the judge.

The power to adjourn the court is a statutory authority, and the policy of the law is to restrict this power within the limits of the statute, and thereby inspire confidence in the administration of justice. It is the right of every citizen to know the times and places for holding courts, where his liberty or property may be put in jeopardy. *People v. Northrup*, 37 N. Y. 206. It was one of the causes of complaints of the Colonists in the early history of this country, that the Crown appointed the courts at unseasonable times and inconvenient places, greatly to the injury of the parties who had matters pending before the court. To avoid this, the legislature has determined that all the judges of the district shall unite in appointing the times and places of holding the various terms of court, and require that the appointments thus made shall be published in the State paper for three weeks before any court shall be held in pursuance of them. Section 44 provides for all cases and proceedings in cases of failure to adjourn, so that such failure can work no real injury to any; there is, therefore, no necessity for a forced construction of the Code. In case a term of court should fail, and public interest require it, the governor is authorized by section 234 to appoint extraordinary terms of the Supreme Court, and he is also to give notice of the appointment as in his judgment the public interest requires. Section 237 provides that the governor may designate a justice of the Supreme Court to preside at the term of Oyer and Terminer or Circuit Court in case there is danger of the term failing.

The Oyer and Terminer was adjourned the same as the Circuit. It has been decided that a Circuit judge in court could not adjourn the Oyer and Terminer, and such is the law now. In the case of *The People v. Brodwell*, 2 Cowen, 445, it was held that a court of Oyer and Terminer cannot be adjourned by a Circuit judge, or otherwise, by reason that a number of the county judges sufficient to make a quorum are not present at the day appointed for holding it. To hold that a judge out of court has greater authority to adjourn the term he is appointed to hold, than he would have if sitting in term, would be in conflict with the general principles of law; yet such must be the construction if it is held that an Oyer and Terminer may be adjourned upon the written direction of a judge out of court.

By the Constitution and the statutes, the Court of Oyer and Terminer was organized an independent court, not continuing as other courts with succeeding terms. *People v. Appo*, 18 How. 350. It cannot by implication be embraced in the Circuit, although held at the same time, for they are distinct in organization, and in jurisdiction, and are so recognized by the Constitution. On the first day of the term of the court, there was in attendance, at the court-house in Mayville, the county judge and two justices of Sessions, who were authorized to sit in the Court of Oyer and Terminer, and they constituted a majority of the court, although not authorized to organize or hold it. It

seems that if there was any authority vested in any one to adjourn the Oyer and Terminer, it was vested in the county judge and justices of the Sessions by virtue of section 34 of the Code, for it is there provided that any judge of the court may adjourn a term thereof in the absence of a sufficient number of judges to hold the term. From these provisions of the Code, and authorities cited, it would seem that the Oyer and Terminer must have failed on the first day of the term by reason of an unauthorized adjournment, and that the second adjournment of the Circuit or Oyer and Terminer was clearly without authority of law.

JAMESTOWN, N. Y., February 18, 1878.

H.

"THE WAY OUT" FOR SURETIES.

To the Editor of the Albany Law Journal:

SIR—As one emerges from the cars at the terminus in London of many of the railways, he sees over the door of exit, in immense letters, the words, "The way out." The expression recurred to me when I read the case of *Risley v. Brown*, 67 N. Y. 160. To all inquiring sureties the remedy for their infelicitous condition is there prescribed, and if they will only read and heed they will there find the way out of their contract. It has occurred to me that a fair head-note to that case might be paraphrased from Goldsmith:

When once a "surety" feels his folly,
And plaintiffs sue to hasten pay,
What charm can ease his melancholy,
How can he move the court for "stay?"
If he's too good for "nulla bona,"
And can't from jurisdiction fly,
His heirs get *causa mortis dona*,
And he "relief" if he will—die.

ROCHESTER, February 23, 1878.

F. A. W.

NOTES.

THE February number of the *Law Magazine and Review* contains an unusual number of valuable articles. Sir Travers Twiss contributes what purports to be a review of the work of Albricus Gentilis on the Right of War, but which is in reality a very entertaining history of the life of Gentilis. Charles Clark follows with a critical discussion of the subject of General Average. The third article, upon the Curiosities of English law by Robert Collier, deals with the subject of Usurious Contracts with expectant heirs. "The Laws of War and the Institute of International Law" is a reproduction, with brief editorial comment, of a paper on that subject issued by the Institute named. "The Block in the Common Law Divisions," by J. V. Vesey Fitzgerald, is of local interest only. "Law and Custom Among the Southern Slavs" is a very interesting and instructive description of the laws and customs of a people about whom we know but little. The closing article by G. Broke Freeman, on the "Evidence of Experts," treats the subject in a careful and learned manner. The Digest of Select Cases is well selected, and the Book Reviews are, as usual, written with discrimination and fairness.

A correspondent of the *Nation* suggests a method in which the debts of defaulting States may be collected. In referring to the unpaid bonds of Tennessee, he says: "New York can sue Tennessee in the Supreme Court of the United States. Let her take the Tennessee bonds of her citizens, giving her own in exchange for them, having a longer time to run, the transaction being upon such terms that she cannot in any event lose thereby. Perhaps it would answer for her merely to undertake to collect the Tennessee bonds for a commission. An agent to whom commercial paper is transferred for purposes of collection may sue thereon in his own name. But some arrangement by which New York should sue on the bonds in her own name could easily be made. There would then be no difficulty in New York's obtaining a judgment in the Supreme Court of the United States against Tennessee."

There would be some trouble about enforcing collection of the judgment, but mandamus to the legislature of the State is suggested. In case that should prove insufficient, Congress might provide a remedy.

THE PUBLISHERS of the LAW JOURNAL issue with this number a sixteen-page Supplement containing the General Laws of the State and the laws relating to the City of New York, thus far passed. Subscribers to the LAW JOURNAL desiring to receive this and the subsequent Supplements should remit one dollar. To persons not subscribers to the LAW JOURNAL the Supplements will be sent on receipt of \$2.50.

The Albany Law Journal.

ALBANY, MARCH 9, 1878.

CURRENT TOPICS.

THE supplemental nine chapters of the Code of Civil Procedure have passed both houses of the legislature by a majority so large as to render it of little moment whether the Governor gives them his approval or not. The vote in the Senate was 17 to 4, and in the Assembly 78 to 21. These chapters are to go into operation July 1st. An obstructionist in the Senate undertook to delay or defeat the passage of the bill by insisting that the chapters be read section by section, and this being refused, he and his friends now insist that the bill was not passed in accordance with the requirements of the Constitution. It is not at all unlikely that some adventurer with a hopeless case will not long hence endeavor to topple over this bulky structure of the Commissioners, on the ground that the Senate would not read it. In this connection we must again call the attention of the members of the legislature to the necessity of making provision for continuing the revision of the statutes. The work is too far advanced — has already cost too much, *is too much needed*, to be allowed now to fail. The Civil Code, which embraces the great body of substantive civil law, is ready for submission to the profession and the legislature. Mr. Emott, also, has nearly completed the Criminal Code, which includes the law relating to crimes and their punishments, and, we are happy to say, has so nearly followed the Penal Code of 1865 as to insure a creditable performance. Now let the legislature continue the Commission with some instructions as to the completion of the work until at least these two Codes are completed. There certainly ought to be enough continuity of purpose in the legislature of this State to finish a work so far advanced.

The Revision Commission has submitted to the legislature, during the week, two acts: one relating to the fees, salaries and other compensation of officers connected with the administration of justice

in civil cases, and the other amending the Code of Civil Procedure now in operation. The fee bill is one urgently needed, and one likely to excite unusual interest, as it comes home to the "business and bosoms" of a very large number of "fellow citizens." Among other changes the fees of referees are increased to six dollars a day. The sum named should have been ten dollars, as any one fit to hear a reference deserves at least that sum, and then no higher amount should have been allowed by consent of parties or otherwise, save on an order of the court. The amendment act makes changes in some sixty sections of the Code which experience has shown to be desirable.

In the supplement of laws issued with this number of the LAW JOURNAL, is an act which makes it a misdemeanor to knowingly sell, use or expose "any horse or other animal having the disease known as glanders, or farcy, or any other contagious or infectious disease, by such person known to be dangerous to human life, or which shall be diseased past recovery." The act further provides as follows:

§ 2. Every animal having glanders, or farcy, shall at once be deprived of life by the owner or person having charge thereof, upon discovery or knowledge of its condition; and any such owner or person omitting or refusing to comply with the provisions of this section shall be guilty of a misdemeanor.

Of the constitutionality of this second section we doubt. So long as a person keeps animals affected with contagious diseases upon his own premises he is guilty of no invasion of the rights of others (*Fisher v. Clark*, 41 Barb. 329); nor can he be deprived of them "without due process of law." He is, of course, bound at his peril to keep them from harming others, and if he takes them into a public place, then the police power of the government may punish him for his disregard of the public weal. *Mills v. The N. Y. & Harlem R. R. Co.*, 2 Rob. 236; *Barnum v. VanDusen*, 16 Conn. 200; *Eaton v. Winne*, 20 Mich. 156; 8 C. P. 4 Am. Rep. 377; *Mullett v. Mason*, L. R., 1 C. P. 559; *Fulte v. Wycoff*, 25 Ind. 321. At best it is a very curious piece of legislation. It threatens with severe punishment the omission to do an act which is required to be done in a contingency about which there is liable to be differences of opinion.

Among the bills introduced in the legislature during the past week, not elsewhere noticed, are these: Requiring attorneys and counselors entitled to practice in the courts of the State to register with the clerk of the Court of Appeals a copy of their certificate of admission, or, if admitted before 1867, an affidavit of the fact; providing that attorneys shall be *ex-officio* notaries public; provid-

ing that the verdict of nine jurors shall be sufficient in civil cases; permitting a person having husband, wife, child or parent to devise or bequeath to a benevolent or other society only one-fourth of his estate, after paying debts, and requiring such devise, to be valid, to be made more than two months before death; and repealing laws exempting from taxation the property of churches and clergymen.

The bills relating to attorneys, above mentioned, we are sure will meet the approval of the profession. An authentic list of attorneys entitled to practice in the courts of the State is very much needed, and the method provided will undoubtedly secure it. When the requirements for admission to the bar were so easy that any one of ordinary intelligence could enter with but a brief preparation, there was, perhaps, little temptation to surreptitiously assume the title of attorney, but as the barriers have become more difficult to overcome, there are many who do not hesitate to hold themselves out to be what they are not. There is at present no easily available means of determining whether a person claiming to be an attorney has been actually admitted, a difficulty which the proposed registration will remedy. The proposal to constitute all attorneys notaries public is a proper one, and has been brought before previous legislatures. A jealousy of the profession or some other cause has heretofore operated to defeat the measure, but we have hopes of better success this time.

The difficulties which are liable to result from the decision in the *Franconia* case have led to the introduction into the English Parliament of a bill wherein the authority of the government and the jurisdiction of the courts of the Kingdom are declared to extend three miles from its shores. It has, until the discussion raised by that case, been generally believed that the jurisdiction of every independent State embraced the extent of sea mentioned, and the doctrine that the courts were without jurisdiction over acts done by foreigners within that belt was adopted by a divided court, six judges dissenting from the view of the majority, who numbered seven. And even one of the majority, Mr. Justice Lush, is reported to have said that if Parliament had on any occasion declared the waters within the three miles' limit to be part of the United Kingdom, he would have been of opinion that the courts of law had jurisdiction. Such a declaration is contained in the Foreign Enlistment Act, but it was not brought to the notice of the judge. The bill, it is stated, will pass Parliament without dissent, and will tend to render more definite a very important principle of international law.

What is known as the *Emma Mine* suit, which has been pending before the United States Circuit Court for a year or more, was disposed of by Judge Wallace on the 2d inst., a motion for a new trial, made by the plaintiffs, having been denied. This suit, which was an attempt to revive, on this side of the water, a litigation that had been somewhat fruitlessly conducted in the English courts, was brought to recover \$5,000,000, which it was claimed that the plaintiff, a corporation, had lost through the sale to it by defendants of a mine, falsely and fraudulently represented to be of great value. The jury, as will be remembered, rendered a verdict for the defendants. The court, in a lengthy opinion, holds that there were no mistakes made in relation to the admission and exclusion of evidence, and that upon the evidence a case was not presented for a new trial. The complaint alleged that the defendants sold the mine to plaintiff by means of fraud and deceit, and in consummation of an original fraudulent scheme. The inquiry related to the state of mind of the defendants, and while the evidence disclosed many circumstances connected with the sale which strongly impeached the honor and morality of the transaction, these were to be eliminated from the case except so far as they bore on the question of fraud; and the court could not say that they so established the fraud charged as to warrant a disturbance of the verdict.

The well-known *Bradlaugh-Besant* case has been reversed on appeal by the English Court of Appeals. It will be remembered that the defendants were tried by the Court of Queen's Bench upon an indictment charging them with unlawfully publishing an obscene book called "*Fruits of Philosophy*." The defendants, at the trial, moved to quash the indictment on the ground of its insufficiency, because the book, or any passage thereof, was not set forth in the indictment. The court overruled the motion, citing as authority the American cases, *Commonwealth v. Holmes*, 17 Mass. 386; and *Commonwealth v. Sharpless*, 2 Serg. & Rawle, 91. In the former case, Parker, C. J., said: "It can never be required that an obscene book should be displayed upon the records of a court, for this would be to require that the public itself should give permanency to indecency." This reason seems to have influenced Chief Justice Cockburn in giving judgment against the defendants, though the reasons set forth by him were that setting out the whole book would be inconvenient, that it would be far more reasonable that the objection should be taken by demurrer before the trial, and that the publication was a public nuisance. The Court of Appeal overruled the objections raised by the Lord Chief Justice, answering that it would hardly ever be necessary to set forth the whole book, and that the same reasoning would

apply to other cases; that though the demurrer suggested would be a more reasonable course to adopt, the law is that the objection may be raised after verdict, and that a public nuisance is no exception to the general rule requiring the words which constitute the offense to be set out. We think that the decision of the Court of Appeal is the correct one. And it might be said, in answer to the reason given in the American cases cited, that the purity of the records of the court ought not to stand in the way of giving a person charged with an offense like the one here charged an opportunity of knowing what is alleged against him with certainty, which he cannot have in case the indecent words are not set out.

The Supreme Court of Illinois, in the case of *Safford v. People*, decided on the 7th of June last, and to appear in the 85th Illinois Reports, passed upon a novel question in the law relating to receivers. In this case an injunction was granted by a State court and served on a railway company, restraining it and its servants from obstructing a public avenue in a city, with its trains. Thereafter a receiver of the company was appointed by a Federal court in a proceeding instituted therein. The Illinois court decided that the injunction was binding on the receiver, and that he would be punishable for contempt in disobeying the mandate of the writ. The court held that a receiver of a railway company, appointed to manage its business, is legally the agent of the company, though under the direction of the court appointing him, and that such court in making the appointment has no power to enlarge or restrict the corporate powers conferred on the corporation by its charter; that the receiver is bound by the charter to the same extent that the directors of the company are, and that, if the company is under a legal obligation to do or not to do a certain act, the same obligation will devolve upon the receiver. To the same effect, see *St. Joe, etc., R. R. Co. v. Smith*, 16 Alb. L. J. 408. These conclusions are so sensible and well put that they will receive general approval. A receiver has, by virtue of his position, no greater rights than the person whose place he takes, and if he undertakes to exercise other rights the official position he holds does not shield him.

NOTES OF CASES.

IN *Kane v. Hibernia Ins. Co.*, 10 Vroom, 697, the Court of Errors and Appeals, of New Jersey, decides that in an action on a policy of insurance against loss by fire, where the defense is that the property insured was willfully burned by the assured, the rule in civil, and not in criminal cases, as to the quantum of proof, applies, and a charge to the jury

that the defendant is bound to establish the defense beyond a reasonable doubt, and by the same measure of proof that would be necessary to convict the plaintiff if he was on trial upon an indictment charging that offense, is erroneous. This ruling is contrary to the doctrine of *Thurtell v. Beaumont*, 1 Bing. 339, which holds that the defense that the plaintiff had willfully set fire to the premises must be as fully and satisfactorily proved as if the plaintiff were on trial on indictment. *Thurtell v. Beaumont* is followed by *Greenleaf* (2 Greenl. Ev. 418), and by *Taylor* (1 Taylor's Ev., 5th Ed., 97 a.), though it never received approval in the English courts. In many American courts the doctrine has been repudiated and that of the principal case followed. See *Ellis v. Buzzell*, 60 Me. 209; *Blaessner v. Milwaukee, etc.*, 87 Wis. 81; *Elliott v. VanBuren*, 33 Mich. 99; *Jones v. Greaves*, 26 Ohio St. 2; *Knowles v. Scribner*, 57 Me. 497; *Scott v. Home Ins. Co.*, 1 Dillon's C. C. 105; *Huchberger v. Merchants' Fire Ins. Co.*, 4 Bissell's C. C. 265; *Washington Ins. Co. v. Wilson*, 7 Wis. 169; *Blaessner v. M. M. Ins. Co.*, 87 id. 81; *Rothschilde v. Amer. Cent. Ins. Co.*, 62 Mo. 356; *Etna Ins. Co. v. Johnson*, 11 Bush, 587; *Hoffman v. W. M. & F. Ins. Co.*, 1 La. Ann. 216; *Wightman v. Same*, 8 Rob. 442. A like doctrine has been adopted in reference to other subjects. In *Gordon v. Palmer*, 15 Gray, 413, it was held that, in an action on a promissory note, the defense that the note was obtained by false and fraudulent representations might be sustained by a preponderance of evidence, as in other civil cases, and that it was not incumbent on the defendant to establish it by proof beyond a reasonable doubt, although the defense was based on a charge of fraudulent representation, such as might be the subject of a criminal prosecution. In *Bradish v. Bliss*, 35 Vt. 326, the action was in trespass for burning the plaintiff's building, and the evidence shows that the defendant, if guilty of trespass, had set fire to the building designedly, and was guilty of the crime of arson. The court, nevertheless, held that, it being a civil cause, the issue must be determined by the fair preponderance of evidence. A similar decision was made in *Munson v. Atwood*, 30 Conn. 102, which was an action on a statute which gave the right to recover the treble value of property feloniously taken. In an action of trover, where the evidence was such as to involve a charge of larceny, a direction to the jury that the evidence, to justify a verdict against the defendant, must satisfy them of the truth of the charge beyond a reasonable doubt, was held to be erroneous. *Bissel v. Wert*, 35 Ind. 54. See, also, *G. W. Railway Co. v. Rimell*, 18 C. B. 575; *Metcalf v. L. & B. & S. C. R. Co.*, 4 C. B. (N. S.) 207; *Vaughton v. L. & N. W. R. Co.*, L. R., 9 Exch. 93; *McQueen v. G. W. R. Co.*, L. R., 10 Q. B. 569.

RUFUS CHOATE.

X.

IN seeking to illustrate somewhat the less obvious traits of Mr. Choate's mind and character, we shall refer to his attitude in respect to some of the subjects to which he gave attention. The reader may thus be brought into nearer relations with him, and have a clearer conception of the spirit which inspired the lessons he taught. In the record Mr. Choate has left, we can clearly discern his love of nature and of all that is good and true and beautiful, the sagacity and prudence that guided him in his public services, and the tenderness and cheerfulness that made his home-life as a perpetual summer. If, without such aid, his opinions, the part he took at the bar, in politics and legislation, could be stated without blur or distortion, he would still seem remote if not inaccessible; the character imposing, but the subtle aroma that sweetened the life would elude the apprehension. It would be as when we survey the range of hills, but do not find the secret springs that nurse and beautify the valley below, or draw the landscape with correct detail, yet give no hint of the blending lights and shadows that should qualify the picture.

In previous papers we have referred to Mr. Choate's attention to the choice of words, and to his study of the great masters of eloquence. We have, also, casually referred to his style, and only advert to it now, because the quotations to be made may seem to invite attention to the subject. The reader will notice a marked distinction between his style in speaking and in writing. In his addresses he was copious, reiterative, and much given to illustrations helpful to the argument; as a writer, his style was terse, simple and severe. In neither did he check the onward flow of discussion to crown his thoughts with flowers; his most brilliant imagery does not seem to have been used as mere embellishment, but came to his aid as naturally as the more simple forms of expression. The visions of beauty in his mind became articulate in those forms, and the musical tone and cadence could no more be imitated than could the melody of the murmuring stream. The reader will also notice that his language, when rising to the fervor of tropical heat, was tempered by an earnest and constant attention to practical affairs. Thus did it seem to us when we listened to him, or rather, tried to study him, in two great cases in which his arguments were continued for several days.

With an additional observation, we leave what was special in Mr. Choate's language and style to the attention of a friend distinguished for his learning and judgment. We have, then, simply to add that Mr. Choate's devoted study of the great masters of speech, in other languages and in our own

—quite sufficient to have led captive any other disciple—left him to the free use and development of the style that came to him as a natural gift and was best adapted to his genius. Hence it is that a wholesome relation appears between the tone, complexion and sympathetic power of his earlier and of his later speeches. Each bore the impress of his mental peculiarities, upon each his superscription and his seal. So it appeared to Chief Justice Perley, who entered college while young Choate was there, and knew him up to the time of his death. In the eulogy on Mr. Choate, delivered at Dartmouth in July, 1860, the Chief Justice said: "He was always remarkable for the same brilliant qualities which distinguished him in his subsequent career. To those who knew him and watched his onward course, little change was observable in his style of writing and manner of speaking except such as would naturally be required by subjects of a wider range, and by more exciting occasions."

In this relation, and before taking up the particular subjects to which we have referred, we are led to notice Mr. Choate's taste as having been delicate, exacting and severe. Like his style, owing much to nature and organization, it was refined by study; so cultivated that it grew with his growth, ripened with his maturity. Without assuming to assign to each co-operating faculty its relative influence, or to inquire how much the ripened fruit had been nourished by faith, principle or judgment, it may be said that his taste served him in every office of his life—in manners, conversation, in the deference due to others and in the respect due to himself, in the selection of subjects most worthy of study, and in the moral tone of those principles which he sought by the most earnest and delicate persuasion to implant in the public mind. How highly he valued that taste and its culture clearly appears. A man of the most delicate sentiments, his nature, as was said of Racine, "a living fountain of enthusiasm," his taste and judgment were in strict alliance. He was tolerant in his opinions of others, severe in his estimate of himself. He recalls with fidelity, and as if for his own encouragement or admonition, his studies in various departments; at times, seems hopeful, almost glad, in view of what he perceives he may attain; at other times, he seems sad, as if his studies had been partial or inadequate. As an instance, after he had garnered up in his mind and heart such wealth of learning as only one so receptive and devoted could acquire, we find him saying:

"I have written only this translation of Quintilian since Saturday, professional engagements have hindered me; but I have carefully read a page or two of Johnson's Dryden, and a scene or two of Antony and Cleopatra every morning—marking any felicity or available peculiarity of phrase—have launched Ulysses from the Isle of Calypso, and

brought him in sight of Phaeacia ; kept along in Tacitus, and am reading a pretty paper in the "Memoirs" on the old men of Homer. I read Homer more easily, and with more appreciation, though with no helps but Cowper and Donnegan's Lexicon. Fox and Canning's Speeches are a more professional study, not useless, not negligently pursued. Alas, alas ! there is no time to realize the dilating and burning idea of excellence and eloquence inspired by the great gallery of the immortals in which I walk !"

Again, he says: "How difficult it is to arrest these moments, to aggregate them, to tell them as it were, to make them day by day extend our knowledge, refine our tastes, accomplish our whole culture !"

His solicitude as to the improvement and preservation of his taste is freely confessed. Thus, he says:

"I have been long in the practice of reading daily some first-class English writer, chiefly for the *copia verborum*, to avoid sinking into cheap and bald fluency, to give elevation, energy, sonorousness, and refinement, to my vocabulary. Yet with this object I would unite other and higher objects—the acquisition of things—taste, criticism, facts of biography, images, sentiments.

In the same spirit as to a contemplated course of study, he says:

"The investigations it will exact; the collections of authorities; the constant use of the pen; the translations, the speculations, ought to constitute an admirable exercise in reasoning, in taste, in rhetoric as well as history."

Again, after referring to a course of reading considered too *denultory*, he states the benefits thus:

"No doubt taste has been improved, sentiments enlarged, language heightened, and many of the effects, inevitable, insensible and abiding, of liberal culture, impressed on the spirit."

And again, later, as to his plans when traveling abroad, he says:

"Then I must get, say half an hour a day, for Greek and Latin, and elegant English. For this purpose, I must get me an *Odyssey* and *Crusius*, and a *Sallust*, and some single book of poems or prose, say *Wordsworth*. This, lest taste should sleep and die, for which no compensations shall pay !"

In speaking of Mr. Choate's taste as having been *severe* as well as delicate and exacting, we were conscious of using a word of high commendation. If we had ever heard an improper word from his lips in the informal interviews to which we were kindly admitted, or had found in his writings an expression having the slightest immoral taint, we should have repressed the eulogy. But, happily, without a shade of mental reservation, we can let the word stand. In another sense, and, perhaps, not to the fancy of some sentimental scholars, was his taste

severe. Of this, Chief Justice Chapman gives an illustration, for which we are indebted to Professor Brown. The Chief Justice says:

"Mr. Choate's conversational power was scarcely less remarkable than his forensic power. It was, by no means, limited to the subject of oratory. Indeed, so far as my acquaintance with him is concerned, he never made that a prominent topic of conversation; but I recollect one of his conversations on eloquence. He was talking of Burke's speeches, of which he was known to be a great admirer, and remarked to a friend of mine who was extolling Burke above all other men, that he thought on the whole that the most eloquent and mellifluous talk that was ever put together in the English language was the speech of Mr. Standfast in the river. I went home and read the speech soon afterward, and I confess I appreciated John Bunyan's eloquence as I never had done before."

Yet, it will appear that this man, so delicate, refined, emotional, with such a keen sense of what was sweet and beautiful in life, sentiment, and study, was not the less able to deal with stern and sober subjects, to enter into and appreciate the trials and struggles of those who, like the earlier settlers of this country, labored in obscurity, with no embellishments to their lives save such as came from the performance of humble yet important duties.

J. N.

The Hon. Geo. W. Nesmith, late one of the Justices of the Supreme Court of New Hampshire, sends me the following letter: J. N.

FRANKLIN, January 31, 1878.

MY DEAR SIR—I confess it would be a hopeless task for me to delineate the character of Rufus Choate. You have given, in your own finished style, a concise, yet comprehensive view of what he was and did, and you have been aided by those who saw and heard him more frequently than myself. Yet I will place my memory at your service.

I knew him well while at college. Our acquaintance commenced in 1816. He was one year in advance of me in collegiate standing, and in age. I belonged to the same literary society with him, for three years, and remember with pleasure his leadership there. During my last year at college he was a tutor.

After graduation we lived a hundred miles apart. I frequently saw him when I visited Boston, had interviews with him, and occasionally heard him in courts of justice. I was with him in the Whig Presidential conventions at the nominations of Gen. Taylor, at Philadelphia, and Gen. Scott, at Baltimore. At both conventions we supported Mr. Webster as a candidate. I afterward heard his famous eulogy upon Mr. Webster. A short time before his death I had an interesting conversation with him, in which he announced the unwelcome intelligence that his physicians had notified him to quit all labor and to take a sea voyage as affording the only hope of recruiting his feeble bodily frame.

The only reminiscence of his college life which occurs to me as not already narrated by your correspond-

ents, was an amusing practical joke perpetrated by him and some others in the exchange of potatoes for apples in the sole remaining sack in which the latter were offered for sale by a farmer of the name of Johnson, from Norwich, and then getting Johnson to offer them for sale at the college. A purchase was made by the students who had been notified of his approach by Choate, and then, upon opening the sack, an outcry raised against Johnson for attempted imposition. Protests of innocence were met with ridicule, and suggestions of the interference of the Evil One. Choate, standing in front of Johnson, and amused at the perplexity depicted upon his countenance, exclaimed "Would that Hogarth were here!" Johnson caught at the name, with suspicion, and afterward offered to reward us if we would tell where Hogarth was to be found.

One of Choate's most eloquent and effective speeches was delivered in his senior year at college, in the autumn of 1818, while acting as president of our literary society. It was upon the occasion of the introduction of many members from the Freshman class. The custom of presidents of the association had been to make a brief formal speech setting forth the objects of the society and the duties of its members, and that was all we expected. We were surprised by a well prepared and eloquent address of considerable length. At that time he was in vigorous health and full of energy. The silvery tones of his voice, resounding through our little Hall, kept the assembly spell-bound while he discoursed upon those elements of character essential to the formation of the ripe scholar and the useful citizen. The late Chief Justice Perley was one of the young men then made a member of the society of "Social Friends." In after life I often heard him allude in terms of high commendation to that performance. On the following day I undertook to note down in a little scrap-book some of the thoughts to which he had given utterance, although I could not reproduce the brilliant language in which they were expressed. I give some of those memoranda:

"To make the successful scholar, patient, constant, well-directed labor is an absolute requisite. * * He must aim at reaching the highest standard of excellence of character. Good mental endowments must be allied to conscience, truthfulness, manliness. In the affairs of life brains are essential, but truth, or heart, more so. * * Not genius so much as sound principles, regulated by good discretion, command success. We often see men exercise an amount of influence out of all proportion to their intellectual capacities, because, by their steadfast honesty and probity, they command the respect of those who know them. George Herbert says 'A handful of good life is worth a bushel of learning.' Burns' father's advice to his son was good —

'He bade me act the manly part,
Though I had ne'er a farthing,
For, without an honest, manly heart,
No man was worth regarding.'

A critic said of Richard Brinsley Sheridan, that if he had possessed *reliableness* of character he might have ruled the world, but, for want of it, his splendid gifts were comparatively useless. Burke was a man of transcendent gifts, but the defect in his character was want of moral firmness and good temper. To succeed in life we must not only be conscientious; we must have also energy of will, a strong determination

to do manly work for ourselves and others. The strong man channels his own path, and easily persuades others to walk in it. * * When Washington took command of the American army the country felt as if our forces had been doubled. So when Chatham was appointed Prime Minister in England great confidence was created in the government. * * After Gen. Green had been driven out of South Carolina by Cornwallis, having fought the battle of Guilford Court House, he exclaims 'I will now recover South Carolina, or die in the attempt.' It was this stern mental resolve that enabled him to succeed. * * Every student should improve his opportunities to cultivate his powers. He owes this duty to his friends, his instructors, and his country. Our learned men are the hope and strength of the nation. 'They stamp the epochs of national life with their own greatness.' They give character to our laws and shape our institutions, found new industries, carve out new careers for the commerce and labor of society; they are, in fact, the salt of the earth, in life as well as in death. Constituting as they do the vital force of a nation and its very life-blood, their example becomes a continual stimulant and encouragement to every young man who has aspirations for a higher station or the higher honors of society. Now, my brethren and young friends, we beseech you to strive earnestly to excel in this honorable race for just fame and true glory, and in your efforts to mount up upon the fabled ladder do not be found, in the spirit of envy, pulling any above you down, but rather, in the exercise of a more liberal spirit, holding out a helping hand to a worthy brother who may be struggling below you. Be assured you exalt yourself in proportion as you raise up the humbler ones."

The second part of his discourse was specially devoted to the pleasure and rewards derived from an intimate acquaintance with classical learning. His suggestions were valuable and impressive, and urged home upon our attention with great rhetorical force. If this speech had been published it would have furnished the young student with a profitable guide in his pursuit of knowledge.

Mr. Choate has been rightly described to you as an *original nondescript*. He was like no other person in his style of writing, or in his oratory. He perceived quickly and acquired rapidly. He possessed a retentive memory, appropriating to himself readily the thoughts of others. To his able reasoning powers he united an imagination "richly perfumed from Carmel's flowery top," powerful, soaring, unbounded. He seemed to have been fashioned for a poet. He remarked to me one day that he loved poetry, but poetry did not love him. As to temper he was always indulgent and kind, speaking evil of none. In his daily intercourse with others, he was courteous and liberal to a fault. He was naturally gentle, but when pressed hard was capable of inflicting blows that left an impression. I once heard him deal with a bad witness in court. He did not call him hard names, but covered him over with an oily sarcasm so deep that the jury did not care to look after him. In other words, the witness was slain politely, and laid out to dry.

Not far from the year 1845, the Hon. Levi Woodbury was invited by the literary societies of Dartmouth College to deliver an oration at the annual commencement in July. Going thither I had a seat in the stage coach with Mr. Webster, Mr. Woodbury and Mr. Choate. A good opportunity was presented

of witnessing their conversational powers. Mr. Webster and Judge Woodbury had for many years resided in Portsmouth, N. H., and topics relative to men and scenes there were much discussed by them. Of course I could not but be an interested listener. The early history of our State, the character of the settlers, their leaders, their privations and sufferings by reason of Indian warfare, the character of our early governors, and the growth of the State, with historical reminiscences and anecdotes, were introduced. I was surprised to find that Mr. Choate was so familiar with our early history as to give dates and events with accuracy. By easy transitions they passed to the judiciary of the State and the members of the bar, discussing their respective merits. On these local subjects the New Hampshire men, of course, had the vantage ground. Wishing to give a new direction, therefore, to the conversation, I asked Mr. Choate as to his later reading. He answered that he had recently been occupied in the perusal of Milton's prose and poetry. Mr. Webster said to him, "As you are so recently out of Paradise, will you tell us something about the talk that Adam and Eve had before and after the fall?" Mr. Choate asked, "Do you intend that as a challenge to me?" Webster answered, "Yes, I do." Choate hereupon recited promptly portions of the addresses of Adam to Eve, and Eve to Adam, much to the edification of his audience. Webster rejoined with the description of the conflict between Gabriel and Satan from the sixth book of "Paradise Lost." His recitation was received with applause. John Milton himself, had he been present, would have been satisfied with the performers on that occasion. We have seen celebrated actors on the stage, but none before like those in the stage.

At my last interview with Mr. Choate in Boston, after alluding to his incessant and severe labor at the bar for many years, he said he was literally worn out, and added in a melancholy way, "I have cared much more for others than for myself; I have spent my strength for naught." I reminded him that he had gained high reputation in his profession, and also as a scholar, and this was his reward. He said, "We used to read that this kind of fame was but an empty bubble; now I know it is nothing else." Such was Mr. Choate's estimate of human glory when consciously near the termination of his eventful and honored life. He added, "My light here is soon to be extinguished. I think often of the grave. I am animated by the hope of that glorious immortality to be enjoyed in a kingdom where sin and sorrow cannot come."

I remain, very respectfully, etc.,

GEO. W. NEESE.

RETROSPECTIVE CONSTRUCTION OF STATUTES OF LIMITATION.

THE PEOPLE v. LORD, 12 Hun, 282.

THE defendant committed the offense of bribery in 1871, and as the law then stood an indictment "shall be found within three years after the commission of the offense." But in 1873, before the limitation had expired, the statute was amended by substituting the word "five" for the word "three." The indictment was found in 1875, within five years after the commission of the offense. The defendant contended that the amendment of 1873 should be construed to apply only to offenses committed subsequent to its passage, and that all offenses committed previous thereto were

to be governed by the original limitation, which had expired before this indictment was found. Upon a motion to strike out defendant's plea of the statute of limitations, Clinton, Ch. J., of the Superior Court of Buffalo, held that the amendment applied to offenses committed previous to its passage, which were not then barred by the original statute. The indictment was afterward sent to the Court of Oyer and Terminer, and Daniels, J., upon a motion to direct a verdict of not guilty, held the same way. But the General Term, in an opinion delivered by Mullin, P. J. (Talcott, J., concurring in result, and Jas. C. Smith, J., dissenting), held that the amendment should not be construed to take in offenses committed previous to its passage, though not then barred under the original limitation. We propose to examine this question and to show that, upon principle and upon the authorities, this decision cannot be sustained.

The principle is general, if not universal, that all laws, civil or criminal, are to be construed as furnishing a rule for future cases only, unless they contain language unequivocally and certainly embracing past transactions. 24 N. Y. 20. Or, in other words, statutes are to be construed to operate prospectively, and not retrospectively. "Retrospective" is defined, "Having reference to what is past; affecting things past." And a retroactive or retrospective law or statute is defined to be one which operates to make criminal or punishable, or in any way expressly to affect, acts done prior to the passing of the law. Webster. And every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective. 2 Gall. 139.

It has been said that a statute may be construed to operate retrospectively, if vested rights are not thereby impaired or affected. But Mr. Austin says (Jurisp., vol. 2, 887-9) that the epithet "vested," as applied to a right, is superfluous or tautological. "Every right, properly so called, is of necessity present or vested: that is to say, it presently resides in, or is presently vested in, a present and determinate party, through the title, or investitive fact, to which the law annexes it as a legal consequence or effect. When we oppose a vested or present, to a future or contingent right, we are not opposing a right of one class to a right of another class, but we are rather opposing a right to the chance or possibility of a right. A right may be present or vested, although the right to enjoy it, or exercise it, be contingent or uncertain. Or, in other words, a present and certain right to possession is not of the essence of a present and certain right." And the principle of construction above stated is just as applicable to contingent rights, or to chances or possibilities of rights, as to vested rights, or rights properly so called. To deprive a man of an expectancy, by construing a statute retrospectively, were just as pernicious as to deprive him of a right without the same reason to justify the construction. By contingent rights, we mean rights to property. An expectation of acquiring a defense to an action or indictment, by reason of neglect to sue or prosecute the same within the time prescribed by law, is not an expectant right to property, and is not, therefore, within the meaning of the rule. Before proceeding to show the application of the rule of construction above mentioned to statutes of limitation, it should be observed that the

prisoner (Lord) had no rights, vested or contingent, at the time the amendment was passed, which it did or could take away. And Mr. Austin says that, from a legal point of view, there are no rights but those which are the creatures of positive law. The proposition we maintain (and which is founded on principle and supported by authority) is this: That a statute *extending* the time within which actions may be brought or indictments may be found, and providing that they may be brought or found within a certain time after the cause of action *shall accrue*, or after the offense *shall be committed*, is to be construed as applying to rights of action which *have accrued*, or to offenses which *have been committed*, before the statute was passed, and which were not then barred by any previous limitation; and that, in such case, the statute does not operate retrospectively, but prospectively, and affects existing rights or offenses only from the time of its passage.

But where a statute *reduces* the limitation, and provides that certain actions must be brought within a specified time "after the cause thereof shall accrue," or, "shall have accrued," it is not to be construed (though the language may admit of that construction) to apply to rights of action which have previously accrued; for if such a construction were adopted, many rights of action would become absolutely barred the moment the statute took effect, and, as to those, would be unconstitutional, and, therefore, void, as impairing the obligation of contracts, in taking away all remedy to enforce them. Thus, if the original limitation was five years, and a subsequent statute reduced it to three, all rights of action which have accrued more than three years before the statute was passed would be cut off immediately. So, also, if no limitation was previously prescribed. Construing such a statute to run against existing rights of action from the time the right shall have accrued, would be giving to it a retrospective operation, which would work injurious consequences. A rule of construction which would lead to such consequences will not, therefore, be adopted, when its language will admit of a different construction. This rule protects the party in whom the right is vested, and was adopted and applied in the following cases: *Ridgeley v. Steamboat Reindeer*, 27 Mo. 442; *Hull v. Minor*, 2 Root, 223; *Thompson v. Alexander*, 11 Ill. 54; *Watkins v. Haight*, 18 Johns. 138; *Sayre v. Wisner*, 8 Wend. 661; *Williamson v. Field*, 2 Sandf. Ch. 569; *Didier v. Davison*, 2 Barb. Ch. 477; *Calkins v. Calkins*, 2 Barb. 355. (It should be noticed, however, that the N. Y. Rev. Stats. expressly provide that the limitations therein prescribed shall not apply to any cases where the right of action shall have accrued before 1830.) *Boyd v. Barringer*, 23 Miss. 269; *Garrett v. Beaumont*, 24 id. 379; and *Murray v. Gibson*, 15 How. (U. S.) 421, Daniel, J., saying: "As a general rule for the interpretation of statutes, it may be laid down that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only. Especially should this rule of interpretation prevail, when the effect and operation of a law are designed, apart from the intrinsic merits of the rights of parties, to restrict the assertion of those rights."

And where a statute provided that certain actions shall be brought within two years from the time the right "*has accrued* or shall accrue," it was held unconstitutional as to a cause of action which accorde

more than two years before the statute was passed. 10 Cal. 305.

Though this rule of construction is evidently just and sound, yet it may leave existing rights of action unprovided with any limitation whatever. Thus, if the statute supersedes or repeals a former statute on the same subject, or if no limitation had been previously prescribed, causes of which have previously accrued, are left without any limitation. Still we see not how this circumstance affects the soundness of the rule.

But the contrary rule was adopted and applied by the District Court of Philadelphia in *Com. v. Hutchinson*, 2 Pars. 453, where a statute providing "that from and after the passage of this act no indictment shall be found, unless within five years from the time at which the offense shall have been committed," was held to apply to offenses committed more than five years before the statute took effect. "The expressions employed are broad and comprehensive, and would seem to embrace all cases where the offense had been perpetrated before the passage of the act, as well as after. It is simply prohibiting the officers of justice from acting in such cases." If the same rule of construction applicable to statutes of limitation in civil cases is applicable to statutes of limitation in criminal cases (and we perceive no good reason why the same rule should not govern both cases), then this decision cannot be sustained upon that rule, for the rights of the people against criminal offenders became immediately barred. However, if the decision is correct, it is an authority in our favor.

Another and different rule of construction of statutes *shortening* the time within which actions must be brought, is to construe them as running against existing causes of action *from the time the statute took effect*, notwithstanding the statute provides that suits thereon must be instituted "within two years next after the cause or right of action shall have accrued, and not after." This rule was adopted and applied in *Sohn v. Waterson*, 17 Wall. 596. With much stronger reason should this rule apply to statutes *lengthening* the limitation. The importance of this decision, the high authority of the court rendering it, and the fact that the principle enunciated and established is decisive of the present case, require a liberal quotation from the opinion delivered by that distinguished jurist, Judge Bradley. "The plaintiff contends that the statute cannot apply to actions which accrued more than two years before its passage, because it would cut them off and defeat them altogether, and would thus impair the obligation of contracts. A literal interpretation of the statute would have this effect. But it is evident that the legislature could not have had any such intention. * * The court below held that the act was prospective in its operation, and affected existing causes of action only from the time of its passage. This seems to us a reasonable construction and one that prevents the legislative intent from being frustrated. * * It is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect. The plaintiff contends that the application of this rule to the statute in question would have the effect of restricting its application to actions accruing after the passage of the act. But this is not a necessary conclusion. A statute of limitations may undoubtedly have effect upon actions which have already accrued as well as upon actions

which accrue after its passage. Whether it does so or not will depend upon the language of the act, and the apparent intent of the legislature to be gathered therefrom. When a statute declares generally that no action, or no action of a certain class, shall be brought, except within a certain limited time after it *shall have accrued*, the language of the statute would make it apply to past actions as well as to those arising in the future. But if an action accrued more than the limited time before the statute was passed, a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such was not the intent of the legislature. Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a prospective operation. In doing this, three different modes have been adopted by different courts. One is to make the statute apply only to causes of action arising after its passage. But as this construction leaves all actions existing at the passage of the act, without any limitation at all (which, it is presumed, could not have been intended), another rule adopted is, to construe the statute as applying to such existing actions only as have already run out a portion of the statutory time, but which still have a reasonable one left for prosecution before the statutory time expires—which reasonable time is to be estimated by the court—leaving all other actions accruing prior to the statute unaffected by it. (4 Wisc. 18; 15 Id. 55; 7 Ind. 91; but see 31 Id. 221.) The latter rule does not seem to be founded on any better principle than the former. It still leaves a large class of actions entirely unprovided with any limitation whatever, or, as to them, is unconstitutional, and is a more arbitrary rule than the first. A third construction is that which was adopted by the court below in this case, and which we regard as much more sound than either of the others. It was substantially adopted by this court in *Ross v. Duval*, 13 Pet. 62; and *Lewis v. Lewis*, 7 How. 778. In those cases certain statutes of limitation had originally excepted from their operation non-residents of the State, but this exception had been afterward repealed; and this court held that the non-resident parties had the full statutory time to bring their actions after the repealing acts were passed, although such actions may have accrued at an earlier period. 'The question is,' says Chief Justice Taney (speaking in the latter case) 'from what time is this limitation to be calculated? Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided.'" Speaking of *Murray v. Gibson*, 15 How. 421, he says: "But that decision was made in express deference to those of the State court, which were regarded as authoritative. In the present case we are not bound by any decisive construction of the State court on this point." (See, also, *Lawrence v. Trustees*, 2 Denio, 582 (Vice-Chancellor Hoffman); 7 Ind. 468, and *dicta* in 8 Wend. 681, and 10 Cal. 306, *supra*.) It may admit of some doubt whether the principle adopted was correctly applied to the statute in that case. We might say (with Vice-Chancellor Sandford in 2 Sandf. Ch. 569) that the statute says nothing of two years from the time it goes into effect; its language is plain and positive, "after the cause of action shall have accrued, and not after." However this may be, it needs no argument to show that the principle of that decision is applicable to the statute in

this case, and is decisive. If the same rule of construction should be adopted in construing statutes of limitation, extending the time within which indictments may be found (and we see no good reason why it should not be) then we have a few additional authorities directly in favor of our proposition.

In *Ogden v. Blackledge*, 2 Cranch, 272, the limitation was seven years, but before that period had run against the plaintiff's demand, the statute was repealed, and suit was commenced fifteen years after the right of action accrued, and it was held that the statute "having been repealed by the act of 1789, at which time seven years had not elapsed," was no defense. This case was followed in *Winston v. McCormick*, Smith's R. (Ind.), 8, where the contract was made while the act of 1838, which limited the bringing of an action to five years, was in force, but that act was repealed by the act of 1843, before five years had elapsed, which extended the time to six years. The defendant relied on a proviso in the repealing act. But that learned and able judge, Blackford, said that "the effect of the proviso is only to save from the consequences of the repeal certain rights actually existing when the repeal took place. It does not appear that at the time of the repeal the defendant had any defense. If the defense did not exist when the act of 1838 was repealed, the defendant had no existing right to be affected by the repeal. Had the five years expired before the repeal of the act of 1838, that might be said to have operated upon the case, and the defendant then would have had a defense, which the subsequent repeal of the act would not have taken away. This point was decided in *McKinney v. Springer*, 8 Blackf. 506. But this is a different case. * * The defendant, in order to show his construction of the statutes to be right, says that suits on contracts made previous to the act of limitations of 1843, are unlimited unless the old act governs them; the act of 1843 being prospective only. But we do not agree to this. The language of the act of 1843 on the subject is not uniform. In one place it is 'after the cause of action shall accrue;' in another, 'after the accruing of the cause of action'; in others, 'after the cause of action shall have accrued.' We suppose the legislature intended to embrace all cases, both before and after the taking effect of the act, except such as are within the decision of *McKinney v. Springer*. * * This suit having been commenced after the act of 1843 was in force, which prescribes six years as a bar, the plea relying on the lapse of five years next before the suit was commenced, cannot be sustained. Were the statute of limitations a part of the contract, then this plea would be valid; but the law is otherwise. The statute affects the remedy only; and that statute governs cases like this which happens to be in force when the suit is brought." Approved in *Pritchard v. Spencer*, 2 Ind. 487. S. P. applied, in 8 Id. 362, to a statute shortening the limitation, and thereby cutting off an existing right of action. The decisions in that State are not harmonious (see 7 Ind. 91, 468; 31 Id. 221); but they do not affect the decision above quoted.

Royce v. Hurd, 24 Vt. 620, holds that a statute affecting non-resident defendants "against whom there is or may be any cause of action" from the operation of the statute of limitations, applied to all subsisting cause of action not barred at the time of its passage.

Couch v. McKee, 1 Eng. (Ark.) 484, merely holds that an amendment to a statute extending the limita-

tion from three to five years did not apply to rights of action previously barred.

In *Calvert v. Lowell*, 5 Eng. 147, the right to sue accrued in 1841, and the limitation was three years; but in 1844, before three years had elapsed, a statute was enacted providing that as to "causes of action which shall accrue," the limitation shall be five years, but did not expressly repeal the former statute. Action brought in 1847. Plaintiff claimed five years from 1844, but the court decided that his case was governed by the former statute, which had not been repealed.

In *Stone v. Flower*, 47 N. Y. 566, a statute provided that "The time of absence from this State of any such person during his term of service [in the war] and while engaged therein, shall not be taken as part of the period limited," etc. Held, that the time of absence of a person in such service, prior to its passage, is not excluded in calculating the time limited for the commencement of an action previously accrued. In *Ex parte Lane*, 8 Metc. 213, a statute provided that no certificate of discharge should be granted if a debtor shall, within six months before filing his petition, make an assignment to preferred creditors, and it was held to apply to debtors who had filed their petition before the passing of the statute. "The statute is not to be considered a retrospective act, disturbing vested rights; but as altogether prospective in its operations, although it might depend, in some cases, on acts done before it took effect." And see, also, *Moore v. Mansert*, 49 N. Y. 332.

Dash v. Van Kleeck, 7 Johns. 477, merely holds that, where a defense to an action of tort existing by the common law is taken away by statute, and the statute is repealed, the defense is not available against an action pending at the time of the repeal.

The following named cases were cited by defendant's counsel, but none of them arose under the statute of limitation: *Wood v. Oakley*, 11 Pal. 400; *People v. Carnal*, 6 N. Y. 463; *Ely v. Horton*, 15 id. 595; *Sanford v. Bennett*, 24 id. 20; *Prince v. U. S.*, 2 Gall. 204; *Carroll v. Carroll*, 16 How. (U. S.) 275; *Couch v. Jeffries*, 4 Burr. 2460; *Gilmore v. Sleuter*, 2 Mod. 310.

Now let us present the views of Judge Mullin. He bases his decision on the following extract from Whart. Crim. Law, VI, § 444 a. "A mistake is sometimes made in applying to statutes of limitations in criminal suits the construction that has been given to statutes of limitation in civil suits. The two classes of statutes, however, are essentially different. In civil suits the statute is interposed by the legislature as an impartial arbiter between two contending parties. In the construction of the statute, therefore, there is no intentment to be made in favor of either party. Neither grants the right to the other; there is, therefore, no grantor against whom arise the ordinary presumptions. But it is otherwise when a statute of limitation is granted by the State. Here the State is the grantor, surrendering by act of grace its right to prosecute, and declaring the offense to be no longer the subject of prosecution. The statute is not a statute of process, to be scantily and grudgingly applied, but, on the contrary, declaring that after a certain time oblivion shall be cast over the offense; that the offender shall be at liberty to return to his country, and resume his immunities as a citizen, and that from henceforth he may cease to preserve the proofs of his innocence, for the proofs of his guilt are blotted out. Hence it is that statutes of limitation are to be liberally construed in favor of the defendant, not only because such liberality

of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition and ratification by the legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt." But the learned judge misapprehends Mr. Wharton, for it is evident, not only from the language of the text, but also from note b, to "legislative attempts to institute prosecutions for offenses which prior statutes have canceled." The proposition that the legislature, by passing a statute of limitation, surrenders its right to alter that statute is (to use a mild expression) absurd.

That portion of the original statute prescribing a limitation of three years was so far abrogated by the amendment of 1873. Consequently, if the statute as amended is not applicable to offenses previously committed, they are left without any limitation whatever! Thus, the arguments used by defendant's counsel operate like a boomerang.

The statute does not read "after the offense shall be committed," but "after the commission of the offense."

The conclusions we reach are:

1. That a statute extending the time within which actions may be brought, and providing that they may be brought within a specified time after the cause of action shall accrue or shall have accrued, is to be construed as applying to causes of action which have accrued before the statute went into effect, and which were not then barred by any previous limitation; and that, in such case, the statute does not operate retrospectively, but prospectively, and affects existing rights of action only from the time of its passage. Especially is this so, when the statute is an amendment of a former statute.

2. That upon principle the same rule of construction is applicable to statutes of limitation in criminal cases.

3. That if the statute as amended in 1873 is not applicable to offenses committed before its passage, those are left unprovided with any limitation, the original statute being so far abrogated.

4. That at the time the amendment was passed the defendant had no rights, vested or contingent, which it did or could take away.

These propositions are founded on principle and fortified by authority. "What rights are taken away? Is the defendant deprived of his defense upon the merits? The pretense of the defendant does not merit the name of right. It relates to the remedy."

F. P. M.

PROXIMATE AND REMOTE CAUSE—SETTING FIRE TO BUILDINGS.

SUPREME COURT OF PENNSYLVANIA—NOVEMBER 19, 1877.

HOAG V. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

A land-slide took place on defendant's railroad, after which a train of cars loaded with oil came along. The engineer did not see the slide and ran into it, whereby the train was wrecked and the oil set on fire. The burning oil ran into a creek alongside the railroad, floated down the current several hundred feet, and set fire to and destroyed plaintiff's property. Held, that the negligence of the engineer in not seeing the slide was the remote and not the proximate cause of the injury to plaintiff's property, and defendant was not liable.

ACTION by plaintiffs, trading as Hoag & Alger, for damage to their property, caused by the negligence of defendant. The facts appear in the opin-

tion. The court below directed a verdict for defendant, and plaintiffs took a writ of error to this court.

Charles W. Mackay, for plaintiffs.

McCalmont & Osborn, for defendant.

PAXSON, J. This was an action on the case to recover compensation for certain property destroyed by fire, caused as was alleged by the negligence of the defendants. The facts, as far as they are essential to elucidate the point in controversy, are as follows: The plaintiffs were the occupiers of a piece of land situate within the limits of Oil City, on the western bank of Oil Creek. The railroad of defendants is constructed along said creek over the land of the plaintiffs, and at the base of a high hill. On the afternoon of April 5, 1873, during a rain storm, there was a small slide of earth and rock from the hill-side, down to and upon the railroad. About ten minutes prior to the accident one of the defendant's engines had passed over the road in safety; at that time no slide had occurred. This engine was followed in a few minutes by another engine, drawing a train of cars loaded with crude oil in bulk. The latter engine ran into the slide, was thrown off the track, ran on about 100 to 150 feet, when the tender, which was in front of the engine, was overturned into Oil Creek; the engine itself was partly overturned; two or three oil cars became piled up on the track and burst. The oil took fire, was carried down the creek, then swollen by the rain, for several hundred feet, set fire to the property of the plaintiffs, and partly consumed it. The question of negligence in defendants' engineer in not seeing the obstruction and stopping his train before reaching it is not raised upon this record, and need not be discussed. The only question for our consideration is, whether the negligence of the defendants' servants was the proximate cause of the injury to the plaintiffs' property. The answer to the plaintiffs' third point, embraced in the second specification of error, raises this question distinctly. The court was asked to say: "That, if the jury believe from the evidence that the accident complained of was the result of negligence on the part of the defendants, and that, by reason of such negligence, the oil, ignited by the engine attached to the train, ran immediately down to Oil Creek, where it was carried by the current in the space of a few minutes to the property of the plaintiffs, when it set fire to and destroyed said property, the plaintiffs are entitled to recover, provided they did not in any manner contribute to said accident." The court answered this point in the negative, and then instructed the jury that as a matter of law upon the facts in the case the plaintiffs were not entitled to recover, which instruction is assigned here for error.

It was strongly urged that the court erred in withdrawing the case from the jury, and the recent cases of *Pennsylvania Railroad Company v. Hope*, 30 P. F. S. 373, and *Raydure v. Knight*, 2 Weekly Notes, 713, were cited as supporting this view. In the case first cited it was said by the Chief Justice in delivering the opinion of the court: "We agree with the court below that the question of proximity was one of fact particularly for the jury. How near or remote each fact is to its next succeeding fact in the concatenation of circumstances from the prime cause to the end of the succession of facts which is immediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case and depend upon the evidence.

constitute a succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause, the negligence of the defendants." The case of *Raydure v. Knight* was meagerly presented; the charge of the court was not sent up, and a majority of the court were of opinion that no sufficient cause for reversing the judgment had been shown.* I am unable to see any special bearing this case has upon the question before us. The doctrine laid down in *The Railroad Company v. Hope*, and to be gathered incidentally perhaps from *Raydure v. Knight*, is, that the question of proximate cause is to be decided by the jury upon all the facts in the case; that they are to ascertain the relation of one fact to another and how far there is a continuation of the causation by which the result is linked to the cause by an unbroken chain of events, each one of which is the natural, foreseen and necessary result of such cause. But it has never been held that when the facts of a case have been ascertained, the court may not apply the law to the facts. This is done daily upon special verdicts and reserved points. Thus in *The Railroad Company v. Kerr*, 12 P. F. S. 353, a case bearing a striking analogy to this, the court submitted the question of negligence to the jury, but reserved the question of proximate cause upon the undisputed facts of the case. Of course, this could not have been done if the facts were in dispute. A reserved point must be based upon facts admitted in the cause or found by the jury. In questions of negligence it has been repeatedly held that certain facts when established amount to negligence *per se*. *Railroad Company v. Stinger*, 23 P. F. S. 219; *McCully v. Clarke*, 4 Wright, 399; *Penna. Railroad Company v. Bennett*, 9 P. F. S. 259, while in *Raydure v. Knight*, *supra*, the court below in answer to the defendant's second point instructed the jury that if certain facts were believed by them, the negligence complained of was the proximate cause of the injury to plaintiffs' property. This ruling was affirmed by this court. I do not understand the decision in *The Railroad Company v. Hope* to be in conflict with this view. It remains to apply this principle to the case before us. There is not a particle of conflict in the evidence so far as it affects the question of proximate cause. This was doubtless the reason why the plaintiffs assumed the facts in their third point. They would not have been justified in doing so had not the facts been admitted, nor is it likely the learned judge would have answered it. We may, therefore, regard the plaintiffs' third point as a prayer for instructions upon the undisputed facts of the case. Can it be doubted that the court had the right to give a binding instruction? We think not.

But one question remains; was the negligence of the defendants' servants, in not seeing the landslide and stopping the train before reaching it, the proximate cause of the destruction of the plaintiffs' property? We need not enter into an extended discussion of the delicate questions suggested by this inquiry. That has been done so fully in two of the cases cited as to render it unnecessary. A man's responsibility for his negligence and that of his servants must end somewhere. There is a possibility of carrying an admittedly correct principle too far. It may be extended so as to reach the *reductio ad absurdum* so far as it

difficulty may be avoided by adhering to the principle substantially recognized in *The Railroad Company v. Kerr*, and *The Railroad Company v. Hope*, *supra*, that in determining what is proximate cause, the true rule is, that the injury must be the natural and probable consequence of the negligence, such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrong-doer as likely to flow from his act. This is not a limitation of the maxim *causa proxima non remota spectatur*; it only affects its application. There may be cases to which such a rule would not apply, but this certainly is not one. It would be unreasonable to hold that the engineer of the train could have anticipated the burning of the plaintiffs' property as a consequence likely to flow from his negligence in not looking out and seeing the landslide. The obstruction itself was unexpected. An engine had passed along within ten minutes with a clear track. But the obstruction was there, and the tender struck it. The probable consequences of the collision, such as the engineer would have a right to expect, would be the throwing the engine and a portion of the train off the track. Was he to anticipate the bursting of the oil tanks, the oil taking fire, the burning oil running into and being carried down the stream, and the sudden rising of the waters of the stream, by means of which, in part at least, the burning oil set fire to the plaintiffs' buildings? This would be a severe rule to apply, and might have made the defendants responsible for the destruction of property for miles down Oil Creek. The water was an intervening agent, that carried the fire, just as the air carried the sparks in the case of *The Railroad Company v. Kerr*. It is manifest that the negligence was the remote and not the proximate cause of the injury to the plaintiffs' building. The learned judge ruled the case upon sound principles, and his judgment is affirmed.

WHEN THE GOVERNMENT IS BOUND BY THE FRAUDULENT ACTS OF ITS AGENT.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

UNITED STATES v. STATE NATIONAL BANK OF BOSTON.

When the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged or injured party.

A firm had borrowed money, belonging to the government, from the cashier of its sub-treasury. In order to enable the cashier to cover up his violation of duty, and in pursuance of an agreement, one of the firm procured a bank officer to purchase gold certificates, which were to be deposited in the sub-treasury, to remain until the subsequent day. The bank officer did so, and a receipt for the certificates was given by the cashier to C, who indorsed it to the bank officer. The receipt entitled its owner to receive gold certificates for those deposited, or their equivalent, on demand. The bank officer had no knowledge of the plan of the firm and the cashier, and the transaction he entered into was a usual one. *Held*, that the government obtained no title to the certificates, but was liable to return their value to the bank.

APPPEAL from the Court of Claims. The facts appear in the opinion.

Mr. Justice SWAYNE delivered the opinion of the Court.

Upon analyzing this case, as it is presented in the record, the facts are found to be few and simple.

Hartwell was cashier of the sub-treasury in Boston.

He embezzled a large amount of money belonging to the United States by lending it to Mellen, Ward & Co. As the time for the examination of the funds in the sub-treasury approached, Mellen, Ward & Co. endeavored to tide Hartwell over the crisis and to conceal his guilt and their own by the devices out of which this controversy has arisen. They had sold to the Merchants' National Bank of Boston a large amount of gold certificates with the understanding that they might buy back the like amount by paying what the bank had paid, and interest at the rate of six per cent per annum. Carter, one of the firm, arranged with Smith, the cashier of the plaintiff, to buy from the Merchants' Bank gold certificates to the amount of \$420,000, and to pay for them with the checks of Mellen, Ward & Co., certified to be good by Smith as such cashier, and then to deposit the certificates in the sub-treasury, where they were to remain until the ensuing day. A receipt was to be taken from the proper sub-treasury officer. The certificates were bought, paid for, and deposited accordingly. Hartwell received them from Smith in the presence of Carter and made out the receipt to Mellen, Ward & Co. or order. Smith inquired why the receipt was to them. Carter thereupon indorsed it by the firm name to Smith as cashier, and Smith took it without further remark.

Subsequently, pursuant to a like arrangement between the same parties, Smith, as such cashier, made a further purchase of gold and gold certificates from the Merchants' Bank, and converted the gold into gold certificates. The aggregate of the certificates thus procured was \$60,000. Thereafter Smith, as such cashier, at the instance of Carter, made a further purchase of gold certificates from another bank to the amount of \$100,000. All these certificates, amounting to \$160,000, were also deposited by Smith in the sub-treasury in the presence of Carter, and a receipt taken and indorsed as before to Smith as cashier. The receipts specified that the certificates deposited were "to be exchanged for gold certificates or its equivalent on demand." Only \$60,000 of the last deposit is claimed by the appellee. The residue is not involved in this controversy. The total claimed is \$480,000. All these things occurred on the 28th of February, 1867. On the following day Smith presented the receipts at the sub-treasury, and payment was refused. The certificates were all canceled and sent to the proper officer at Washington. The gold which they represented has since remained in the treasury of the United States. Carter gave Smith plausible reasons, not necessary to be repeated, for desiring to make the deposits. The Court of Claims found these facts: * * * "He (Carter) submitted his plan to Hartwell, which was as follows: He proposed to buy gold certificates in New York, bring them to Boston, and borrow money upon them of the Merchants' Bank, and he then proposed to get Smith, the cashier of the State Bank, to pay for these certificates and leave them with Hartwell during the examination. Hartwell made no objection to this plan, but he thought Smith would not do it. The plan was carried into effect by Carter, as hereinbefore set forth, but Hartwell had no agency in carrying it out, except to receive the moneys and gold certificates paid to him on the 28th of February as aforesaid, and he had no actual knowledge of the proceedings taken by Carter on that day to obtain said gold certificates. When Carter and Smith deposited the \$420,000 of gold certificates in the sub-treasury as aforesaid, Smith did not know Hartwell, nor did Hartwell know Smith, or

know that Smith was connected with any bank or money institution."

The case under another aspect was before us on a former occasion. *Merchants' Bank v. The State Bank*, 10 Wall. 604. We there held, after the most careful consideration, that the legal title to the certificates was, by the purchases made by its cashier, vested in the State Bank. We find no reason to change this view. The finding of the court shows clearly that Hartwell knew when he received the certificates that they did not belong to Mellen, Ward & Co., and that they did belong to the plaintiff, and that Smith represented the plaintiff as its agent. Hartwell was privy to the entire fraud from the beginning to the end, and was a participant in its consummation.

It is not denied that Smith acted in entire good faith. What he did was honestly done, and it was according to the settled and usual course of business. Hartwell was the agent of the United States. He was appointed by them and acted for them. He did, so far as Smith knew, only what it was his duty to do, and what he did constantly for others, and it is not denied that it was according to the law of the land. 12 Stat. 711. Smith no more suspected fraud, and had no more reason to suspect it, than any other of the countless parties who dealt with the sub-treasury in like manner.

There could hardly be a stronger equity than that in favor of the plaintiff. It remains to consider the law of the case.

The interposition of equity is not necessary where a trust fund is perverted. The *cestui que trust* can follow it at law as far as it can be traced. *May v. Leclerc*, 11 Wall. 217; *Taylor v. Plummer*, 3 Maul. & Sel. 562.

Where a draft was remitted by a collecting agent to a sub-agent for collection, and the proceeds were applied by the sub-agent in payment of the indebtedness of the agent to himself, in ignorance of the rights of the principal, this court held that, there being no new advance made and no new credit given by the sub-agent, the principal was entitled to recover against him. *Wilson & Co. v. Smith*, 3 How. 763; see, also, *Bank of the Metropolis v. The New England Bank*, 6 How. 212.

A party who, without right and with guilty knowledge, obtains money of the United States from a disbursing officer, becomes indebted to the United States, and they may recover the amount. An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial. *Bayne et al. v. The United States*, 3 Otto, 643.

The United States must use due diligence to charge the indorsers of a bill of exchange, and they are liable to damages if they allow one which they have accepted to go to protest. *U. S. v. Barker*, 12 Wheat. 500; *Bank U. S. v. The United States*, 2 How. 711; *United States v. Bank of the Metropolis*, 15 Pet. 378.

In these cases and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in no wise involved.

The cases of *The Atlantic Bank v. The Merchants' Bank*, 10 Gray, 582, and *Sitner v. The Merchants' Bank*, 4 Allen, 290, are in their facts strikingly like th

case before us, and they involved exactly the same point. It was held in each of those cases, after an elaborate examination of the subject, that the defrauded bank was entitled to recover.

But surely it ought to require neither argument nor authority to support the proposition that where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged or injured party.

The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty and could confer no rights upon his principal.

The appellee recovered below the amount claimed. A different result here would be a reproach to our jurisprudence.

The judgment of the Court of Claims is affirmed.

LIMIT OF AUTHORITY OF BANK CASHIER AS TO CERTIFYING CHECKS.

SUPREME COURT OF PENNSYLVANIA, NOVEMBER 19, 1877.

DORSEY V. ABRAMS.

Where a check on its face shows that it was not drawn in the usual course of business, and is not a commercial check, the cashier of the bank on which it is drawn has no power to bind the bank by certifying the check as good.

Accordingly, where a check payable to bearer had indorsed upon it the words "To hold as collateral for 1,000 P. T. oil," etc., held, that an indorsement by the cashier that it was good when properly indorsed would not bind the bank.

ACTION by plaintiff against defendants, who did business under the name of "The Citizens' Savings Bank of East Brady, Pa.," on the following check:

"EAST BRADY, Pa., Dec. 30, 1875.

Citizens' Savings Bank of East Brady, Pa.

Pay to P. Dorsey, or order, two thousand dollars.

\$2,000.

A. W. MCCOLLOUGH.

To hold as collateral for }
1,000 P. T. oil pipage paid }
to Jan. 4, 1876.

Certified on the face, "Good when properly indorsed."
J. Y. FOSTER, Cashier.

The Court of Common Pleas of Clarion county, where the case was tried, charged upon the material points in substance as follows: The certification of a check written out would contain a statement that the drawer had funds sufficient to meet it in the bank, applicable to its payment, and an agreement on behalf of the bank that these funds should be retained and paid upon the check whenever it was presented. The cashier has a right, by virtue of his office, to make this certificate when the drawer has funds. *Cook v. State Bank*, 52 N. Y. 96. Even if the drawer had no funds we apprehend that the certificate of the cashier would hold the bank when the transaction was within the range of its legitimate business, but the acts of the cashier, or other officer of the bank, only bind the stockholders when such acts are within the regular and just sphere of banking transactions. *Lloyd v. West Branch Bank*, 3 Harris, 172. We do not think this transaction within such sphere. The certificate of the cashier upon the paper upon which suit has been brought would not, therefore, bind the stockholders, without proof that they authorized him to make such certificate, or without proof of such usage and practice on the part of the cashier as would justify third persons in believing

that such usage was authorized. The judgment was for the defendants and plaintiff took a writ of error.

PAXSON, J. This was a suit brought against the defendants, an unincorporated banking association, to recover the amount of a check held by the plaintiffs, a copy of which is here given *ut supra*.

The J. Y. Foster who certified the check is the cashier of the defendants' bank. It was alleged upon the trial, and there is evidence tending to prove, that the certificate of Mr. Foster was a forgery. Mr. Foster has recognized it and confirmed it by his subsequent acts and declarations.

We do not regard the question of the alleged forgery as an important element in the discussion of this case. It was conceded that at the time McCollough drew the check upon the bank he had no funds there, and no right to draw. It is also apparent that the check was entirely out of the usual course of banking business. This is plain from the face of the instrument. Instead of being a mere order upon a bank to pay a certain sum of money to a person therein designated, or to bearer, it has the significant indorsement in one corner, "to hold as collateral for 1,000 P. T. oil," etc. This indicates plainly that the check was given merely as collateral security for the delivery of the oil. If any doubt could exist upon this point, it is put at rest by the testimony of Dorsey, the plaintiff, himself. He says: "The first check was given for borrowed oil; if the oil was not returned, the check was to be paid; that check was carried for thirty days; supposed it was all right and not forged. The second check was taken when oil was advancing, and I would not extend the check without he would give me a check which would secure me for the return of the oil." If the certificate of Foster that the check was "good when properly indorsed" is to bind the bank, then the cashier has made the bank security for the delivery of 1,000 barrels of oil. This he could not do without authority. It is an act entirely outside of any of the ordinary recognized duties of the cashier of a bank. There is not a word in the evidence to show that the defendants, or any of them, knew of this transaction, much less sanctioned it. An attempt was made to show a similar course of dealing by the bank as to prior transactions; that is to say, to certify checks drawn without funds, to be held as collateral for oil. It was not successful, however. The checks certified were what the witnesses call "straight checks," by which we understand commercial checks for the payment of money, free from clog or condition. As to such checks, it is not outside the line of a cashier's duties to certify them when requested, if the drawer has funds in the bank. It has been decided that he has a right to make such a certificate by virtue of his office. *Cook v. State Bank*, 52 N.Y. 98. The effect of such a certificate we need not discuss, as the question is not before us. Nor need we consider at length the proposition that the plaintiff was a *bona fide* holder for value. The face of the check was notice that it was not drawn in the usual course of business; that it was not a commercial check. The plaintiff's own testimony shows, as we have seen, that he was only to hold it as a security for the oil. He had no right to draw the money upon the check until default in the delivery of the oil. There was ample to put him upon inquiry as to the authority of the cashier.

We are of the opinion that the learned judge of the court below was entirely accurate in his rulings embraced in the first assignment. This practically dis-

poses of the case. We may say, however, in regard to the fifth assignment, that the point referred to was not based upon any evidence in the case. There was no error, therefore, in declining to answer it. Judgment affirmed.

COURT OF APPEALS ABSTRACT.

BOUNDARIES.

When fixed monuments do not govern courses in deed.—The rule that in deeds of land, courses, distances and quantities must yield to natural or artificial monuments is not an inflexible one. It applies with less force to monuments which are artificial than to natural, permanent monuments, and when there is any thing in the description which shows that the courses and distances are right in themselves they will prevail, because the primary object in all cases is to carry out the intention of the parties. Accordingly, when it is apparent from the face of the deed that the intention was to convey a specific quantity of land, if the courses and distances given would include such quantity, and the description by monuments embraces more or less, the former should be followed. Judgment below affirmed. *Higginbotham v. Stoddard*, appellant. Opinion by Miller, J.

[Decided January 15, 1878. Reported below, 9 Hun, 1.]

COMMON CARRIER.

Stipulations in bill of lading exempting carrier from liability: when shipper bound by.—A carrier received goods for shipment. Afterward, on the same day, the carrier sent to the shipper a bill of lading, wherein it was provided that the carrier should be exempt from liability for loss from fire. The shipper procured insurance from plaintiff, and the goods were thereafter, while being transported, burned, without negligence on the part of the carrier. Plaintiff, having paid the loss, brought action against the carrier. Held, that plaintiff had only the rights of the shipper as to holding the carrier liable; that if the goods had not left the place of shipment at the time the bill of lading was received by the shipper, he would be bound by the condition exempting from liability for loss by fire, and it was for plaintiff to show that they had then left to relieve him from such condition. Order below affirmed. *Germania Fire Ins. Co., appellant, v. Memphis & Charleston R. R. Co.* Opinion by Rapallo, J. [Decided January 15, 1878. Reported below, 7 Hun, 233.]

CORPORATION.

When knowledge of officer is knowledge of corporation: president of bank.—G. was president of a bank and controlled its business, and was also executor, having in trust an estate. He was largely indebted to the bank, which was on that account in an embarrassed condition, and G. was also embarrassed financially and unable to pay what he was owing. Nearly \$17,000 belonging to the estate was on deposit in the bank. G. sold to the estate stock in the bank belonging to him for \$17,000, and in payment thereof drew his check as executor against the fund on deposit. This amount he deposited to his own individual account in the bank. Held, that in the transaction the knowledge of G. acquired as executor and as an individual was imputable to the bank when it received on deposit the moneys paid by G., as executor, for the stock, and the stock being an improper investment of trust funds, the bank was liable to the *cestui que trust* for the profit it made out of the transaction, which was

the amount of moneys received by it from the funds of the estate and credited to the individual account of G. Judgment affirmed. *Holden v. New York & Erie Bank, appellant.* Opinion by Folger, J. Church, C. J., Miller and Earl, JJ., concur.
[Decided January 29, 1878.]

INDORSEMENT.

Accommodation indorser of note secured by mortgage: holder not bound to look first to mortgage.—Defendant was accommodation indorser upon notes discounted by a bank, and to secure which the bank had taken a mortgage from the maker. *Held*, that the bank was not bound to first exhaust its remedy on the mortgage, but might bring its action against defendant in the first instance, nor did it alter the case that the notes were given to pay up an antecedent indebtedness, and that defendant was known to the bank to be an accommodation indorser. Judgment below affirmed. *First National Bank of Buffalo v. Wood.* Opinion by Miller, J.

[Decided December 11, 1877.]

LEASE.

1. *Surrender of, by operation of law: making new lease.*—Although since the statute of frauds a parol contract for a new lease of the same premises may operate as a surrender in law of a term created by a lease in writing and under seal, such new lease must be a valid one, and a parol lease for seven years would not operate as a surrender. Judgment below affirmed. *Coe v. Hobby, appellant.* Opinion by Allen, J.

2. *Reduction of rent not making new lease.*—A surrender of an existing lease and the granting of a new one cannot be implied from an agreement to reduce the rent. The new agreement becomes a part of the antecedent one, and the two constitute a lease for the unexpired term. *Ib.*

[Decided January 15, 1878. Reported below, 7 Hun, 157.]

MASTER AND SERVANT.

1. *When relation does not exist so as to render liable for negligence*—A number of persons, who had severally caused to be out and placed in the Racket river a large number of saw logs for the purpose of being floated down the river to their respective mills during the high water of the spring of 1867, made a contract with a firm to drive all the logs down the river and deliver them at the booms of the respective parties. Other logs belonging to other parties were also floated down the river, the other parties taking charge of driving them. All these logs were intermingled promiscuously in the stream. By the negligence of those having charge of driving the logs, a number of them dammed up against a town bridge and carried it away and destroyed it. *Held*, that the firm was not the agent or servant of the parties owning the logs so as to make such parties or any of them responsible for its negligence, and such parties employing it were neither jointly nor severally responsible for the loss of the bridge. Judgment below reversed. *Town of Pierpont v. Loveless et al., appellants.* Opinion by Rapallo, J.

2. *Constitutional law: who cannot raise question of constitutionality of act.*—By an act of legislature passed in 1850 the Racket river was declared a public highway for the purpose of floating logs. It was claimed by plaintiff that this act gave defendants no right to put these logs in the river, as the act was unconstitutional in not providing for compensation to the ri-

parian owners. *Held*, that the riparian owners only could set up this objection of unconstitutionality. *Ib.*

3. *Public right to float logs on small streams.*—The law of this State recognizes the right of the public to use such streams through private property for rafting and floating logs as far as necessary for public accommodation. *Ib.*

[Decided January 29, 1878.]

PLEADING.

Complaint not stating facts sufficient to constitute cause of action: action against receiver.—A complaint alleged that plaintiff was "entitled to the possession of, and the rents, issues and profits" of certain land described; that in an action in the Supreme Court between the defendants, except one Cameron, Cameron was appointed receiver of the rents and profits of the land, and a large sum of such rents, etc., had come into his hand; that plaintiff had demanded the same and payment had been refused by Cameron, and asked relief that Cameron should account for the moneys received by him as receiver, and be restrained from paying over the moneys, and be required to pay the same into court. No judgment or relief was asked against any one except the receiver. The complaint did not allege any facts showing that the plaintiff was entitled to the rents and profits, or allege that he ever owned or possessed the premises. *Held*, that the allegation that plaintiff was entitled to the possession of the land, etc., was a mere allegation of a conclusion of law, and the complaint did not state facts sufficient to constitute a cause of action. Judgment below affirmed. *Sheridan v. Jackson.* Opinion by Earl, J.
[Decided January 15, 1878. Reported below, 10 Hun, 89.]

NOTES OF RECENT DECISIONS.

Agency: agent cannot act for two principals.—The law will not allow a person to act as agent for two persons standing in positions antagonistic to each other, and to demand and receive compensation from each, without the full consent of both parties freely given. Supreme Court of Wisconsin, Feb. 5th, 1877. *Meyer v. Hanchett.*

Attorney: lien of.—The lien of an attorney for services rendered in obtaining a judgment is not defeated by the dormancy of the judgment. If the judgment is revived, and the money is made thereon, the lien is still good. Supreme Court of Georgia, Jan., 1878. *Jenkins v. Stephens.*

Common carrier: liability for loss by Chicago fire.—Suit by appellee for goods not delivered. Defense, that, without the fault of the carrier, the goods were destroyed in the great Chicago fire of 1871. *Held*, (1) that this fire was not the act of God so as to release common carriers from liabilities as imposed by the common law. Supreme Court, Illinois, Jan. 21st, 1877. *Dispatch Transit Co. v. Thielbar.*

Constitutional law: statute as to killing cattle.—That part of the statute of June 22, 1867, which gives to the owner of live stock "double the value of his property injured, killed or destroyed" on a railroad track, in case the same is not paid within thirty days after demand therefor is made upon the company, is unconstitutional and void. Supreme Court, Nebraska, Oct., 1877. *Atchison & Neb. R. R. Co. v. Baly.*

Constitutional law: impairing obligation of contracts.—A State law which increases homestead ex-

emptions, so far as it applies to debts previously contracted, impairs the obligation of contracts, and is unconstitutional and void. Supreme Court of Alabama, December, 1877. *Wilson v. Brown*.

Eminent domain: erection of telegraph on line of railroad.—A railroad company may, for its own use, in operating its road, construct a telegraph line over and along its right of way, and in so doing, cut down, if necessary, trees standing upon its right of way, without subjecting itself to any additional claim of the original land-owner for compensation. If such line of telegraph is built by the railroad company and another party at their joint expense and for their joint use, the latter is only responsible to the land-owner for the damages caused by the additional burden, if any there be, cast upon the easement by its use of the telegraph line. Supreme Court, Kansas, Jan., 1877. *Western Union Telegraph Co. v. Rich*.

Estoppel: when unconstitutionality of law cannot be set up.—The plaintiff is a property owner on Ellsworth avenue, and petitioned councils for the improvement of said avenue in accordance with the Penn avenue Act, was elected a commissioner, and as such gave his time and energies to the work of making said improvement. When assessments were laid on the abutting property for the payment of the cost of improvement, he refused to pay his assessment per foot front, alleging that it was exorbitant and unconstitutional; and contended for general taxation as the legal mode of paying the cost. The city brought suit for the amount of his assessment and the court below gave judgment against him, holding that his own acts estopped him from alleging the unconstitutionality of the act under which the improvement was made. On appeal to this court the judgment of the court below was affirmed. Supreme Court of Pennsylvania, Jan. 7th, 1878. *Bidwell v. City of Pittsburgh*.

Maritime law: neglect of vessel to display light.—Before a conviction can be had for a violation of the following section (§ 4233, rule 10), "All vessels, whether steam vessels or sail vessels, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon, and at a distance of at least one mile," it must be made to appear that before the time of filing the libel the vessel had been seized by the collector of customs. Should the light be extinguished, from some unusual and unexpected cause, for a short time, not from want of proper care on the part of the owners of the vessel, it would not render such owners liable to prosecution. U. S. District Court, E. D. Texas, December, 1877. *In re Eclipse*.

Municipal corporation: liability of, for negligence in executing work for owner of property.—By section 23 of the Public Health Act, in the case of a house being insufficiently drained, the local authority "shall by written notice require" the owner to make a covered drain emptying into any sewer which they may use; and, if the notice be not complied with, may do the work required, and recover in a summary manner the expenses incurred by them in so doing from the owner. Held, that, if the owner waive his *prima facie* right to make the drain himself, and procure it to be made by the servants of the local authority with their consent, the local authority, in their public capacity, are liable for the negligence of their servants. English High

Court of Justice, Dec. 21, 1877, Q. B. Div. *Hall v. Mayor of Bailey* (37 L. T. Rep. [N. S.] 710).

Sale of personal property: insolvency of vendee: vendor's lien: warehousemen: actual delivery.—Goods remained in the possession of the appellants as unpaid vendors, but the purchaser paid rent for them to the appellants as warehousemen, and the goods were transferred into the name of the purchaser in the appellants' books. Held (reversing the judgment of the court below), that, as no actual delivery had been made, the vendor's lien revived upon the insolvency of the purchaser, as against his assignees. English Privy Council, Dec. 6, 1877. *Grice v. Richardson* (37 L. T. Rep. [N. S.] 677).

RECENT BANKRUPTCY DECISIONS.

COMPOSITION.

Examination of bankrupt.—At the second meeting in composition, an opposing creditor may examine the alleged bankrupt touching the question of best interest of the creditors; and the alleged bankrupt may be directed to produce his books and papers to be used on such examination. U. S. Dist. Ct., S. D. New York. *In re Ash*, 17 Nat. Bankr. Reg. 19.

CONTRACT.

1. **With third party in consideration of forbearance of bankruptcy proceedings.**—The Bankrupt Act does not forbid the creditor of an insolvent debtor to take a contract or covenant from any third party, in consideration of forbearance to institute proceedings in bankruptcy against such debtor; such a transaction is not a violation of the act or of public policy. But if such creditor has received a transfer of property from the debtor, having, at the time, knowledge or reasonable cause to believe the debtor to be then insolvent, the contract is without consideration, and there can be no recovery upon it. Ct. of Appeals, Maryland. *Ecker v. McAllister*, 17 Nat. Bankr. Reg. 42.

2. **Creditor receiving preference may not institute proceedings.**—No creditor who has received a preference, having, at the time, reasonable cause to believe his debtor insolvent, is authorized to institute proceedings in bankruptcy. The debtor cannot be admitted as a witness to testify as to his intent in making the transfer. Where the probable consequence of the act is to give a preference, he will be conclusively presumed to have intended to give such preference. *Ib*.

DISCHARGE.

When it will not be set aside.—Where the specifications filed in opposition to a discharge have been overlooked and a discharge granted, such error or irregularity is one which is the subject of review by the Circuit Court. Where proceedings for a review are not taken within the time prescribed by the rules of the Circuit Court, and the bankrupt has in the meantime acted upon his discharge, the discharge will not be set aside for the purpose of having a trial on the specifications. Ignorance of the fact that a discharge has been granted is no excuse for a delay in making application to set it aside. U. S. Dist. Ct., S. D. New York. *In re Buchstein*, 17 Nat. Bankr. Reg. 1.

EXECUTION.

When assignee takes property subject to lien of.—In the State of New York, an execution is a lien upon the property of the judgment debtor from the time it is

delivered to the sheriff, and an assignee in voluntary proceedings takes the property subject to such lien, although no levy has been made. Where no levy has been made under the execution, the sheriff has no right to take and sell the property, but the assignee must sell it separately from other goods, and the execution creditor can then make application to the Bankrupt Court for satisfaction of his lien. U. S. Dist. Ct., S. D. New York. *In re Patne*, 17 Nat. Bankr. Reg. 37.

HUSBAND AND WIFE.

Claim by wife against husband: waiver: jurisdiction: wife's separate estate.—An assignee in bankruptcy filed a petition asking a reference to the register, with instructions to take an account of liens binding upon the bankrupt's real estate, and of their priorities, and to summon lien creditors to show cause against a sale of the real estate free of incumbrances. Pending that petition, in court, in term, and in consequence of it, the bankrupt's wife preferred her petition in court, praying a settlement out of a certain parcel of the bankrupt's real estate. By the same order of court which granted the prayer of the assignee's petition, the wife's claim for a settlement was also referred to the register, with instructions to take evidence and to make report in regard to it, as well as in regard to liens and their priorities. Six weeks after this order of reference, to wit: on the 8th of December, 1877, the assignee and all lien creditors, having been summoned before the register and been present before him, and being still before him, the register made up his report as to the liens, and as to the wife's claim for a settlement. On the 12th of December, 1877, the register presented his report in court, in term, the assignee and lien creditors being present in person, or by counsel; and the assignee then filed exceptions to the report, these exceptions relating only to that part of the register's report which treated of the bankrupt's wife's claim for a settlement. On this state of facts, it was, on sundry exceptions, *held*, (1) that although the wife could not have been required to submit her claim to the judgment of the Bankruptcy Court in the summary bankruptcy proceeding, yet that it was competent for her to waive her right to an adjudication on plenary proceedings, and to submit voluntarily to the adjudication of the Bankruptcy Court. *Held*, (2) that in the summary bankruptcy proceeding, it was sufficient that the assignee and lien creditors had had opportunity to produce evidence and make argument before the register against the wife's claim for a settlement, and to file exceptions to the register's report; and that they had had a day in court to object to the report of the register; and that, therefore, they had no right to insist that the wife, against her wish, should be driven to a plenary proceeding in another court. *Held*, (3) that clause third of section 4972, R. S. of U. S., gave full jurisdiction to the Bankruptcy Court over the subject-matter of the wife's "specific claim" to a settlement out of the bankrupt's estate; and that her coming voluntarily into the Bankruptcy Court, by petition, to assert that claim, gave the Bankruptcy Court jurisdiction, personally as to herself, to "ascertain and liquidate" that claim. *Held*, (4) that where a wife's separate estate has been changed from one form of investment to another by agreement between herself and her husband, and, before the title in the property newly acquired had been made to her, the husband becomes bankrupt, the Bankruptcy Court, as a court of equity, in a case where its jurisdiction is clear, will treat that as done

which ought to have been done, and decree a settlement upon the wife of property acquired with her separate means. U. S. Dist. Ct., W. D. Virginia. *In re Campbell, Ex parte Campbell*, 17 Nat. Bankr. Reg. 4.

INJUNCTION.

To restrain creditors of bankrupt: when granted: composition.—No injunction to restrain creditors from interfering with or molesting the bankrupt can be granted after the lapse of the full time provided by the terms of composition. This rule is applicable to a case in which the bankrupt has put in his answer to a suit in a State court before the composition could be set up as a defense, and has been obliged to apply for leave to put in a supplemental answer setting up the composition and its fulfillment, where he has had ample time to apply for and obtain an injunction during the pendency of the composition proceedings. U. S. Dist. Ct., S. D. New York. *In re Nebensahl*, 17 Nat. Bankr. Reg. 23.

PARTNERSHIP.

Indorsement of accommodation note in firm name.—Where one member of a firm indorses an accommodation note in the firm name, for the benefit of a third party, without the knowledge or consent of his copartner, such note cannot be proved against the firm assets. U. S. Dist. Ct., S. D. New York. *In re Irving*, 17 Nat. Bankr. Reg. 22.

REDEMPTION.

When incumbrancer will not acquire title by assignee redeeming with general funds of estate.—During pendency of a bill in equity brought by the assignee for the redemption and sale of the bankrupt's real estate, an incumbrancer will not be permitted, by redeeming, to acquire any absolute title to the property to the exclusion of the assignee or the other incumbrancers. Where the assignee has used the general funds of the estate to redeem the real estate of the bankrupt from levy, at the request of the subsequent incumbrancers, the amount so paid should be refunded out of the proceeds of the sale of the premises. U. S. Dist. Ct., Maine. *In re Longfellow*, 17 Nat. Bankr. Reg. 27.

RECENT AMERICAN DECISIONS.

SUPREME COURT OF WISCONSIN, JANUARY AND FEBRUARY, 1878.*

CHATTEL MORTGAGE.

1. *Agreement made contemporaneously with, when treated as one contract.*—A chattel mortgage and a written agreement to govern the same subject-matter between the parties, executed contemporaneously, must be treated as one contract. *Blakeslee v. Rossmann*. Decided Jan. 3, 1878. Opinion by Ryan, C. J.

2. *Chattel mortgage void as to creditors.*—A chattel mortgage permitting the mortgagor to remain in possession, and to sell, and apply the proceeds, or any part of them, to his own use, is fraudulent and void in law as against creditors. *Ib.*

DIVORCE.

1. *Power of courts as to, in this country.*—Courts in this country possess, in actions for divorce, only the power conferred by statute. (*Barker v. Daylon*, 28

* From O. N. Conover, Esq., State Reporter. To appear in 43d Wisconsin Reports.

Wis. 367.) The power of courts in this State, in such actions, to divest the husband of the title to realty in favor of the wife, rests entirely on sec. 29, ch. III, R. S., as construed in *Donovan v. Donovan*, 20 Wis. 586, and subsequent cases. *Bacon v. Bacon*. Decided Feb. 5, 1878. Opinion by Ryan, C. J.

2. *Alimony: not an estate, but an allowance.*—In the statute, as in the practice of the English courts, *alimony* is not an estate, nor part of the husband's estate assigned to the wife as her own, but an allowance, annual or in gross, out of the husband's estate, for the nourishment of the wife; and the court granting it may from time to time revise its judgment, and render such new judgment as it might originally have made, in respect thereto. *Ib.*

FIRE INSURANCE.

1. *Conditions in policy avoiding it: unoccupied building.*—A policy of insurance against fire, which provides in terms that it shall be void if the building insured shall become unoccupied without the consent of the insurer indorsed on the policy, is *voidable* at the option of the insurer after a loss, if, at the time of such loss, the building was unoccupied without the insurer's consent so indorsed. *Gans v. St. Paul F. & M. Ins. Co.* Decided Jan. 3, 1878. Opinion by Lyon, J.

2. *When company estopped from claiming avoidance.*—If an insurance company, with notice, actual or constructive, of facts rendering the policy voidable at its option, objects upon other grounds only to proofs of loss furnished, and subjects the insured to trouble and expense in furnishing new proofs, it will be *estopped* from setting up such facts in avoidance of the policy. And this estoppel arises although such first proof did not, and the new proofs do, furnish the company cumulative evidence of the facts relied upon as a breach. *Ib.*

3. *When knowledge on part of agent of violation of conditions is knowledge of company.*—Knowledge on the part of the agent of an insurance company, authorized to issue its policies, of facts which render the contract voidable at the insurer's option, is knowledge of the company; and the effect of such knowledge is not varied by stipulations in the policy, that "the use of general terms, or any thing less than a distinct, specific agreement, clearly expressed and indorsed on the policy, shall not be construed as a waiver of any printed or written condition or restriction therein;" that the agent "has no authority to waive, modify or strike from the policy any of its printed conditions;" that his assent to an increase of risk is not binding upon the company until it is indorsed upon the policy, and the increased premium paid; and that, in case the policy shall become void by violation of any condition thereof, the agent has no power to revive it. *Ib.*

4. *Stipulation in policy cannot make insurance agent agent of insured.*—Where A is authorized by an insurance company to receive applications for and issue its policies, a provision in a policy so issued, that "any person, other than the assured, who may have procured the insurance to be taken by this company, shall be deemed to be the agent of the assured, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance," cannot substitute the assured for the company as A's principal. *Ib.*

5. *Waiver of written condition by parol.*—A clause in an insurance policy, declaring that a waiver of any condition thereof, to be binding, must be indorsed upon it, may itself be waived by parol, or by acts *in pais*. *Ib.*

UNITED STATES SUPREME COURT ABSTRACT. OCTOBER TERM, 1877.

COMMON CARRIER.

1. *Contract for transportation over connecting lines: power to make and liability under: presumption.*—Defendant, a railroad company, contracted to carry sixteen car-loads of cattle for defendant from East St. Louis to Philadelphia. Nothing was said about a change of cars or about other companies. *Held*, that defendant might, unless forbidden by its charter, make a contract to carry cattle over connecting lines, and it would be liable in all respects upon other lines, as on its own. *Railroad Co. v. Pratt*, 22 Wall. 128. In such cases the public has a right to assume that the contracting company has made all the arrangements necessary to the fulfillment of the obligations it has assumed. *Railway Co. v. Blake*, 7 H. & N. 987; *Buzton v. R. R.*, L. R., 3 Q. B. 549; *Weed v. R. R.*, 19 Wend. 534; *Knight v. R. R.*, 56 Me. 240. Judgment of Circuit Court, E. D. Missouri, affirmed. *Ohio & Mississippi R. Co., plaintiff in error, v. McCarthy*. Opinion by Swayne, J.

2. *Ultra vires: when railroad corporation cannot set up.*—Injury was done to plaintiff's cattle by the delay and negligence of a connecting line to transfer them promptly. In an action against defendant for the loss, *held*, that defendant could not set up that the contract of shipment was *ultra vires*. When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers. The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong. (*Union Water Co. v. Murphy's Co.*, 22 Cal. 630; *Morris R. R. Co. v. R. Rd. Co.*, 29 N. J. Eq. 542; *Whitney Arms Co. v. Burton*, 63 N. Y. 62.) *Ib.*

3. *Agency: principal not bound by acts of agent beyond powers.*—A person sent with the cattle to take care of them, in order to get them forwarded over the connecting line, signed under protest a new contract. *Held*, that plaintiff was not bound by such contract so as to relieve defendant. *Ib.*

4. *Estoppel: assigning new reason for act after suit brought.*—Defendant gave as a reason for neglect to ship the cattle, want of cars, and gave evidence to that effect on trial. Afterward he claimed that the Sunday law of West Virginia forbade the shipment of cattle on Sunday. *Held*, that this point could not be raised by defendant. Where a party gives a reason for his conduct and decision touching any thing involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. (*Gold v. Banks*, 8 Wend. 567; *Holbrook v. White*, 24 id. 169; *Everett v. Sillers*, 15 id. 474; *Wright v. Reed*, 3 Durnford & East, 554; *Duffy v. O'Donovan*, 46 N. Y. 223; *Winter v. Coit*, 3 Selden, 294.) *Ib.*

INJUNCTION.

Will not be granted to restrain acts done under valid act of Congress.—In an action by the State of Wisconsin to enjoin the construction of a canal in the State of Minnesota by the city of Duluth, which it was

claimed would injure or render unnavigable a navigable river, which formed the boundary between Minnesota and Wisconsin, it appeared that the United States Congress had appropriated \$10,000 toward constructing the canal. Held, that Congress had authority to make the appropriation and thus adopt the work, and this court could not forbid such work. Cases cited: *South Carolina v. Georgia*, 33 U. S. 4; *Gibbons v. Ogden*, 9 Wheaton; *The Blackbird Creek Marsh Case*, 2 Peters, 260; *The Wheeling Bridge Case*, 18 How. 528; *Gilman v. Philadelphia*, 3 Wall. 713. Bill in equity dismissed. *State of Wisconsin, complainant, v. City of Duluth*. Opinion by Miller, J.

NEW BOOKS AND NEW EDITIONS.

WOOD ON FIRE INSURANCE.

A treatise on the law of Fire Insurance, adapted to the present state of the law, English and American, with copious notes and illustrations. By H. G. Wood, author of "The Law of Nuisances," "The Law of Master and Servant," etc. Banks & Brothers, New York and Albany, 1878.

ANY work bearing the name of Mr. Wood as author is certain to treat of the subject to which it relates in a way that cannot be improved upon. The reputation this gentleman has achieved as a careful, painstaking and consequently accurate writer is a guarantee to the profession that they will find in the book before us the most complete as well as the latest exposition of the law of Fire Insurance. But not only in the way of accuracy is Mr. Wood pre-eminent among modern law writers. His skill in deducing principles from adjudicated cases, and his happy manner of expression, make his treatises at once instructive and entertaining. Elementary law books upon special subjects are too often merely a jumble of case head notes, strung together without much system, and oftentimes serving to confuse rather than to enlighten the student. But in the books of this author, the principles that govern the subject upon which he treats, with their essential modifications, are stated in his own language, and the expositions of the courts are used to fortify and give authority to his statements. The present work has come to the profession at an opportune time. During the past few years the law, controlling many features of insurance contracts, has been essentially modified, especially in relation to the powers and functions of agents, implied waiver, estoppel and the scope of the risk, and there was no work that treated properly of these subjects. The book before us very fully covers every one of them, giving the gist of the latest and freshest cases, both those which have appeared in the reports and those not yet published there. The author treats first of the general principles relating to the contract, next comes a chapter devoted to the policy and its incidents, then one relating to the application, including the topics of warranties, representations, concealments and misrepresentation; then come chapters devoted to each of these topics, and following them are other chapters wherein are considered the subjects of alteration or change of risk, insurable interest, alienation, assignment of policies, double insurance, agents' notice and proofs of loss, limitation of action, adjustment of loss, subrogation, reformation of policies, questions for court and jury, remedies in policies, waiver, estoppel, evidence, and mutual insurance. In referring to the cases cited the author notices not only the original reports where they are found, but also the place in

Bennett's Fire Insurance Cases and the American Reports, a very proper thing, as the volumes of reports mentioned have found their way into the libraries of very many lawyers both in this country and England. The volume is excellently printed and bound and contains a good index and a table of cases cited.

WHARTON'S LEGAL MAXIMS.

Legal maxims, with observations and cases. Part I. One hundred maxims, with observations and references to English cases. Part II. Eight hundred maxims, with translations, by George Frederick Wharton, of the English Bar. To which are added in this edition, Part III. Several hundred maxims, with references to American cases. New York: Baker, Voorhis & Co., 1878.

A collection of legal maxims is always interesting reading, and there is no doubt that the principles of law conveyed thereby obtain a more permanent lodgment in the mind than do abstract statements or the law itself. The tendency of people to put the results of their experience into these brief, homely expressions indicates in what estimation the maxim is held as a means of conveying practical truths. Every business or professional man of experience has at his tongue's end numerous maxims pertaining to his calling, and the lawyers are not behind any of the others in this matter. Broom has long been the standard writer on this subject, though he does not by any means include all the current sayings of the profession. The present collection embraces, we imagine, every thing of value or that has received the approval of authority. The maxims given by Mr. Wharton number nine hundred, and about four hundred are added by the American editor. Very many of these four hundred are indeed repetitions of what is given by Mr. Wharton, and are merely inserted in order to refer to the American adjudications upon them, but it may safely be said that the book contains fully twelve hundred maxims. The observations and illustrations appended to the first hundred maxims are well written, and clearly explain and apply them. The references to American cases are full and we should judge accurate. The collection of maxims with explanatory notes taken from the Civil Code formerly prepared for the State of New York by the commissioners of the Code, but never adopted, adds materially to the value of the work. In every way the book is well done and we heartily recommend it to the profession.

DIGEST OF MOAK'S ENGLISH REPORTS.

Digest of Moak's English Reports, Volumes 1 to 15 inclusive, with a list of cases reported, table of cases reversed, overruled and considered, by James Simmons; also a Digest of American Notes, by Nathaniel C. Moak, Albany.

The "English Reports," edited by Mr. Moak, contain all the judgments of the English courts rendered since the beginning of the year 1872, which were believed to be of interest to the legal profession of this country. With such judicious discrimination have the selections been made that very few American lawyers will ever have occasion to consult an English decision not contained in the series.

The digest of the series which is now issued will, therefore, practically answer every need of the American lawyer, so far as he feels the need of an English Digest.

To the possessor of Mr. Moak's Reports this digest will be especially welcome, as it guides him to the contents of the editor's notes.

Of Mr. Simmons' part of the work we cannot speak

in praise, although he has done better than is his custom. His great fault is his failure to give proper and complete cross-references. A single illustration will show how unreliable — inexcusably so — his work is in this regard. The only cross-references given under the title "Director" are "Joint Stock Company" and "Public Company"; but on turning to "Corporations" we find the first two principles headed with the catch-line "Power of Directors" and the next two with the catch-line "Liability of Directors." His Index is even worse, as in that under "Directors" he refers only to "Public Company," this time omitting "Joint-Stock Company" because, very likely, he had discovered there was nothing under that title except "See Public Company." Here then in a case taken at random we find that Mr. Simmons has not only omitted to give a cross-reference to a title containing few pertinent principles, but has actually given a cross-reference to a title containing absolutely nothing.

Fortunately, however, the compiler's lack will not seriously interfere with the usefulness of the book, since a repetition of principles under different heads renders it almost impossible to miss any thing.

The letter-press, paper and binding are unusually good.

BENCH AND BAR.

BENJAMIN FRANKLIN WADE died on the 2d inst. at his residence at Jefferson, Ohio. He was born near Springfield, Mass., October 27, 1800. He received a common school education. He came to Ohio in 1826, and in 1828 was admitted to the bar of that State. In 1835 he was chosen prosecuting attorney of Ashtabula county. In 1837 he was elected to the State Senate, and was twice re-elected. In 1847 he was elected presiding judge of the third judicial district of Ohio, which office he held until chosen to the United States Senate in 1851, which place he held for several terms. His last official position was that of commissioner to investigate affairs in St. Domingo, which he held in 1871. His reputation as a lawyer was very high, but it was overshadowed by the eminent place in political life occupied by him.

The death is announced in England of Mr. Thomas Chitty, the well-known Special Pleader, at the ripe age of 76. He was the author of several well-known works, Chitty's Practice and a collection of statutes being the best known. He was the father of Mr. J. W. Chitty, Q. C., one of the leaders in the Rolls Court. Mr. Thomas Chitty had the following well-known lords and gentlemen as his pupils in by-gone days: Chancellor Cairns, Lord O'Hagan, Chief Justice Whiteside, Mr. Justice Willes, Mr. Justice Quain, and Sir James Hannen.

Samuel Currey, one of the oldest members of the Rhode Island Bar, died at Providence, R. I., on the 1st inst. He filled various public stations during his life.

Asa Biggs died at Norfolk, Virginia, on the 6th inst., aged sixty-eight. He held the position of member of Congress for several terms, United States Senator and United States District Judge for North Carolina.

The Senate have confirmed the nomination of Judge Blatchford for Circuit Judge.

NOTES.

WE are pleased to welcome among our list of exchanges the *Juristische Blätter*, published at Vienna. This periodical is the leading law journal of the Austro-Hungarian empire, and contains each week learned and interesting articles upon legal and social subjects. The great changes that are now being made in the constitution and procedure of the German courts are having a considerable influence in Austria, and the subject of law reform occupies quite a prominent place in the newspapers and magazines of that country. The matters discussed are treated from a philosophical rather than a practical standpoint, but the legislation which results from such discussions is apt to be as practical as that drawn entirely from precedent. The contributions appearing in the numbers of the *Juristische Blätter* which we have already received, are particularly able and exhaustive.

By a recent amendment of the Constitution of Wisconsin the number of judges of the Supreme Court of that State is to be increased from three to five. The two new judges will be elected by the popular vote in April next. By an arrangement between the leaders of the two political parties, one candidate has been presented by each party. The candidates thus brought forward are David Taylor, republican, and H. S. Orton, democrat. Both have been Circuit Court judges.

The dean of the Boston University Law School, Hon. E. H. Bennett, has announced the following as the subject for the Hillard prize essay next June: "Insanity as a Defense in Criminal Cases." — It is stated that the cost of the new Palace of Justice in Brussels, which will be a splendid building, will amount to 35,000,000f. The original estimate was 8,000,000f.

In the Croyden, England, County Court, in a case entitled *Sanders v. Evans*, the English idea of giving every one a chance was well illustrated. Plaintiff sought to recover damages for the loss of a lamb, which had been killed by defendant's dog. "In answer to his honor, the plaintiff said he could not prove that the defendant was aware that the dog was in the habit of biting other animals. "His honor thereupon remarked that by the law of England a dog was allowed his first bite. Assuming that the lamb did die through an attack made by the defendant's dog, plaintiff was not entitled to recover unless he could say that the defendant was aware that the dog had previously misconducted himself in a similar way. He, therefore, nonsuited the plaintiff, and advised the defendant to take better care of his dog in future." It is suggested by a correspondent of the *Solicitors' Journal*, that there is a statutory provision covering the case. In that case the court may have erred, but it is to be assumed that he stated the common law correctly.

In the case of *Bowery Nat. Bank v. Duryee*, decided by Judge Lawrence on the 26th ult., it is held that under section 558 of the new Code a party who obtains an order of arrest must set forth in his complaint the facts which he alleges entitle him to such an order, so that the defendant may take issue on that question and have the issue disposed of by a jury.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, MARCH 16, 1878.

CURRENT TOPICS.

THE president evidently means that the regular business of the United States courts shall be done at the regular terms, as he has vetoed a bill which had passed both houses of Congress, authorizing the United States Circuit Court for the Southern District of Mississippi to hold a special session at Scranton, in Jackson county, for the purpose of conducting the trial of suits instituted by the government against persons alleged to have stolen timber from the public lands. The grounds assigned by the president were that the government could not prepare for the trial of the cases by the time the court was appointed to be held, and that no pecuniary provision was made for such preparation. Scranton, where the sitting was proposed to be held, is in the heart of the timber district, and it is intimated that those against whom proceedings have been taken are more confident of success there than they would be at another place, and that the bill was passed in their interest.

The narrow escape of the Master of the Rolls from death at the hands of an insane suitor, noticed by us a few weeks ago, has furnished the English papers an opportunity to discuss the dangers of the judicial position, which are said to be much greater than is generally believed. A disappointed litigant who has, as is not unusual, staked not only his property but his whole prospects in life upon the result of a single decision, is not the one to take coolly a determination against him. This is especially so when the adverse result is not by any reason of a want of merit in his case, but because of a failure to comply with some technicality of procedure which he before knew nothing about, and even then does not half understand. The people generally do not comprehend the narrow limits of judicial power, and are apt to attribute the conclusion at which a judge arrives to influences other than the true ones. It is not to be wondered that attacks are sometimes made upon judges, but rather that they are so uncommon. The judicial history of England seems to furnish but four recorded instances, including the present one and the famous egg assault, where a suitor has made a personal at-

tack upon a judge in or about the courts. In 1616 Sir John Tyndal, one of the masters in chancery, was killed by a shot fired at him while entering his chambers at Lincoln's Inn, by a man named Bertram, against whom he had given a decision. Shortly thereafter the assailant committed suicide. In 1631 Chief Justice Richardson, who was holding the assizes at Salisbury, was assaulted by a condemned prisoner, who threw a brickbat. For this act the prisoner was immediately and severely punished, his right hand being forthwith cut off and fixed to a gibbet, upon which he was then hanged in the presence of the court.

An "inquiring friend" desires to know what the views of THE LAW JOURNAL are as to the future of the Revision, which would seem to indicate that THE LAW JOURNAL has not made itself wholly intelligible on the subject. The view of THE LAW JOURNAL is, in short, that the commission should be reorganized and continued, for the sole purpose of revising and reporting the remaining four completed Codes, heretofore reported by the Code and Practice Commissioners, which are, the Code of Criminal Procedure, the Political Code, the Penal Code and the Civil Code. The work of such a revision would not be a laborious one at all. It must be assumed at the start, that the reports which these commissioners made were carefully considered, and need scarcely any thing now to be done to them, beyond adapting them to subsequent legislation. The work could all be done in season for the next legislature. The law which we would recommend to the legislature to pass, if our advice were asked, would be this: The commission to revise the statutes, established under the act for the revision of the Statutes, passed March 2d, 1870, shall be reorganized, and continued for one year from the first day of May next, in the manner and for the purpose following, that is to say, five commissioners shall be appointed in the manner provided by the said act, who shall enter upon the exercise of their office on the first day of May next, when the terms of office of the present commissioners will expire, and whose duty it shall be to revise the Code of Criminal Procedure, heretofore reported by the Commissioners on Practice and Pleadings, and the Political, Penal and Civil Codes, reported by the Commissioners of the Code, and report the same, with such amendments as may appear to them necessary, at the next session of the legislature.

The bill providing that the verdict of nine jurors shall be sufficient in civil actions, recently introduced in the legislature and referred to in our last number, will probably meet with considerable opposition from many who regard any change in respect to the system of jury trial with apprehension. Wherever the common law prevails the institution

of trial by jury is looked upon as the most excellent among all human contrivances for securing justice in controversies between individuals, or between society and those who are charged with violating such regulations as society may have deemed necessary for its security and order. And an essential excellence of the institution is believed to be the requirement of unanimity. Now and then, however, an obstinate juror will so embarrass the trial of an important case that courts and litigants will begin to doubt whether the system so extolled is the best, at least for civil trials. A case entitled *Regina v. Truelove*, recently tried in the Queen's Bench Division of the English High Court of Justice, was left undetermined, simply because a single juror would not accept the law applicable to the case from the court, but would hold to his own views of what it ought to be. Cases of this kind are in the experience of every practitioner, oftentimes the disagreement being produced by a less commendable motive, yet the annoyance has not been such as to create any thing more than a few complaints in the newspapers, which had no influence upon the general public or upon legislation. The case mentioned has, however, led to considerable discussion in England, and it would not be surprising if a strong effort should be made to establish there a rule somewhat similar to that proposed in the legislative bill mentioned. Unanimity was not required in the early days of the jury trial. According to Lambard, in a jury of twelve the verdict of eight was to prevail, and from Bracton and Fleta it would appear that the practice in their time was for the judges, when the jury could not agree, to add to its number until twelve out of the entire number could be got to concur in a verdict. In the time of Edward I, the judge had the option of doing this or starving the jurors until an agreement was had. The starving process continued for many years in vogue, though it has in modern times been done away with. In France, Italy, Germany and Scotland unanimity is not required, and in Texas and Nevada a verdict of nine is sufficient.

A reporter of the New York *Herald* has interviewed Mr. Justice Davis, of the Supreme Court of this State, upon the subject of our present lunacy laws, and he gives to the public the views of the judge, which contain some interesting suggestions. In speaking of a bill introduced in the legislature by Mr. Thain, he says, that while in some respects excellent, it has obvious defects. The first clause of the proposed law requires a jury trial in every case except of violent mania, before committal. This, the judge thinks, would entail too much trouble and expense upon the community. The second clause allows no summary committal except in cases of furious mania; this would leave the community too

unprotected. People are often in incipient stages of insanity, when they should be committed before they become violent enough to do harm. This law would compel the physicians to stand still until the patient has actually become a furious madman. The judge believes that the law of 1874, with some few amendments, would accomplish all that is desired. Authority should be given only to such physicians as are approved by a court of record to certify to the insanity of a person who is taken to an asylum, and this approval should be given in open court and upon an application made in public. The certificates upon which a person is committed to an asylum should be filed with some of the higher courts of record and be accessible to every one, and a report from the person in charge of an asylum should be required to be made to a court of record of each committal and the reasons thereof, within three days after it is made. He would make a malicious conspiracy to send a sane person to an insane asylum a felony instead of a misdemeanor, as at present. The suggestions made by Judge Davis, while they may not meet approval in all respects, are worthy of consideration.

A bill has been introduced in the legislature providing that in any criminal proceeding or trial, the complaining witness may be assisted by such counsel as he may select, unless the district attorney or his assistant appears. This will not vary the practice usual heretofore, but it will give the prosecutor as a right what has heretofore been accorded to him as a courtesy. The provision of the bill is a very proper one.

Two bills of local interest are pending in the Senate. One provides for the creation of a court of civil jurisdiction, to be known as the Supreme Court of Rochester; and the other directs the boards of supervisors of the several counties in the Third Judicial District to appropriate the sum of \$10,000 to be applied in payment of the salaries of the justices of the Supreme Court of said district, in addition to the compensation now allowed them by law. This adds the sum of \$2,500 per annum to the salaries of the justices mentioned.

The passage of the supplemental code by the almost unanimous vote of both houses does not dishearten the opponents of that measure, who have renewed the struggle before the executive. It would seem that the vote upon the passage of the bill was so decided that the action of the governor would avail nothing to change the result. Yet, while there is life there is hope, and the governor may be induced to withhold his assent, and may present such cogent reasons as to influence senators and assemblymen to abandon the position they

have taken, and those interested in maintaining the present state of affairs think the experiment worth a trial.

—Since the foregoing was put in type the governor has returned, without his approval, the supplemental nine chapters of the Code. The veto message was lengthy, and discussed at length the objectionable features of this portion of the revision. One of the chief objections of the governor is that the bill was not legally passed, not having been read through on the third reading.

NOTES OF CASES.

THE case of *Safe Deposit Co., plaintiff in error, v. Pollock*, decided in January last by the Supreme Court of Pennsylvania, is upon a branch of the law of bailment, which bids fair in time to assume considerable importance, namely, that relating to the liability of safe deposit companies. It was an action to recover the amount of certain bonds which were lost from a safe hired by plaintiff below from defendant below, and which was situated in defendant's fire-proof vault. The hiring was subject to these rules and regulations, among others: "Whenever a party rents a safe, and deposits therein at pleasure, contents not being made known to the company, its liability is limited: (1) To the keeping of a constant and adequate guard and watch over and upon the burglar-proof safe. (2) To the prevention of access by any renter to the safe of any other renter. (3) To the protection of safes and contents from any dishonesty on the part of any of the company's employees." Plaintiff had exclusive possession of the key to the safe. He placed in the safe certain government bonds and locked it. At a subsequent time he opened the safe and discovered that the bonds were missing. There was no evidence that the safe had been broken or the lock tampered with, but the safe must have been opened with a key fitted thereto. The court held that there was evidence of negligence on the part of the company sufficient to go to the jury, and a verdict for plaintiff was sustained. The case was distinguished from *Finucane v. Small*, 1 Esp. 315, where the trunk of the bailor was delivered to the bailee for safe custody, the bailor agreeing at the same time to pay a certain sum per week for room rent for the trunk, but nothing was to be paid on account of the care and custody thereof, and there was no express agreement as to the care to be exercised; also, from that of *Farnham v. Camd. & Amb. R. R. Co.*, 5 P. F. Smith, 53, where it was held that proof merely of loss was not sufficient to put the bailee on his defense. The evidence in the case at bar did not stop with merely showing the loss. It showed that the bonds had

been abstracted by some one entering the vault and opening the safe by means of a key. The presumption of want of ordinary care was thereby created, and the question was fairly left to the jury. See, however, *Harris v. Packwood*, 3 Taunt. 267; *McKenzie v. Cox*, 9 Car. & P. 682; *Cass v. Post. & Lowell R. R. Co.*, 14 Allen, 488; *Barron v. Eldredge*, 100 Mass. 460.

In *Gramlich v. Wurst*, decided by the same court, on the same day, it is held that a person falling into an excavation in a lot not on the line of a public street, but some distance therefrom, is a trespasser and cannot recover in an action for negligence against the contractor doing the work. The conclusion of the court is in accordance with the numerous authorities. In *Blyth v. Topham*, Cro. Jac. 158, it is held that an action does not lie if a man makes a ditch in his waste which lies near the highway into which the horse of another falls, "for the ditch in his own soil was no wrong to the other, but it was his fault that his horse escaped into the waste." In *Kohn v. Lovett*, 44 Ga. 251, the owner of a storehouse and lot left at the rear of the storehouse an excavation walled up to give light to the cellar, and plaintiff, on an alarm of fire occurring in an adjoining building, went through the storehouse and out the back door and turned into the excavation, injuring himself, and it was held that the owner of the storehouse was not liable for plaintiff's injury, and the occurrence of the fire did not change the rule. In *Harcastle v. So. Yorkshire Railway Co.*, 4 Hurl. & N. 67, it is said that when an excavation is made adjoining to a public way, so that a person walking in it might, by making a false step, or being affected with sudden giddiness, fall into it, it is reasonable that the person making such excavation should be liable for the consequences. "But when an excavation is made at some distance from the way and the person falling into it would be a trespasser upon the defendant's land before he reached it," the case would be different. And in *Knight v. Albert*, 6 Barr, 472, it is decided that though no action lies in Pennsylvania for trespass by cattle pasturing on uninclosed woodlands, yet that not being a matter of right the owner of the land is not liable for injuries happening to the cattle falling into a hole dug by him within the boundaries of the land, and left uninclosed. See, also, as illustrating and enforcing the same doctrine, *Phila. & Read. R. R. Co. v. Hummel*, 8 Wr. 378; *Gilles v. Pennsylvania R. R. Co.*, 9 P. F. Smith, 129. See, also, *Morgan v. City of Hallowell*, 57 Me. 277; *Housell v. Smith*, 1 C. B. (N. S.) 731. See, however, *Beck v. Carter*, 15 Alb. L. J. 211; *Hydraulic Works v. Orr*, 2 Norris, 332; *Barnes v. Ward*, 9 C. B. 392; *State v. Moore*, 31 Conn. 479; *Spofford v. Harlow*, 3 Allen, 176.

THE CASES OF LAGRAVE AND HAWES.

BY SAMUEL T. SPEAR, D. D.

THE extradition treaties of the United States, in specifying the crimes for which extradition may be had, make no distinction between offenses against Federal law and those against State law. The action of the Government in procuring the surrender of an alleged fugitive is precisely the same in both cases.

When, however, an accused person has been delivered up to the United States, the jurisdiction for trial and punishment in the two cases is entirely different. If the offense be against State laws, he is handed over to State authority; and that authority, in its prosecuting and judicial machinery, acts independently of the General Government. If at liberty entirely to ignore the treaty and the extradition proceedings through which it has acquired jurisdiction over the surrendered person, then it is possible that it may so use that jurisdiction as to lead to serious complications between the United States and the foreign government that made the delivery. For any abuse of the power thus acquired the General Government would be responsible; and, hence, there ought to be a preventive remedy within its reach. That would be an anomalous and might be a very embarrassing and possibly a dangerous condition of things, if, after the Government has caught the fugitive by demanding and receiving him, and has transferred him to State authority, the latter were permitted to treat as immaterial the treaty stipulations and extradition proceedings which have placed him in its hands.

Such is not the theory of the Constitution in regard to any treaty of the United States, whether for extradition or any other purpose. It makes every treaty a part of the law of the land, alike in its express and implied obligations, and, as such, binding upon the administrative and judicial authorities of the several States; and if Congress has not already legislated sufficiently to give effect to this principle, and prevent any abuse of the extradition remedy by State authority, then it ought to do so.

The trial of extradited persons should be placed under the exclusive control of the United States, or the right of removing such cases from State to Federal courts should be secured, or the writ of *habeas corpus*, issued by Federal courts, should extend to cases of this character. Section 753 of the Revised Statutes of the United States provides that this writ shall extend to no person in jail, with a series of exceptions, one of which is that the party "is in custody in violation of the Constitution or of a law or a treaty of the United States." This provision would seem to cover the case of a person extradited under a treaty, and yet held in custody by State authority in violation thereof.

In two instances the question, whether an extradited person can be tried for any other offense, committed prior to his extradition, than the one charged in the proceedings and for which he was surrendered, has been brought under consideration in the State courts of this country. The purpose of this article is to state and examine these cases.

The first case is that of Lagrave, considered in 1874 by the General Term of the Supreme Court of New York for the First District, in *Bacharach v. Lagrave, appellant*, and *Adrianse v. Lagrave, appellant*, 4 N. Y. Supreme Ct. Rep. 215. Lagrave was extradited from France to the United States under a treaty between the two countries; and immediately upon his arrival in the city of New York, and while he was still in custody, he was arrested in civil actions brought against him, before he had any opportunity of return to France. After his arrest he gave bail, and in this way obtained his discharge. He applied to the General Term "to have the order for his arrest vacated because he had been brought into the United States as a fugitive from justice, under the extradition treaty existing between this country and France." The decision of the court was that by giving bail he had not waived his right to have the order of arrest vacated, and that the order should be vacated on the general ground that "a person extradited is entitled to full liberty to return to his former habitation after the purposes of justice are satisfied as to the particular offense, and an arrest in a private action is inconsistent with that right."

Judge Daniels — Judges Davis and Brady concurring — delivered the opinion of the court; and that the reader may see the theory upon which the decision rested, we submit the following extract from this deliverance:

"It may be properly assumed in the disposition of it [the present application], that he [Lagrave] was a fugitive from justice, residing in the French Republic, and only amenable to the laws of this State by force of the extradition remedy provided for by the treaty. Without the provision made, he could not have been brought here from that country; and that provided that it could be done only in a prescribed and particularly enumerated class of cases. The effect of such a specification, according to well-settled principles of construction, is to exclude the remedy from all but the enumerated cases. As to those not mentioned, the negative is as effectually implied as though it had been expressly declared. For that reason, when the defendant was extradited it was for the purpose of answering the crime mentioned in the proceedings taken against him, and for no other purpose whatsoever. As to all other matters, being beyond the reach of the laws of this State, he was absolutely entitled to his freedom. He was extradited for a single special purpose, that of being tried for the crime for the commission of which he was removed from the protection of the laws of France. Beyond that he was entitled to the protection of those laws so far as his personal liberty would have been secured by them

in case no removal of his person had been made. *

* * * That power [France] consented, by the provision made, to surrender the person entitled in all other respects to its protection, for trial and punishment on a particularly specified charge, and for no other end or object whatsoever. Without the provision made he could not be extradited at all; and by that it can only be done for a clearly defined object. And it therefore becomes the duty of the power to which the surrender may be made, faithfully to secure its proper observance. * * * *

After the purposes of justice are satisfied as to the particular offense for which the party may be surrendered, then his right to return again to the protection of the laws he was deprived of for the single object allowed by the treaty, is clear and absolute.

* * * * And if a detention and trial for another offense would not be proper, it would seem to be clear that an arrest of a person at the private suit of another must be denied by the same principle. It is a consequence arising out of the implication that, as to all but the extraditable offense, the accused shall enjoy the unrestrained liberty of returning to the country from which he was taken by force of the treaty provisions. Any different construction would be entirely unreasonable, and no enlightened nation would be willing to submit to it. It would be an abuse of the power provided for, allowing extradition only for clearly defined and particularly enumerated charges, and by necessary implication limiting it to those charges."

Judge Daniels added the remark that "the principle in the case is an important one, and it necessarily grows out of these treaty stipulations with other countries. They are part of the supreme law of the State, superior to those of its own enactment, by an express provision of the Constitution of the United States. And it is the duty of the courts to maintain its observance. That cannot be done by allowing extradited persons to be arrested and restrained at the suits of private persons, unless they elect to remain in the country after their discharge from the proceedings provided for by the treaty."

The theory of Judge Daniels, as set forth in these extracts, and concurred in by the other two judges, was that extradition simply secures a special jurisdiction over the person surrendered; that when the purposes of this jurisdiction are accomplished, the extradited party is entitled to the unrestrained liberty of return to the country from which he had been removed; and that, this right being secured by a treaty which is a part of "the supreme law of the land," it is the duty of courts to enforce it. This view proceeds upon the assumption that "the person surrendered is to be deemed still legally in the country from which he was extradited," except for the purpose specified in the extradition proceedings. To that extent, but no further, has he lost the protection of his foreign asylum in respect to offenses antedating his extradition. We say antedating his extradition, since his foreign asylum has no relation to any offenses which he may commit subsequently thereto.

The decision in this case was reviewed by the

Court of Appeals in *Adrianne, appellant, v. Lagrave*, 59 N. Y. Rep. 110. Chief Judge Church stated the opinion of the court, and in conclusion said: "The order of the General Term must be reversed, and that of the Special Term affirmed." This, though setting aside the decision as a legal authority, does not affect the force of the reasons on which it was based. It may be that the logic of the reversed decision is better than that of the Court of Appeals. Such we think to be the fact; and, in support of this view, we submit the following comments upon the deliverance of Chief Judge Church:

1. That part of the opinion which relates to the question of "the legal right to detain the defendant for any purposes, except the prosecution of the particular offense for which he was given up," covers about two and a half pages. The discussion of the subject is, consequently, very far from being exhaustive.

2. The Chief Judge, alluding to the view adopted by the General Term, and sustained by "plausible and forcible arguments," remarks: "I have examined the subject with some care, with a view, if possible, to arrive at the same result, which I regard as eminently just as a principle." Referring also to the act of Congress for the protection, against lawless violence, of persons delivered to the United States, he further says: "That these provisions ought to be extended to protection from other prosecutions or detention, I do not doubt." We have here the opinion of the Court of Appeals, speaking through its Chief Judge, that the "principle" adopted by the court below is "eminently just," and that provision ought to be made by law for carrying it into effect.

The reason for this opinion surely cannot be that there is any impropriety in putting a person on trial for an offense duly charged against him. The law is constantly doing this in the process of bringing offenders to justice. The justice or propriety of the "principle" does not result from the rights of the extradited party, except as they may be secured to him as incidental to those of the government that, under the stipulations of a treaty, made the delivery. The "principle" is "eminently just" to that government; and the reason why it is so must be sought in the fact that it has a basis, either express or implied, in the treaty under which the surrender was made.

If then it be true, as the Chief Judge thinks it is true, that Congress ought to provide for the protection of extradited persons against "other prosecutions or detention," it must also be true that this "principle" is in harmony with, and naturally results from, the extradition treaties, which, so far as the United States are a party thereto, contain all the conditions and obligations in regard to the whole subject of international extradition; and hence, the

Chief Judge, in what he admits, virtually grants that there is some authority for the "principle" in the treaties themselves. It is only in reference to their provisions, and the obligation arising therefrom, that it can be considered "eminently just."

3. The Chief Judge, referring to the English act which provides for the "principle" asserted by the General Term, says: "Congress doubtless has power to pass an act similar to the English act referred to, as the whole subject of extradition is confided to the Federal Government." The power here assumed to exist is not among the powers expressly granted to Congress, and not among those implied, except for the purpose of giving effect to the extradition treaties of the United States. It so happens that the Constitution leaves the question of international extradition to be disposed of by treaty; and all the legislative power that Congress has in regard to it is that of passing laws for the proper execution of extradition treaties. It is not the province of such legislation to change the terms or character of these treaties. The treaties themselves define and limit the sphere of the legislation, unless the intention is to repeal them altogether.

If then Congress can pass an act similar to the English act, and thereby protect surrendered persons against being tried in this country, whether in Federal or State courts, for any but the extradition offense or offenses, it must be because this "principle" exists, either expressly or by implication, in the extradition treaties of the United States. If it does not so exist, Congress cannot by legislation put it there, since this would be virtually making a treaty, which Congress has no power to do. Moreover, it is exceedingly difficult to see how Congress can limit the jurisdiction of a State court in respect to the trial of an extradited person, simply because he is such, except as it may be legislating for the execution of extradition treaties; and if these treaties contain no provisions, express or implied, protecting such persons against trial for any but the extradition offense, then manifestly Congress has no power to afford such protection, as against State authority, when that authority has acquired jurisdiction over them. It cannot, upon this supposition, make a law to control the action of a State court.

Here, again, the Chief Judge, in what he affirms in regard to the power of Congress to legislate on the subject, concedes the "principle" which it is one object of his deliverance to deny. What he affirms can be true only on the supposition that the "principle" is provided for by treaty.

4. The Chief Judge also says: "Any thing necessarily implied [in treaties] is as though inserted; but can it be said that there is such an implication of agreement, on the part of the United States, that the prisoner shall not be detained for any other lawful purpose? It may be conceded that such a pro-

vision would be wise and proper, but can it be regarded as *in the treaty*? I can find no authority warranting such a conclusion." The Chief Judge did not refer to the treaty with France, under which Lagrave was extradited, for the purpose of ascertaining whether it contains such a provision or not. The first article of this treaty reads as follows:

"It is agreed that the high contracting parties shall, on requisitions made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in the next following article, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other: Provided that this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed."

It is upon these conditions, and for the purpose here specified, and for no other purpose, that the two governments agree to withdraw the right of asylum in respect to the persons referred to, and deliver them up as fugitive criminals. One of the conditions is, that the crime for which a person is demanded must be within the list of crimes named in the second article of the treaty. Another is, that there must be a formal charge of some one or more of these crimes. A third is, that the charge must be so proved that the laws of the country in which the fugitive is found, would justify his apprehension and commitment for trial if the offense had been there committed, and, of course, that the authorities of that country are to decide in each case upon this question of adequate proof.

It is not possible to preserve, in their integrity, these conditions of the demand and the obligation of delivery, in any case in which the demanding government, having thus acquired jurisdiction over the person, shall put him on trial for any offense, committed prior to his extradition, other than the one which was the subject of the proceedings that under the treaty secured the jurisdiction. If the party is surrendered on the charge and proof of murder, and is then tried for forgery, the surrendering government, even though both should be extradition crimes, has been denied the right of judging whether the forgery was sufficiently proved to justify a delivery, since neither the charge nor the proof of forgery was presented to that government. This right is one of the provisions of the treaty; and yet, in the case supposed, it has been entirely ignored. The theory of the treaty is that there is no right of trial, as against the right of asylum, until the government asked to make the delivery has decided that the evidence is sufficient to put the party on trial for the crime of which he is accused, and has actually surrendered him for that purpose. To

use the jurisdiction, when gained, for any other purpose, is to violate the treaty itself.

We, hence, answer the questions of the Chief Judge by saying that upon the very face of the treaty with France lies the implication that the jurisdiction, acquired under it, is limited to the purpose for which it was acquired, and that it cannot pass beyond this point without disregarding some one or more of the provisions of the treaty. This limitation is, by necessary implication, "*in the treaty.*" The treaty itself, in its express terms, is the highest authority to show the limitation. That which cannot be done without violating a treaty, is certainly excluded by it.

5. Alluding to the English Extradition Act of 1870, which provides that a fugitive criminal shall not be delivered up unless by the law of the foreign country, or by arrangement, he is protected against being tried for any but the offense specified, until he has had an opportunity of returning to Her Majesty's dominions, and which secures the same immunity to persons surrendered to Great Britain, the Chief Judge remarks: "These provisions would have been unnecessary if there existed any such treaty obligation as is claimed in this case." To this we make two replies.

The first is, that the remark has no pertinency to the question that was before the Court of Appeals. That question arose under an extradition treaty with France; and the matter of inquiry was whether Lagrave, who had been extradited under that treaty, was by it protected against any detention or prosecution, except in respect to the offense for which he was surrendered. We are at a loss to see what the English act of 1870, passed simply with reference to the execution of British extradition treaties, has to do with a treaty between the United States and France.

A second reply is, that the Chief Judge was mistaken as to the design of the English act of 1870. He assumed that it was passed by Parliament to secure to extradited persons a protection which was not, expressly or by implication, in the terms of British treaties. If such protection had been in these treaties, then, as he reasons, "these provisions" of the act would have been "unnecessary;" but because it was not, they were necessary "to meet the difficulty."

Where did the Chief Judge learn that such was the view of Parliament in passing the act? There is not a word in the act itself to indicate it; and it is not reasonable to suppose that Great Britain, one of the parties to extradition treaties, would undertake to legislate into existence obligations or principles for which there was no basis in the treaties themselves, and thus secure by law, and without the consent of the other party, results which lie beyond the provisions of these treaties. Lord Derby

in the Winslow correspondence, says of the act: "It is to be regarded as intended to prevent, for the future, evils that were pointed out by Mr. Hammond and others, as having occurred, and being liable to occur, in private prosecutions to which the attention of the Government had not been called." Foreign Relations of the United States, 1876, p. 228. He expressly insisted that the position taken by the British Government in respect to the trial of extradited persons, and incorporated into the English act of 1870, was involved in the treaty between Great Britain and the United States, and, hence, that the act, so far from seeking to modify or add to the treaty, was simply designed to carry it into effect. He also said that the Government would take the same position, if no such act had been passed. *Id.*, p. 257.

It is to be remembered that the English act operates only in Great Britain, upon its courts and its executive officers. As Lord Derby says, and as Mr. Clarke, in his treatise on Extradition, says, it was intended to be curative of certain evils which had their origin in the execution of extradition treaties, and to which the attention of Parliament had been called by a committee of the House of Commons appointed to investigate the whole subject. The purpose of Parliament was not to change or repeal existing treaties, or supplement them with new and different obligations, but to provide for their execution; and, hence, the act is to be taken as an expression of its judgment as to the nature and requirements of these treaties.

6. The Chief Judge also refers to the rule adopted in France, according to which courts have nothing to do with "the conditions upon which extradition has been granted, except upon a notification from the Minister of Justice." Their business is "to try the facts;" and, when standing before them, the criminal himself can make no plea founded on his extradition, or the treaty under which it was secured. This question is for the government, speaking through its Minister of Justice, and not for the party arraigned on the charge of crime.

The difficulty with this reference is that the rule in France, whatever it may be — a point that we do not here pause to determine — is not pertinent when sought to be applied in this country. The Constitution of the United States makes every treaty a part of "the supreme law of the land," and requires courts to take knowledge of it as such, and apply it in cases to which it is applicable. This is a peculiarity of our political system that does not exist in France. It is, hence, immaterial what is the practice in French courts, since American courts are subject to a fundamental law, of which treaties are a part; and if the extradition treaties of the United States, either expressly or by implication, secure to extradited persons immunity against trial for

offenses other than the ones for which they were surrendered, then this is a part of "the supreme law" which every court in this country is bound to apply in any case involving the question.

This immunity, as we have previously shown, is secured in the extradition treaty of the United States with France; and hence, Lagrave, who was surrendered under that treaty, was, by "the supreme law," entitled to its benefit. It was for a specified purpose, and that alone, that he was surrendered; and it was only in reference to that purpose that any jurisdiction could be acquired over his person without violating the treaty, unless he committed some crime subsequently to his surrender, or chose to remain in this country. So the General Term of the Supreme Court held; and this decision, though reversed, seems to us the only one consistent with the treaty, and, hence, with "the supreme law of the land."

7. The Chief Judge further says: "The indictment [of Lagrave] was for burglary in the third degree under our statute, and clearly not within the treaty; but it is not for the defendant to raise this question. The government of France had power to surrender him for any offense, and even if deceived and defrauded, the defendant cannot interpose in its behalf. The question of good faith is for the two governments." It is quite true that, as to "the question of good faith" between the two governments, Lagrave was not the official representative of either; yet it is to be borne in mind that France delivered him up, not in the exercise of its general "power to surrender him for any offense," but under proceedings in pursuance of a treaty, and on the charge of burglary, which the French authorities must have supposed to be the burglary provided for and defined in the treaty. Such, however, was not the fact as to the crime charged against him; and on this point these authorities were mistaken, and but for this there would have been no delivery. Lagrave was delivered for the common law offense of burglary as set forth in the treaty, and for that alone; and this was not the offense charged. He could not, of course, be tried for the offense in respect to which he was surrendered, since there was no indictment against him charging that offense: and he should not have been held, detained or tried upon any other ground, since by the terms of the treaty, and, hence, by "the law of the land," no jurisdiction had been acquired over him for any other purpose.

To take advantage of the mistake, committed by the French authorities, as to the nature of the charge pending in this country, and use the jurisdiction thus acquired for a purpose different from the one for which it was intended to be granted, was not only to violate the treaty itself as a compact between the two governments, but to disregard the rights of the surrendered party as secured to

him by the law of the land. Judge Fancher, when this case was before him, held that the whole extradition "proceeding was unauthorized and illegal." See 14 Abb. Pr. R. (N. S.) 333. If so, the treaty, both as a compact and a law, precluded any jurisdiction over Lagrave as against his right of asylum in the country from which he had been illegally removed. His arrest and delivery in France were contrary to the treaty, and his arrest and detention in this country were no better. He had a right by the law of the treaty to show this fact.

8. The Chief Judge further says: "The right of exemption from prosecution [for other than the extradition charge], if it can be said to exist at all, is based upon the good faith of the government, which is necessarily uncertain, and is a political and not a judicial question." We have in this statement a mixture of truth and error. It is true that such a right, if secured by treaty, either expressly or by implication, binds the good faith of the government accordingly, and is, in this sense, based upon that faith, because it is in the compact. The government cannot in good faith institute a prosecution for any but the extradition charge. And yet it is just as true in this country that the right, if secured by treaty, is also secured by law, since the treaty itself is a law; and hence, the question, when an extradited party is arraigned for trial, whether the right exists or not under the treaty, is a question of law, and, as such, "a judicial question," no matter what course the government, as a prosecutor, may pursue in the case. The duties and powers of the court, and the rights of the accused party by the supreme law of a treaty, do not depend upon the question whether the government, in prosecuting that party, is observing or violating the obligations of the treaty under which he was surrendered. The treaty being a law, the court is bound to protect him against any invasion of his rights as secured by it.

The remark of the Chief Judge may be true in countries where the construction of treaties is a purely political question; but, so far as it denies the judicial character of the matter referred to, it is not true in the United States, and cannot be, unless it is also true that extradition treaties are excepted from that provision of the Constitution which makes treaties of the United States a part of "the supreme law of the land." No one surely will pretend that the Constitution contains any exception in respect to this class of treaties. Their character as laws is just as clear and complete as that of treaties on any other subject.

9. The Chief Judge also adverts to the case of *Caldwell*, 8 Blatchf. C. C. R. 131, decided by Judge Benedict, and to the opinion of the law officers of the British Government in the case of *Burley*. We considered in a previous article the decision in the first of these cases, and simply here refer to what

was then said, with the remark that the case arose under a treaty with Great Britain, while that of *La-grave* arose under a treaty with France.

As to the opinion of the law officers of the British Government, in the case of *Burley*, it is to be observed that that government, in the Winslow correspondence, rejected the opinion altogether, and declared that it was not a correct construction of the extradition stipulation between Great Britain and the United States. It is not a little remarkable that the Chief Judge should, in 1874, quote this opinion as an authority, when the English Extradition Act of 1870 had entirely set it aside as a false opinion. One would suppose that, as to the proper construction of the treaty between the two governments, the British Parliament in 1870 was quite as good authority as the law officers of the crown in 1864.

We offer this comment upon the several points contained in the deliverance of Chief Judge Church, not to call in question the authority of the decision made by the Court of Appeals, but for the purpose of showing that neither the decision nor the logic in support of it is consistent with the extradition treaty of the United States with France. As between the two decisions, that of the General Term of the Supreme Court, though reversed, seems to us the one which this treaty both sustains and demands.

The other case in which the same question was judicially considered is that of *The State v. Hawes*, arising in the criminal court of the county of Kenton, in Kentucky, August, 1877, and reported in the *Amer. Law Times Rep.*, vol. 4, p. 524. Hawes was demanded from the Dominion of Canada on four indictments, charging him with as many acts of forgery, and by the Canadian authorities he was delivered up on three of them, one of the four not being regarded in Canada as furnishing a sufficient ground for delivery. He was brought to trial on two of these indictments and acquitted; and the other two were dismissed on motion of the attorney for the Commonwealth. The acquittal and the dismissal therefore disposed of all the charges on which he had been extradited.

There were, however, other indictments pending against Hawes, charging him with embezzlement, an offense for which he was not and could not have been extradited. Upon one of these indictments a motion was made to bring him to trial; and whether he could be so tried was the question which came before Judge Jackson for decision. After stating the case, the Judge proceeded to say:

"And now the question is raised by the motion under consideration, whether this court can now detain Hawes for trial of this or the other indictments pending against him, for offenses charged to have been committed prior to his extradition, and for which he was not extradited."

Having shown that this country recognizes no international extradition except as provided for by treaty, and also quoted that section of the Constitution which makes treaties a part of "the supreme law of the land," the Judge further said:

"By the constitution and law of Kentucky, the prisoner (*Smith N. Hawes*) stands indicted for the offense of embezzlement, and he should be tried therefor and punished, if found guilty, according to law, or acquitted if his guilt is not proven to the exclusion of a reasonable doubt, unless by the provision of the treaty of 1842, heretofore referred to, it is illegal to go into the investigation of the case at this time. If there be a treaty governing the subject, that treaty as it now is, and not as it may be by subsequent conventions or high joint commissions between the high contracting parties, is now to control. I am bound to take judicial notice of the treaty concluded at Washington on the 9th of August, 1842, between the United States and Great Britain."

Having quoted the treaty, the Judge then remarked as follows:

"If, by the terms of this treaty, either expressed or implied, the prisoner, *Smith N. Hawes*, cannot be tried for any offense for which he was not extradited, then, although he may be within the bar of this court, or in jail under the control of this court, as this court is bound to regard that treaty, it is outside of its jurisdiction to proceed with the trial, as 'the supreme law of the land' otherwise provides; and this whole question hinges upon the construction of the treaty."

And as to this question of construction, we have the opinion of the Judge in the following extract:

"By the terms of the article of the treaty now under consideration, it is only for certain offenses that extradition will be permitted by either government. Embezzlement is not one of those offenses. * * * It is urged in argument that there is no positive stipulation against the trial of a non-extraditable offense. Why mention any offenses if a party can be tried for any and every thing not mentioned? When nations enumerate, do they not exclude every thing not enumerated? * * * Here we have by this treaty a mutual agreement that certain offenders, and none others, may be extradited, to be tried. * * * Now if there be any thing agreed upon between the two high contracting parties, it was, that for the offenses therein enumerated, and for no other, there was to be a mutual surrender. * * For nothing else could such a demand or surrender be made; and when so made it is monstrous that there should be a trial for any thing else. If there be any thing in the doctrine that when you enumerate rights or privileges, you are held to strictness as to the rights enumerated, and that every thing else not enumerated is not included, then it follows, as a logical sequence, that the treaty here having provided only for extradition as to certain cases and under certain circumstances and proof, the right of asylum is to be held sacred as to any thing for which the party was not and could not be extradited. * * * I do not mean to say that he [*Hawes*] may not hereafter be tried; but what I mean to say is that, in the face of the treaty herein referred to, he is not to be tried until there is a reasonable time given him to return to the asylum from which he was taken."

Judge Jackson disposed of the case in accordance with these views, and gave the prisoner the opportunity of returning to Canada by ordering his discharge from custody, which he immediately improved. The ground taken was that the treaty, considered as a compact between the two governments, contemplates that the person delivered up under it shall be tried only for the extradition charge or charges, and that, considered as a law, the treaty gives him a legal right against any other trial which it is competent for him to present to a court, and which that court is bound to recognize and secure. The jurisdiction of the court to try Hawes on the charge of embezzlement, though complete under the constitution and laws of Kentucky, was, according to Judge Jackson, precluded by "the higher law" of the treaty.

This differs very widely from the doctrine of Judge Benedict in the cases of *Caldwell* and *Lawrence*, and from that of the New York Court of Appeals in the case of *Lagrange*, while it entirely accords with the view taken by the General Term of the Supreme Court in the latter case. We regard it as sound law. Treaties in this country are *laws* for the government of courts, both State and Federal; and it is their duty, alike in civil and criminal actions, to apply them in determining the rights of parties in suits before them, whenever they affect those rights. The fact that they are compacts between nations, and, as such, the subjects of diplomatic consideration and construction, does not change their character as laws, or release courts from the obligation of taking cognizance of them, and giving effect to them, when individual rights are involved in them, or guaranteed by them. They are not to be dismissed on the theory that they are mere compacts with which judicial tribunals have nothing to do. They are *laws* for the regulation of courts, and *laws* in respect to the interests and claims of parties whose rights they affect. The Supreme Court of the United States, in the early case of *Ware v. Hylton*, 3 Dall. 199, asserted and applied this principle, and has repeatedly affirmed it in subsequent cases.

An accused party, when called to plead to an indictment, has the legal right to appeal to the *whole* law applicable to his case. If he can show that the indictment has not been found according to law in any essential particular, then it is not a legal accusation; and this fact appearing, no court has the right to put him on trial upon such a charge. And so, if a trial upon an indictment is precluded by a treaty of the United States, which in that event would be a part of the law applicable to the case, and superior to any State law, strange would it be if the party had no right to appeal to this law as a ground of defense. He has the right as a matter of law; and if the court ignores such a plea altogether, and treats the case as if no such right existed, then it

will dispose of it contrary to law, and contrary to the Constitution of the United States.

We can readily understand how a court may decide that a treaty does not, as a matter of fact, secure immunity against trial for any but the extradition offense, and on this ground proceed to try the party on other charges; but we cannot understand how an American court can refuse to consider the question, treat it as non-judicial, and dismiss it as a mere matter of "good faith" on the part of the government, when presented in the pleading of the extradited and accused party, or exclude the right of such immunity provided it be secured by treaty. If thus secured, it is secured by "the supreme law," which every judicial officer is sworn to obey in adjudicating upon the rights of parties.

Chief Judge Church, in the *Lagrange* case, argued, in some parts of his deliverance, against the existence of any such right by treaty, and, in other parts, against the right of the accused party to present the right to a court as a ground of defense, even if it does exist. With all due respect to that distinguished jurist, we must, in the light of the previous argument, regard him as incorrect in both positions. The extradition treaties of the United States secure the right by an implication so clear that its denial is not consistent with them; and the Constitution of the United States makes these treaties a law in respect to that right, and that law is a proper basis for a plea as to the offense for which an extradited party may be put on trial.

FURNISHED APARTMENTS.

"I DON'T see that law rubbish is worse than any other sort. It is not so bad as the rubbishy literature that people choke their minds with. It doesn't make one so dull." This sapient remark of Mr. Rex Gascoigne (one of George Eliott's latest friends) is the excuse for the appearance, at this season of rubbishy magazine articles, of this *olla podrida* of cases.

Many a young bachelor, and many a young *feme sole*, is just now contemplating the advisability of taking a furnished house, or, at the least, furnished apartments. To such young people we would extend the following words of advice, warning and information, based upon the experience of bygone days.

Imprimis, to avoid all possibility of future disputations with the owner of the furnished lodgings or house (as the contract concerning them is one concerning an interest in lands, within the purview of the Statute of Frauds) it is well to follow Mr. Woodfall's advice, and have the agreement reduced to black and white. In it should be specified the amount of rent, the time of entry, the length of notice to quit required, and other necessary particulars; and do not neglect to have affixed a list of the goods and chattels in the apartments. Woodfall's Landlord and Tenant, 8th ed., 173.

'Tis well to see that the taxes and the rent (unless the landlord owns the house) are paid up and are likely

to be kept so, for one's own personal belongings will be liable for his rent and taxes; unless, indeed, the local habitation chance to be in New England, New York, or some one of the other States of the Union where the power of distress no longer exists. Parsons on Contracts, vol. II, 517. Of course a man does not take much with him except his books, but his wife takes her clothes, her cat and her bird, and none of these are exempt from a landlord's warrant. Wearing apparel cannot be seized for debt but it can be for rent, unless in actual use. Mr. Baynes helped to decide this point. In 1794 he was eight weeks in arrears for his furnished lodgings, so a bailiff appeared on the boards, and took his raiment and that of Mrs. B., although part of it was actually in the wash-tub at the time, and Lord Kenyon, before whom the matter came, said that it was all right. *Baynes v. Smith*, 1 Esp. 206. The same judge, in another case, decided that a landlord could take the clothes belonging to a man's wife and children, while they, the clothes screens (as Carlyle calls them), not the clothes, were in bed, and which the bipeds—thus left naked—were in the daily habit of wearing, on the ground that they were not in actual use. *Bisset v. Caldwell*, 1 Esp. 206 n. As for the cat, Coke said, ages ago, that pussies could not be distrained, because in them no man could have an absolute and valuable property; but that reason is not applicable to costly Angoras, and *cessante ratione cessat et ipsa lex*. Woodfall says a bird may be taken (p. 284). Unfortunately the poor creature seized upon cannot make the other tenants or lodgers pay their share toward the debt. *Hunter v. Hunt*, 1 C. B. 300.

Because this right to distrain is a grievous remedy, in some places only the goods of the debtor himself are allowed to be taken, and not those of an under-tenant. Parsons, vol. I, 518; *Archer v. Wetherell*, 4 Hill (N. Y.), 112.

If any new furniture is to be placed in the rooms by the landlord, and the intending lodger desires it done, the agreement had better be put into writing; for then no rent is payable until the promise is fulfilled. *Mediolen v. Wallace*, 7 A. & E. 54; *Vaughan v. Hancock*, 3 C. B. 766.

Fortunately, when one gets settled in his abode, he need not care if the water pipes in his rooms leak through the floors and injuriously affect the property of the tenant below, provided the defect was not known to him, and could not have been detected without examination, and there has been no negligence on the tenant's part, for he is not bound at his peril to keep the water in the pipe. *Ross v. Fedden*, 7 Q. B. 661. The occupant of an adjoining apartment may, and probably will, if he has any æsthetic sensibilities, object to a stove pipe going from your room to the chimney in his; but if there had been one there before his arrival in the house, the strong arm of the law will nullify his opposition, for then he took his room subject to the easement of the black cylindrical smoke conductor and its necessary hole in the chimney, and he cannot cause your kettle to cease from singing or your pot from bubbling because his sense of the sublime and beautiful is offended. *Culverwell v. Lockington*, 24 C. P. 611.

Sometimes in these latter days of shoddy and of shams the boiler attached to the kitchen stove will explode with terrific uproar, doing considerable damage to the nerves of the inhabitants, and slight injury to the coarser portions of the human frame divine. If such a thing happen in a furnished house,

even though caused by the want of a safety valve, the tenant need not, at least if in New York State, rush off to attack his landlord, unless he can prove that the latter knew of the defect, or had reason to apprehend a catastrophe if the boiler was used. *Taffe v. Harteau*, 56 N. Y. 398. Although on one occasion the courts in the Empire State held the owner of the house liable for injuries caused by an explosion of gas arising from the pipes not being properly secured. *Kimmell v. Burfed*, 2 Daly (N. Y.), 155.

If it happen that on a rainy day, a drip, drip, drip, a patter, patter, patter is heard in the room, and ugly splashes of water are seen descending upon a most costly carpet or valued book, 'tis useless to cry out that the landlord must pay for the mischief done by his leaky roof; for, as Baron Martin lately observed, one who takes the floor in a house must be held to take the premises as they are, and cannot complain that the house was not constructed differently. The storm may have blown off some shingles, and then, even were he bound to use reasonable care to keep the roof secure, he cannot be held responsible for what no reasonable care or negligence could have provided against. He could not certainly be considered guilty of negligence, if he had the roof periodically examined, and it was all secure when last looked at. *Carstairs v. Taylor*, L. R., 6 Ex. 223. But, by the way, in New York, a landlord, who himself occupied the top flat, and allowed liquids to leak through into the rooms of his tenants below, was held liable. *Stapenhurst v. Am. Man. Company*, 15 Abb. Pr. (N. S.) 355. A layman might imagine that a landlord must keep his house in good order so that the occupant be not damaged, but a cleric knows that the law says quite the reverse; that he is not bound to do any repairs, however necessary, except such as he expressly agrees to do; no promise is implied; nor need he do any thing, even though the main walls gape and yawn threateningly, and the pumps have to be worked several hours daily to keep the basement free from water. *Arden v. Pullen*, 10 M. & W. 321; *Keates v. Cadogan*, 10 C. B. 591; *Gott v. Gandy*, 2 E. & B. 845; *Wille v. Matthews*, 52 N. Y. 512; *Taffe v. Harteau*, 56 id. 398. 'Tis true, that, in New Hampshire, a couple of years ago, it was held that a landlord is liable for injuries accruing to his tenants if he negligently builds his house, or carelessly suffers it to continue in disrepair. *Scott v. Simons*, 54 N. H. 426. But then, a very high American authority tells us that the decisions of the courts of other States are entitled to more weight than those of New Hampshire. 16 A. L. J. 419.

Unfortunately for the poor tenant, he must continue to pay rent, however wretched his house becomes, unless there has been an error or fraudulent misdescription of the premises, or they are found to be uninhabitable through the wrongful act or default of the landlord himself. *Lyon v. Gorton*, 7 Scott, 537; and perhaps even then. *Surplice v. Farnsworth*, 7 M. & G. 576. Even if the fire fiend swallows up the building, the landlord is entitled to his rent, just as if all had gone on as merrily as marriage bells, until regular notice to quit has been given, and the required time has rolled round. *Packer v. Gibbons*, 1 Q. B. 421; *Fowler v. Payne*, 49 Miss. 32. Of course, the length of notice required depends upon the nature of the tenancy, whether it be a yearly one, or from quarter to quarter, month to month, or week to week: a half year's or a quarter's, or a month's, or a week's notice

being requisite, as the case may be. *Parry v. Hazell*, 1 Esp. 94; *Woodfall's L. & T.*, 8th ed., 174. But even here judges differ, and some say that in an ordinary weekly tenancy a week's notice to quit is not implied as a part of the contract, unless there is a special usage. *Huffel v. Armistead*, 7 C. P. 56; *People v. Geollet*, 14 Abb. Pr. (U. S.) 130. Yet those who hold to this latter view think that a reasonable notice is needed. *Jones v. Mills*, 10 C. B. (N. S.) 788. Willes, J., on one occasion said, in a half frightened sort of way, as if he knew that he was wrong, that because, in a tenancy from year to year, only six months' notice is required, therefore he could not see how it was possible that a tenant from week to week could be entitled to more than half a week's notice. Id. One cannot leave because the idea has possessed him that the landlord's goods and chattels are about to be seized for rent (*Ricket v. Tullock*, 6 C. & P. 66), unless express stipulation has been made to that effect. *Bethell v. Blencome*, 3 M. & G. 119.

In the case of furnished lodgings, all the rent is deemed to issue out of the land, none out of the tables and chairs, pots and pans. *Newman v. Anderton*, 2 Bos. & P. New R. 224; *Cadogan v. Kennet*, Cowp. 432.

The law will allow a landlord to make himself disagreeable in many ways, but he cannot insist upon locking up the hall door at an early hour in the evening; for when he rents his rooms he impliedly grants all that is necessary for their free use and full enjoyment (and that, in the case of most mortals, includes the use of the hall and stairs) whenever required, and not merely when he in his discretion may deem best. *MacLennan v. Royal Insurance Company*, 39 U. C. R. 515. Nor can he object to the free use of the bell and knocker; in fact, an action will lie against him if he attempts to interfere with the reasonable use of all the necessary adjuncts of his furnished apartments. *Underwood v. Burrows*, 7 C. & P. 26. Though, if the tenants are an undesirable class, the proprietor might, in mitigation of damages, show that he acted in this surly way for the express purpose of getting rid of his lodgers. Id.

Occasionally newly-arrived tenants of furnished rooms find that all the previous occupants have not moved out; that some—small, but aldermanic in shape—have no intention of leaving. Unwilling to test the truth of the scientific assertion that these creatures all retire to their nooks and crannies shortly after midnight, these fastidious individuals eagerly inquire if they can at once quit the haunted house. It seems that they can. Long since Baron Parke said that the authorities appear fully to warrant the position that if the house is incumbered with a nuisance of so serious a nature that no one can reasonably be expected to live in it, the tenant can give it up; because there is an implied condition that the owner rents the place in an habitable state. Lord Abinger went even further, and stated that he thought no authorities were wanted to establish the point, that common sense was enough to decide it. He thought that tenants were fully justified in leaving under such circumstances. *Smith v. Marrable*, 11 M. & W. 5; Addison on Contracts, 375.

Some gentlemen, learned in the law, have, however, thought that these judges were mistaken in this, because, in some later cases, it has been held that there is no implied warranty in the lease of a house, or of

land, that it should be reasonably fit for habitation, occupation or cultivation, and that there is no contract (still less any condition) implied by law on the demise of real property, only that it is fit for the purpose for which it is let. *Hart v. Windsor*, 12 M. & W. 68; *Sutton v. Temple*, id. 57; *Searle v. Laverick*, L. R., 9 Q. B. 131. But then, in some of these latter decisions the case of a ready-furnished house is expressly distinguished, upon the ground that the letting of such a house is a contract of a mixed nature, being, in fact, a bargain for a house and furniture, which, of necessity, must be such as are fit for the purpose for which they are to be used. Lord Abinger was particularly strong upon the point; he said that "if a party contract for the lease of a house ready furnished, it is to be furnished in a proper manner and so as to be fit for immediate occupation. Suppose, said he, it turn out that there is not a bed in the house, surely the party is not bound to occupy it or continue in it. So, also, in the case of a house infested with vermin; if bugs be found in the beds, even after entering into possession, the lodger or occupier is not bound to stay in it. Suppose, again," his lordship continues, "the tenant discovers that there are not sufficient chairs in the house, or they are not of a sort fit for use (short of a leg, we presume) he may give up possession." *Hart v. Windsor*, *supra*. And so late as April in the last year of grace, Lord C. B. Kelly said it was his opinion, both on authority and on general principles of law, that there is an implied condition that a furnished house shall be in a good and tenable state, and reasonably fit for human occupation from the very day on which the tenancy is to begin, and that when the house is in such a condition that there is either great discomfort or danger to health in entering or dwelling in it, then the intending tenant is entitled to repudiate the contract altogether. *Wilson v. Finch Hatton*, L. R., 2 Ex. Div. 343. Judge Shaw, of Massachusetts, says that when furnished rooms in a lodging-house are let for a particular season, a warranty is implied that they are suitably fitted for such use (*Dutton v. Gerrish*, 63 Mass. 94), and Abinger thought that the proprietor was bound to supply whatever goods and chattels might be necessary for the use and occupation of a house such as the one let.

Across the line it has been held that the existence of a noxious smell in a house does not afford the tenant a reasonable excuse for leaving. *Westlake v. De Grau*, 25 Wend. 669. But my lady, the Dowager Countess of Winchelsea, found otherwise. She agreed to rent a furnished house in Wilton Crescent, London, for three months of the season of 1875 for 450 guineas; but when she arrived, with her servants and personal baggage, an unpleasant smell saluted her aristocratic nostrils, so she declined to occupy the mansion, and, ordering round her horses, drove off. On investigation, the drains were found to be in a shocking state; it took three weeks to make the place fit for habitation, and then the Countess refused to go back or pay any rent. The lawyers then had to appear on the scene and after them the judges. These latter bewigged gentlemen unanimously held that the state of the drain entitled her ladyship to rescind her bargain and refuse to pay the rent. *Wilson v. Finch Hatton*, L. R., 2 Ex. Div. 336.

Some people object to scarlet fever and small-pox (perhaps rightly so) and do not like to take up their

quarters in houses where persons have lately departed this life through the assistance of these diseases. To such particular persons it may be a comforting reflection to know that Lord Abinger thought that if a new tenant found that the old one had left because some one had recently died in the lodgings of the plague or scarlet fever, the incomer might legally retire (*Smith v. Marrable*, 11 M. & W. 5); and that in Massachusetts a man who caught small-pox, through no fault of his own, but because the owner of the house willfully neglected to inform him that the rooms were infected with that disease, might recover damages from the landlord (*Minor v. Sharon*, 112 Mass. 477), always provided, we suppose, that he recovered from the small-pox in the first place.

Chairs and tables in furnished apartments are oft-times weak in the legs (owing to their long standing); it is well, therefore, to know that an occupier of such places is not responsible for deterioration by ordinary wear and tear in the reasonable use of the goods by the landlord. Add. on Cont. 377.

If a lodger sports a brass plate, bearing his patronymic, on the front door, the landlord is not at liberty to take it off. A Dr. Lane hired certain rooms from one Johnson, with the privilege of putting up his plate on the door; Johnson shortly after leased the whole premises to one Dixon for twenty-one years. The health of the community being good, the doctor got behind in his rent; so Dixon removed the plate and refused him access to his rooms; in fact, he actually fastened the outer door against the doctor. The medico sued for damages, and the jury gave him £10 for the breaking and entering his rooms, expelling him therefrom and seizing his *et ceteras*, and £20 for the removal of the plate. Dixon was dissatisfied with the verdict, and appealed to the court, but the judges sustained the finding, considering the removal of the plate a distinct and substantial trespass. *Lane v. Dixon*, 3 M. G. & S. 776.

A different decision was arrived at in *Hartley v. Bloxham*, 3 Q. B. 701, where the defendant, claiming that money was due him by the plaintiff, his lodger, looked up the defaulter's goods in the room, pocketed the key, and refused poor Hartley access to them until the bill was paid; it was held that there was no trespass. But in this latter case the landlord never actually touched the goods, he only looked up the door and kept the key. Where a landlord, before his boarder's time was up, contrary to his wishes, entered his room, and removed therefrom books, maps and papers, placing them where they were damaged by the rain, the court decided that he was a trespasser, and made him pay for all the injuries sustained, both that arising from the direct and immediate act, and that happening remotely from the act of God. *Noulan v. Trevor*, 2 Sweeny (N. Y.), 67.

And now we think that we have given the amiable persons mentioned in the beginning of this article as much advice as they can stand at present; if they need further information let them apply to some practitioner near at hand and pay for it. All we would now say is, "Do not go to law with your landlord," for, as Mr. Owen Feltham wrote in 1670, "To go to law is for two to contrive the kindling of a fire to their own cost, to warm others, and singe themselves to cinders."

R. VASHON RODGERS, JR.,
in the *Canada Law Journal*.

CONTROL OF RECEIVERS.

SUPREME COURT OF ILLINOIS, JUNE TERM, 1877.

SAFFORD V. THE PEOPLE.*

1. INJUNCTION BY STATE COURT — *receiver appointed by Federal court*. Where an injunction is granted by a State court, and served on a railway company, restraining it and its servants from obstructing a public avenue in a city with its trains, etc., the same will be binding upon a receiver of the company subsequently appointed by the United States court, and such receiver, the same as a subsequent purchaser, will be punishable for contempt for disobeying the mandate of the writ.
2. SAME — *punishment after removal from office*. If the receivers of a corporation disobey an injunction against the corporation, made before their appointment, the fact that they have been removed at the time they are tried for a contempt, affords no defense whatever.
3. SAME — *as to receiver not actually participating*. Where a railway company passes into the hands of receivers after it and its servants and agents are enjoined from obstructing a certain avenue, etc., with its cars, and in managing its business the injunction is disobeyed, one of the receivers cannot be exonerated because he took no active part in the matters complained of. It is his duty to see that the injunction is obeyed.
4. RECEIVER — *of railroad company as its agent*. A receiver of a railway company, appointed by the court to manage its business, is legally the agent of the company, although under the direction of the court appointing him.
5. SAME — *powers*. The court, in appointing a receiver for a corporation, has no power to enlarge or restrict the corporate powers and duties conferred on the corporation by its charter. The receiver is bound by the charter to the same extent as the directory. If the company is under a legal duty to perform or not to do a certain act, the same will devolve upon its receiver.

WRIT of error to the Circuit Court of Alexander county; the Hon. DAVID J. BAKER, Judge, presiding.

Mr. Samuel P. Wheeler, for the plaintiffs in error.

Mr. Justice WALKER delivered the opinion of the Court:

It appears that on the 6th day of March, 1873, a bill was filed praying an injunction against the Cairo and Vincennes Railroad Company, to restrain it, its agents, employees and attorneys from the further use of Commercial avenue, in the city of Cairo, for loading and unloading cars, from leaving them standing thereon, or making up trains, and from using railroad tracks for switching cars or trains thereon, or for any purpose other than for transit of cars and trains over their tracks, except the company might use their tracks south of and below Sixth street for making up trains and switching, and of using their tracks below Fifth street, except at street crossings, for storing, loading and unloading cars, and of using their tracks between Seventh and Eighth streets, and between Eighth and Ninth streets, for standing passenger trains for such time as might be necessary on the arrival or departure of trains. A writ was, on that day, granted, according to the prayer, restraining them until the further order of the court. The writ was served on an agent of the company on the next day.

On the 5th day of March, 1874, plaintiffs in error were appointed receivers of the road by the United States Circuit Court for the Southern District of Illinois, and entered upon the discharge of their duty as such. They, in disregard of the injunction, caused to be switched, daily, upon the side track large numbers of cars to be loaded and unloaded, and allowed cars to be left standing on the side track in the portion of the avenue in respect of which the company had been restrained.

*From N. L. Freeman, Esq., State Reporter, and to appear in 85 Ill. See, to the same effect, *St. Joe, etc., R. R. Co. v. Smith*, 16 A. B. Law Journal, 408.

It is, however, set up as a defense, that they were not the agents or servants of the railroad company, but, being appointed receivers of the Federal court, they were its agents, and not amenable to nor were they restrained by the injunction of the State court, and if they were, by force of the writ, it was, in effect, annulled by a decree of the Federal court, authorizing them to perform the several acts which are charged as violations of the injunction.

The railroad company was under restraint, by an order of a court of competent jurisdiction, at the time plaintiffs in error were appointed receivers, and no question can be, with any pretense of legal principle for its support, urged against the binding force of the injunction. According to every principle of the law, it was binding upon all persons to whom it was directed, and in the very necessities of the case its scope and operation must be broader than is claimed by plaintiffs in error. The order and writ are matters of public record, of which all persons are bound to take notice, at their peril. If the court were to enjoin a person from doing a specified act, in reference to a piece of property of which he was the owner, and he were to sell it pending the injunction, can it be possible that the authority of the law, as spoken by its appropriate tribunals, could be defied and successfully resisted by the purchaser doing the very act the law had prohibited his vendor from performing? Most assuredly not.

Suppose, in this case, the road, property and franchises of the company had been sold, would that have revoked and annulled the restraining order of the court, and permitted the purchaser to have proceeded to the performance of the prohibited act? Most unquestionably not. The authority of the law cannot be so easily evaded and thwarted. It surely has some vigor, and its decrees must have some force. To hold otherwise would be to render the courts impotent, and their power only effective so far as litigants might choose to acquiesce. In the cases supposed, besides a large number of others that might be cited, the purchaser would take the right precisely as it was held by the seller. If he were under restraint as to its use, the vendee would be under the same restraint.

In this case the injunction was against the corporation as a legal entity, and its agents, servants, etc. When the receivers were appointed by the Federal court, there was no change in the corporate body. Its existence was intact, with its legal functions unimpaired, but simply its acts were performed by agents appointed by the court, and not by the corporation. The agents appointed by the court to perform its duties and exercise its functions are legally its agents, although they are under the direction of the court appointing them, within the limits of its charter. The court only authorizes the receiver to exercise the privileges and perform the duties prescribed by the charter. The court does not, nor could it if attempted, enlarge or restrict the powers and duties conferred by the charter. When it appoints the receiver, the court assumes the management of the corporation under and in accordance with the charter, and is bound by its provisions to the same extent that are the directory, and the agents appointed by the court are required by it to act within the limits of the charter, and to perform all duties imposed thereby.

When the court thus seized the control and management of the road, the company was not thereby released from any debt, legal liability incurred or the

performance of any duty imposed. In this case, this company was under the duty to obey the injunction, and the Federal court did not nor could it legally dissolve the injunction rightfully granted by the State court. The decree appointing the receivers does not, in the least, pretend to do such an act. The petition for their appointment does not ask for it, nor does the decree in any, the remotest, manner refer to or purport to, in anywise, dissolve, modify or affect the injunction, and the law did not operate to interfere with its operation in any degree. The receivers were, then, bound to observe and obey the injunction whilst in force, precisely as though they had been appointed and were acting under the directory of the company. The decree of the Federal court neither required nor authorized them to act differently.

It appears that plaintiffs in error and two of their employees, being attached for contempt of court in disregarding the injunction, applied to the Federal court to annul the injunction, and to have the attorney causing their arrest attached for contempt of that court, and for leave to lay additional track in a portion of the avenue. Of course, the prayer to annul the order granting the injunction by the State court, and the attachment of the attorney, was not, as it could not be, granted. But the court authorized the laying of the side track, as asked, for the purpose of passing of trains, and "for standing of cars thereon, above Twentieth street, in such manner as not to unnecessarily interfere with the public right thereon, or obstruct street crossings, and only such reasonable length of time as may be required for loading and unloading such cars." Now, here was only permission to stand cars above Twentieth street, and yet these plaintiffs in error, in violation of the injunction of the State court, and in utter disregard and contempt of the order of the Federal court, permitted cars to stand on the avenue, and to be loaded and unloaded, below Twentieth street. They thus seem to have been actuated by a disregard for all authority, both Federal and State, in their management of the road in the city. When they have so acted, it is strange that we shall be asked to indorse and sanction their acts.

We do not perceive the slightest excuse for their conduct. They first defy the injunction of the State court, and when they are about to be compelled to submit to its power and authority, they, to carry out their purposes, appeal to the Federal court to abrogate the order of the State court, and punish its officers for attempting to enforce its decree, and to obtain permission to proceed in acts violative of the injunction, and, failing in that, by only obtaining leave to stand, load and unload cars above Twentieth street, they persistently continued in their purpose, and did stand and load and unload cars below that point, and then ask this court to say that such defiance of authority is legal, justifiable, and not a contempt of the authority of the State.

Nor is it any, the slightest, excuse, to say they did not know the force and effect of the injunction. They, by their petition to the Federal court, set out, in terms, the order of the judge granting the injunction, and cannot be heard to say they did not understand its force, as the language was plain, simple and easily understood by the most ordinary intellect. But, had it not been easily comprehended, it was their duty to learn its import. They do not say, in their petition to the Federal court, that they cannot understand its import, but they ask that it be held to be void. Even

if they had not seen the writ, knowing that it had been issued, it was their duty to see and learn its import.

Nor is Safford exonerated from responsibility because he, by arrangement with Morrill, took no active part in the running arrangements of the road. He was equally bound for Morrill's acts, and, knowing of the injunction, and the limitation of their powers by the order of the Federal court, on his own petition, he was bound to see that the orders were not disobeyed by Morrill or their employees. He could not escape liability by merely remaining inactive. He was bound to act to prevent disobedience to these orders, and cannot shield himself by saying others did the act.

Nor is it any defense to say, if they did defy the authority of the State, acting through its properly constituted authorities, they have been removed from the receivership, and their contempt was thereby purged. As well say, an officer committing a criminal official act cannot be punished because he has been removed from office or his term has expired.

An examination of the entire record presented to us in this case discloses no ground for a reversal, and the judgment of the court below must be affirmed. Judgment affirmed.

RECENT AMERICAN DECISIONS.

SUPREME COURT OF WISCONSIN, JANUARY AND FEBRUARY, 1878.*

PUBLIC POLICY.

1. *Contracts void by: contracts against public morality.*— Courts will always refuse to enforce contracts which are contrary to public morality or policy, whenever and however, in actions upon them, that fact may be made to appear. *Wight v. Rindskopf*. Opinion by Ryan, C. J. Decided February 5, 1878.

2. *Admission of accomplice as witness on implied promise of pardon.*— The admission of an accomplice as a witness for the government upon implied promise of pardon, in any case, is not at the pleasure of the public prosecutor, but rests in the sound judicial discretion of the court. *Ib.*

3. *When accomplice not to be admitted as witness.*— If an accomplice in one crime be also indicted for another, and the fact be within the knowledge of the court, he will not, in general, be admitted as a witness; but, if admitted, though he testify in good faith against his accomplices upon one indictment, he will be put upon his trial on the other, and punished upon conviction. *Ib.*

4. *Agreement with public prosecutor, when a fraud on court.*— An agreement of the public prosecutor, unsanctioned by the court (if such sanction could be given in such a case), for immunity or clemency to several defendants, in several indictments, upon one of them becoming a witness for the prosecution upon still other indictments, would be a fraud upon the court, and an obstruction of public justice. *Ib.*

5. *Witness not allowed an attorney.*— A witness, as such, cannot have an attorney; and though an accomplice may act by advice of his attorney on the question whether he will become a witness for the prosecution, when he once becomes such a witness, the relation of attorney and client ceases *quoad hoc*. *Ib.*

6. *What services are not within scope of professional retainer.*— While several indictments were pending in

a Federal court against defendant and six other persons for violation of the revenue laws, plaintiff told defendant that his relations with the prosecuting attorneys were such that he thought he could render these parties essential service. Thereupon it was agreed between defendant and plaintiff that the former should give evidence for the United States, under the counsel and direction of the latter, against persons, other than those included in the agreement, against whom still other indictments for violations of the revenue laws were pending in the same court; and plaintiff undertook that defendant and the other six persons above mentioned should be permitted severally to plead guilty to those counts only, in the several indictments against them, involving the least punishment, and receive upon those the lowest punishment of the law; and for this service, if successful, defendant was to pay plaintiff a large sum for each person mentioned. The agreement required no disclosure, evidence or other aid to the government from any other person than defendant, and did not require him to make full disclosure to the prosecuting attorneys, or to put himself in their hands as their witness. *Held*, that the services on plaintiff's part thus stipulated for were not within the legitimate scope of a professional retainer of an attorney at law, and a contract therefor is void as against public morality and policy. *Ib.*

7. *When court will not assume agreement to be sanctioned by another court.*— The mere fact that the judgments of the Federal court on the indictments were such as to fulfill plaintiff's agreement, will not warrant this court in assuming that such agreement was sanctioned by that court; nor could it hold the agreement valid even upon that assumption. *Ib.*

REPEAL.

Of penal act without saving clause affects pending actions.— After the repeal of chapter 273 of 1874 (the Potter Law), no recovery could be had in any action then pending under the penal provisions of that act, either by virtue of section 33, chapter 119, R. S. (*Dillon v. Linder*, 36 Wis. 344), or by virtue of the clause in the repealing act (ch. 57 of 1876), which provided that nothing therein contained should "in any manner affect any litigation" then pending in any of the courts of this State, or of the United States. To save pending actions for statutory penalties, or pending prosecutions for statutory offenses, upon the repeal of the statute, an express saving of all penalties incurred or offenses committed under it, whether in the course of prosecution or not, is essential. *Rood v. C. & St. P. Railway Co.* Opinion by Ryan, C. J. Decided Jan. 3, 1878.

WITNESS.

Though party cannot impeach his own he may contradict him.— Although the general rule is, that a party cannot impeach the general reputation for truth of his own witness, yet he may prove the truth of any particular fact relevant to the issue by any other competent testimony, in direct contradiction of what one of his witnesses has testified, even where such proof may collaterally show such witness to be generally unworthy of belief. Thus, in an action on a promissory note alleged by the answer to have been without consideration, after plaintiff, as a witness for defendant, had testified that the note was for the price of specified chattels sold by him to defendant, the latter was entitled to show by his own testimony that he was not indebted to plaintiff on account of such chattels when the note was given. *Smith v. Elmer*. Opinion by Cole, J. Decided Jan. 3, 1878.

* From O. N. Conover, Esq., State Reporter. To appear in 42d Wisconsin Reports.

RECENT ENGLISH DECISIONS.

BAILMENT.

Factor's Acts: agent intrusted with the possession of goods: agent broker and also merchant: goods left in possession of paid vendor: pledge: 6 Geo. 4, c. 94, s. 2.—H., a merchant dealing in tobacco and a broker in that trade, had fifty hogsheads of that article lying in bond in his name in the K. dock. The warrants for them had been issued to him. The plaintiff bought the tobacco from H. and paid for it, but he left the dock warrants in the possession of H., and took no steps to have any change made in the books of the dock company, as to the ownership of the tobacco. H., being the ostensible owner of the tobacco, fraudulently obtained advances on the pledge of a portion of the tobacco from the defendants respectively, and handed to them the dock warrants. Both the defendants acted in good faith, and took fresh dock warrants from the dock company. *Held*, that H. was not intrusted by the plaintiff as his factor or agent with the documents of title, within 6 Geo. 4, c. 94, s. 2; and that the conduct of the plaintiff, in leaving the indiola of title in H.'s hands and thus enabling him to obtain advances on the security of the goods, was not such as to disentitle the plaintiff to recover its value from the defendants. *Johnson v. The Credit Lyonnais Company*, L. R., 3 C. P. D. (C. A.) 32.

BILL OF EXCHANGE.

1. *Effect of cancellation, as between payee and acceptor, without full payment.*—The plaintiff obtained from the defendants an advance of 15,000*l.* upon the security of goods then in transitu to Monte Video, consigned to one S., and of six bills of exchange drawn by the plaintiff upon and accepted by S. against the shipments. Two of these bills were duly paid; but, other two having been dishonored, the defendants (at Monte Video) proposed to realize the goods at once, whereupon the plaintiff handed them a cheque for 2500*l.*, accompanied by a letter requesting them not to sell, and authorizing them to hold the 2500*l.* as collateral security for S.'s acceptances, to be returned to the plaintiff when all the bills should have been paid. The remaining bills having also been dishonored by S., the defendants took proceedings against him at Monte Video, which resulted in a judicial arrangement under which the goods were sold, and the bills were delivered up to S. canceled without the knowledge or consent of the plaintiff. The sale of the goods did not produce sufficient, even with the 2500*l.*, to pay all the bills. In an action by the plaintiff against the defendants to recover back the 2500*l.*, *held*, that, notwithstanding the effect of the cancellation of the bills was to discharge both the plaintiff and S. from all liability on the bills, and also to deprive the plaintiff, as drawer, of all remedy upon them against S. as acceptor, the circumstances under which such cancellation took place was not equivalent to payment of the bills in full; and, consequently, that the plaintiff was not entitled to call upon the defendants to refund the 2500*l.*, or any part of it. *Yglesias v. The Mercantile Bank of the River Plate*, L. R., 3 C. P. D. 60.

2. *Bills drawn and accepted by same parties.*—Although bills of exchange, drawn and accepted by the same parties, may be in strictness promissory notes rather than bills, yet where the intention to give and receive such documents as instruments capable of being negotiated in the market as bills of exchange is

clear, both the holders and the parties may treat them accordingly. *Willans v. Ayers*, L. R., 8 App. Cas. P. C. 133.

3. *Custom as to damages in lieu of exchange: re-exchange, etc.*—A custom as to allowing a fixed percentage by way of liquidated damages in lieu of exchange, re-exchange, and other charges, when bills are returned from the colonies dishonored, however valid in law, does not apply in the absence of an agreement, express or implied, to allow re-exchange. *Ib.*

4. *When re-exchange not allowed.*—Where the holders of bills drawn by P. L. & Co. in London on P. L. & Co. in Australia, having no occasion to transfer money from London to Australia, sent them to the latter country, not for the purpose of employing the proceeds there, but of having them remitted to London, the dishonor of such bills does not entitle the holders to recover damages by way of re-exchange. *Ib.*

5. *When right to re-exchange arises.*—The right to "re-exchange," in the absence of express agreement, arises when the holder of a bill who has contracted for the transfer of funds from one country to another has sustained damages by its dishonor through having to obtain funds in the country where the bill was payable. "Re-exchange" is the measure of those damages. *Ib.*

RECENT BANKRUPTCY DECISIONS.

JURISDICTION.

When Federal courts have not exclusive: statutory construction.—Section 711 of the U. S. Revised Statutes, which gives exclusive jurisdiction to the Federal courts over "all matters and proceedings in bankruptcy," does not extend to actions brought by assignees to collect the assets of bankrupts. The only effect of the amendment of 1874 (chap. 178, § 2) is to permit the Federal courts to decline to entertain actions brought to recover legal assets of a bankrupt not exceeding five hundred dollars in amount. Subject to the authority thus conferred, the Federal and State courts have concurrent jurisdiction over all actions brought by an assignee to collect the assets of the bankrupt, whether legal or equitable, and of whatever amount. *Supt. Ct., New York, 4th Dep. Wentz v. Young*, 17 Nat. Bankr. Reg. 90.

PARTNERSHIP.

1. *Note given by partners individually for firm debt a firm liability: security on separate estate.*—Where T. and S. had become copartners, and, preliminary to beginning their copartnership business, negotiated a loan of money, giving therefor their joint note, but signing the same by their individual names, and the money was treated as a copartnership fund and applied to the business uses of the firm, *held*, that the debt was a firm liability. A firm creditor, holding mortgage security upon the separate estate of one of the partners, may prove his whole debt against the joint estate, without valuation or surrender of the security, even though the individual schedules of the partner whose separate estate is thus mortgaged, do not show that he owes individual debts. *U. S. Dist. Ct., E. D. Wisconsin. In re Thomas*, 17 Nat. Bankr. Reg. 54.

2. *Adjudication against firm: one member adjudged bankrupt.*—The adjudication of a copartnership must be made in one proceeding and on one petition. Where an individual member of a firm is adjudged a bankrupt, without any adjudication against the firm, and there were assets of the firm when the proceeding was

instituted, the estate of the firm is not in the Bankruptcy Court in any such wise as to make a discharge operative as to the debts of the firm. Adjudication of the members of a firm by adjudication of one member in one proceeding, and of the other members in another, is not an adjudication of the copartnership, and the Bankrupt Court will not thereby acquire jurisdiction over the estate of the copartnership. A bankrupt in a given proceeding must be discharged as to all his debts or from none. U. S. Dist. Ct., S. D. New York. *In re Plumb*, 17 Nat. Bankr. Reg. 76.

PRIORITY OF PAYMENT.

Out of what assets preferred creditor entitled to payment: debt due a State.—A creditor who is entitled to preference under section 5101 can only have a priority in payment out of what assets the debtor has which would go to his assignee. Where it appears that there are no assets of any value, he cannot demand that his claim shall be paid in full before confirmation of a composition, or that such composition shall be subject to his debt. But he may examine the debtor and other witnesses in the composition proceedings to show that the debtor has other assets. Although, under the laws of the State, the moneys to be collected upon a bond given to the People of the State are to be paid into the treasury of the city of New York, the State is the creditor. U. S. Dist. Ct., S. D. New York. *In re Chamberlin*, 17 Nat. Bankr. Reg. 49.

TRADESMAN.

Who is a merchant or tradesman: livery stable keeper.—A livery stable keeper who only purchases horses for use in his business and sells them when disabled and unfit for use, and who boards the horses of other parties and feeds them with hay, etc., which he has purchased, is a merchant or tradesman within the meaning of subdivision 7 of section 5110 of the U. S. Revised Statutes. U. S. Dist. Ct., S. D. New York. *In re Odell*, 17 Nat. Bankr. Reg. 73.

UNITED STATES SUPREME COURT ABSTRACT, OCTOBER TERM, 1877.

BAILMENT.

1. *Right of pledgee to possession of securities pledged.*—A bank took from its debtor, as a pledge to secure notes against him, held by it, certificates of indebtedness of a corporation. Before the notes became due the debtor was adjudged bankrupt, and the assignee demanded possession of [the] certificates. *Held*, that the bank, in virtue of the pledge, acquired a special property in the certificates of indebtedness. It was entitled to retain possession until the objects for which they were pledged had been fully accomplished. Until the note for \$5,000 was fully paid it was not bound to return the certificates either to the bankrupt or to the receiver or assignee in bankruptcy. Judgment of Circuit Court, Louisiana, affirmed. *Yeatman, assignee, plaintiff in error, v. New Orleans Savings Institution.*

2. *Bankrupt law does not impair rights of pledgee.*—*Held*, also, that these rights of the pledgee were not impaired or affected by any of the provisions of the bankrupt law. The established rule is that except in cases of attachments against the property of the bankrupt within a prescribed time proceeding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of law

or by act of the bankrupt, which existed against the property in the hands of the bankrupt. *Brown v. Heathcote*, 1 Atkyns, 160; *Mitchell v. Winslow*, 2 Story, 637; *Gibson v. Warder*, 14 Wall. 248; *Cook v. Tullis*, 18 id. 332, and *Jerome v. McCarter*, 94 U. S. 739. He takes the property in the same "plight and condition" that the bankrupt held it. (*Winsor v. McLellan*, 2 Story, 495; *Goddard v. Weaver*, 1 Wood, 200.) *Ib.*

3. *Refusal of pledgee to appear in bankruptcy proceedings does not impair rights to pledge.*—*Held*, also, that the right of the bank to the certificate would not be impaired by its refusing to appear in the bankruptcy proceedings and prove its claim. The only effect of its failure to make that proof was to lose the privilege of participating in such distribution of the bankrupt estate as might be ordered in the bankruptcy court. It had the right to forego that advantage, and look for ultimate security wholly to the certificates of indebtedness which it held under a valid pledge. *Ib.*

LIFE INSURANCE.

Conditions in policy as to payment: forfeiture: waiver: authority of agent.—In a policy of life insurance it was provided that if the premium should not be paid when due, "or if the principal of, or interest upon, any note or other obligation given for the premium upon said policy shall not be paid at the time the same shall become due and payable, then and in every such case the company shall not be liable to pay the sum assured, or any part thereof, and said policy shall cease and be null and void without notice to any party or parties interested herein," and "in case a loan of, or credit for, a portion of said premium shall be made on this policy, said policy shall be subject to all of the terms and conditions expressed in the acknowledgment or obligation given for such loan or credit." By an indorsement on the policy, it was declared that "agents of the company are not authorized to make, alter, or abrogate contracts, or waive forfeitures." All the premiums were paid except the last one, which was settled by the payment of \$50 in cash, and the balance in two promissory notes of the insured to the insurance company, payable respectively in two and three months, and maturing one on the 20th of June, the other on the 20th of July, 1875. Each note contained a clause declaring that if it were not paid at maturity the policy would be void—this being the usual form of premium notes. A few days after the first note came due the son of the insured asked the agent to extend the time of payment for thirty days to which the agent agreed; before the expiration of the thirty days payment of the note was tendered and refused.

In an action on the policy, *held* that the forfeiture incurred by the non-payment of the note could be waived by an agreement made for extending the note after its maturity, and that evidence that the insurance company had on previous occasions permitted the agent to extend such indulgence, was admissible as indicative to the power given to the agent, and it was not error to submit to the jury upon such evidence, to find whether the defendant had, or had not, authorized its agent to make such extensions; nor in submitting it to them, to say whether, if such authority had been given, an extension was made in this case. Judgment of Circuit Court, N. D. Illinois, affirmed. *Knickerbocker Life Insurance Co., plaintiff in error, v. Norton.* Opinion by Bradley, J.

Strong and Swayne, JJ., dissented on the ground that there was no evidence that the company gave its agent authority to waive a forfeiture after it had occurred.

COURT OF APPEALS ABSTRACT.

AGENCY.

Construction of power of attorney: ratification.—An agent had a power of attorney to draw and indorse "checks on any bank" in which his principal had an account, "and to do any and all things connected with my account in" such banks as the principal might do. After the word "checks," the words "promissory notes" were interlined so as to make the power of attorney give authority to draw and indorse "checks or promissory notes on any bank," etc. *Held*, only to give authority to deal with the accounts mentioned, and not to give the agent authority to sign his principal's name to notes not connected with such accounts, but given for his own purposes. *Held*, also, that the execution of a mortgage for the purpose of securing such notes procured by the agent from the principal, the principal not understanding such to be the purpose, did not amount to a ratification of the agent's act. Judgment below affirmed. *Craighead, appellant, v. Peterson.* Opinion by Allen, J.

[Decided January 29, 1878. Reported below, 10 Hun, 596.]

EVIDENCE.

1. **Invalid contract performed when admissible to show title.**—In an action upon a promissory note made payable to the order of plaintiff, a married woman, who had it in her possession at the time of trial, the defense was that the note belonged to plaintiff's husband, and that defendant had paid him the amount due on it. Evidence was offered to show that the husband, who was an alien, wished to deal with his own money in real estate, and that he made an arrangement with plaintiff, whereby she was to take title to all lands bought by him, and to convey, when required by him, and that this note was given in a transaction made under such arrangement. *Held*, admissible, and not to be excluded on the ground that the arrangement in question did not constitute an enforceable agreement. Judgment below affirmed. *Dunn, appellant, v. Hornbeck.* Opinion by Folger, J.

2. **Agency: presumption from usual course of dealing.**—It was in evidence that the husband was, under the arrangement mentioned, accustomed always to do plaintiff's business for her, and to receive payments on account of the property sold by her. *Held*, a legitimate inference that he was entitled to receive payment on this note, though authority to do so may not have been given in specific terms. *Ib.*

[Decided January 15, 1878.]

FRAUDULENT CONVEYANCE.

1. **Bankruptcy: how far discharge affects debts: judgment confessed on old debts after discharge: fraudulent transfer void as to future creditors.**—E., for the purpose of defrauding creditors, caused his real estate to be transferred to M., who was to hold the title thereto until E. could be discharged from his debts in bankruptcy, or otherwise, when M. was to convey the property to E. E. was discharged in bankruptcy, and thereafter confessed judgment upon plaintiff's debt, which was in existence when the bankruptcy proceedings were instituted. *Held*, that although plaintiff's debt was canceled by the discharge in bankruptcy, it furnished a sufficient consideration for the judgment which became a new debt and was not out off by such discharge. That the transfer of the real estate of E. to M. being made to defraud creditors, was void, both as to existing and future creditors, and could be impeached by either class of creditors. Judgment below

affirmed. *Dervey v. Moyer, appellant.* Opinion by Earl, J.

2. **Effect of bankruptcy proceedings as to fraudulent transfer: rights of assignee: defense.**—It was claimed on behalf of M., in an action to procure satisfaction of such judgment out of the property in his hands, that the assignee of E. in bankruptcy became vested with it by virtue of the statute. No such defense was set up in the pleadings. *Held*, that M. could not interpose the defense without pleading it, and even if he had done so, it would have availed nothing further than to require the assignee to be made a party to the action. *Held*, also, that the proceedings in bankruptcy as appearing, were not a bar to the action. *Ib.*

[Decided January 15, 1878. Reported below, 9 Hun, 473.]

NEGLIGENCE.

1. **Action by city over against one unlawfully obstructing streets so as to render city liable: defenses.**—Defendant, in erecting a building in a city, negligently left materials and rubbish in the street at night so as to obstruct it without putting a barrier around the obstruction, or placing lights as required by the city ordinance. M., who ran into the obstruction and was injured, brought action against the city for the injury, and the city notified defendant to defend. M. recovered a judgment. *Held*, that defendant was liable over to the city for the amount of the judgment, and that in an action therefor, he could not set up contributory negligence on the part of N., but could set up his own want of negligence, and it was incumbent on the city to show that he was negligent. Judgment below affirmed. *City of Rochester v. Montgomery, appellant.* Opinion by Rapallo, J.

2. **When contractor for city liable to city for negligent acts.**—The fact that the building to which the materials causing the obstruction belonged was being erected by defendant for the city upon its land under a contract, would not furnish a defense. (*Holloway v. City of Buffalo*, 7 N. Y. 487, distinguished.) *Ib.*

3. **Evidence: city ordinance on question of negligence.**—A city ordinance which defendant violated in leaving the obstruction unguarded and unlighted held admissible on the question of negligence. *Ib.*

[Decided January 15, 1878. Reported below, 9 Hun, 394.]

WILL.

1. **Construction of: living children: grandchild.**—Testator had made provision for a daughter of his deceased daughter, describing her as such in one clause of his will. In another, he gave the residue of his estate to his wife and "living children." *Held*, not to include the granddaughter. Judgment below modified. *Low v. Harmony, appellant.* Opinion by Rapallo, J.

2. **When grandchild included in gift to children.**—In another clause of the will he made a limitation over of the shares of his children in case of their dying without issue, to "my other children and wife or their heirs." *Held* to include the granddaughter. *Ib.*

3. **Will so construed as not to exclude lineal descendant or heir.**—When the language of a limitation is capable of two constructions, one of which would operate to disinherit a lineal descendant of the testator, while the other would not produce that effect, the latter should be preferred. An intention to disinherit an heir or lineal descendant will not be imputed to a testator by implication nor where he uses language capable of a construction which will not so operate. *Ib.*

[Decided February 5, 1878.]

NEW BOOKS AND NEW EDITIONS.

MAY'S DEMOCRACY IN EUROPE.

Democracy in Europe: A history. By Sir Thomas Erskine May, K. C. B. D. C. L. Author of "the Constitutional History of England since the Accession of George III. 1760-1871." In two volumes. New York: W. J. Widdleton, 1878.

HE subject of the present volumes is one of great interest to the student of political science, and we doubt if any writer could have been found more competent in every way to discuss it than Mr. May. His Constitutional History of England displayed his ability to deal with first principles in a philosophical manner, and to treat living questions with fairness and impartiality, while holding definite opinions of his own. The method pursued in the present work is best stated in his own words. He says:

"Taking Democracy in all its aspects as my theme I have illustrated it from the history of those States in which its incidents have been most remarkable. I have investigated the causes of the political development of nations. I have studied the inner life of many republics in ancient and modern times, and I have followed the most memorable revolutions and the greatest national struggles for civil and religious liberty to be found in the annals of European monarchies. While passing lightly over the beaten track of English Constitutional history I have dwelt upon the periods in which democracy has taken a prominent place."

After an introduction wherein the moral, social and physical causes of freedom are considered, a chapter is devoted to political conditions and influences in the East. Democracy in Greece and in Rome is discussed in four chapters. A chapter is given to the dark ages and the revival, and one to the Italian Republics. The last two chapters of the first volume treat concerning Switzerland. The second volume opens with two chapters upon The Netherlands. Next follows France, embracing five chapters. The remaining part of volume two is given to England. The subject is, of course, treated from an English stand-point, and the author thinks that the condition of society in England is in every respect superior to that in other European communities. In comparing the result of the influence of democracy in England with what the same influence has effected in France he says:

"A society so strong, so varied and so composite assures the stability of our institutions and the equitable policy of our laws. In France the disorganization of society has been the main cause of revolutions. In England its sound condition has been the foundation of political progress, and constitutional safety."

The volumes ought to be read by every student of history.

SELDEN'S NOTES, SECOND EDITION.

Notes of cases decided in the Court of Appeals of the State of New York. To which are added a table of cases and index. By Henry B. Selden, State reporter. Second edition. Albany: W. C. Little & Co., 1878.

This is the second edition of a volume well known to the profession twenty years ago, though it has not of late years been so frequently met with. It consists of notes of cases decided by the Court of Appeals, made by Mr. Selden while State reporter. Very many of the cases referred to are reported in full in the New York Reports or elsewhere, but many of them are accessible to the public in this form only. Consequently a professional library, in order to contain a full collection of cases decided by our court of last resort, should embrace this volume. Some of the cases given only

here are upon points of interest, usually in practice. The index is fair, and the book is well printed and bound.

BENCH AND BAR.

AUGUSTUS C. HAND, formerly a Justice of the Supreme Court of this State, died at his residence in Elizabethtown, N. Y., on the 8th inst. He was born in Shoreham, Vt., in 1806. He studied for his profession partly in this State and partly in Connecticut, and shortly after his admission to the bar settled in Elizabethtown. He was a Representative in Congress from 1839 to 1841, and a member of the State Senate from 1845 to 1848. From 1848 to 1856 he was a Justice of the Supreme Court. Since then he has devoted himself exclusively to the practice of his profession. He was considered one of the leading lawyers of the State, and he leaves three sons who have each achieved a high position at the bar.

Paolo Frederigo Sclopis di Solerano, an eminent Italian jurist, died on the 8th inst. at Turin. He was born in 1798, and received his diploma as doctor at law when twenty years of age. He presided at the Geneva Court of Arbitration, and achieved great credit for his conduct on that occasion. He was considered as one of the foremost international lawyers of the age.

CORRESPONDENCE.

REORGANIZATION OF THE FEDERAL COURTS.

To the Editor of the Albany Law Journal:

SIR—I venture to propose another scheme for the expedition of business in the Federal courts.

Let the Circuits be reorganized, so that there shall be twelve instead of nine, with a resident Circuit judge, and, if need be in any Circuit, more than one in each. The Supreme Court should be enlarged correspondingly by the addition of three judges, and would then sit in three divisions of four judges each. A cause will in the first instance be argued before one of these divisions, with the privilege of a further hearing, in proper cases, before the whole court.

By these means the present calendar of the Supreme Court will be cleared in a year; and thereafter causes can be heard as soon as they are ready for argument. The terms of the court may be shortened after the first year, and the judges will have more time to devote to the Circuit Courts. Judge Dillon's just complaint of the impossibility of giving adequate consideration to all the cases that come before the judges of these courts will no longer be a reproach to our judicial system, and suitors will not be forced to wait several years after a trial in the District Court before the final determination of their causes in the Supreme Court.

NEW YORK, March 4th, 1878.

G. Z.

THE LIABILITY OF A SURETY'S ESTATE.

To the Editor of the Albany Law Journal:

SIR—Were I a poet, as your Rochester correspondent—"F. A. W."—proves himself to be by his happy paraphrase from Goldsmith in your issue of the 2d inst., I might construct another one founded on Moore's famous—

"Oh, ever thus since childhood's hour," etc., which his ideal "surety" would surely feel inclined to utter did he know the unpleasant truth concerning his liability, the knowledge of which effectually destroys

the happy illusion occasioned by reading *Risley v. Brown*, 67 N. Y. 160.

Section 758 (amended 1877) of the N. Y. Code of Civil Procedure overrules the above case, which formerly appeared in 14 Alb. L. J. 359. Messrs. Throop and Bliss both note this fact in their respective editions of the Code. As Mr. Sickels fails to do so in his last volume, but prints the report of the case without comment, it is naturally to be feared that others than "F. A. W.'s" "Surety" may find themselves misled, to their great inconvenience and disgust.

Yours respectfully,

NEW YORK, March 8th, 1878.

J. M. L., JR.

NOTES.

WE have received analyses of Judge Cooley's lectures on Constitutional Law, delivered in the Johns Hopkins University. The first lecture was on "The Accretion of Federal Power," and the other four were devoted to a discussion of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution. — A brochure has been issued containing the resolutions adopted by the Washington bar on the death of the late Geo. W. Paschal, and the address of Mr. Riddle on presenting the resolutions. Mr. Riddle's remarks are unusually interesting. — Mr. F. H. Norton has entered upon an undertaking in this city which, properly conducted, ought to be of service to the profession. He purposes to furnish to lawyers any information that they may desire from the State law library; to examine questions submitted, prepare briefs, procure copies of cases, etc. Mr. Norton is well recommended.

Mr. Seymour D. Thompson, who has heretofore been the editor in chief of the *Central Law Journal*, has discontinued his connection with that paper. Mr. John D. Lawson, who has for some time been associate editor, succeeds Mr. Thompson. The *Journal* has, under Mr. Thompson's charge, acquired a high position in legal journalism, which we believe will be fully sustained by his successor.

The *Real Estate Journal*, Mansfield, Ohio, says: "The ALBANY LAW JOURNAL is a journal of rare worth, embodying comprehensive reports of the most important decisions rendered in the Supreme Courts of England and the United States, including an abstract of all the decisions of the Supreme Court of the United States, New York Court of Appeals and English Court of Appeals, together with a summary of legal intelligence and copious comments of questions of particular interest. It is received with popular favor and warmly indorsed by the most eminent men of the profession." — A former subscriber to the LAW JOURNAL who discontinued at the beginning of the year writes from Cleveland, under date of March 4th: "I find I miss the ALBANY LAW JOURNAL too much to longer be without it. Send it to me again together with the back numbers. I was led to believe that one of our western law journals would be more useful to me, but I find that such is not the fact."

The Rev. H. J. Dodwell, the assailant of the Master of the Rolls, is, says the *Solicitors' Journal*, the ex-chaplain of a workhouse in Sussex, who was dismissed from his position by the guardians, and presented a petition of right with a view to his being reinstated, which was summarily dismissed by Vice-Chancellor

Malins and the Court of Appeal. He applied a few days ago at Bow-street Police Office for a summons against Lord Justice James and other judges for calling him "a perjured man." Before making his way to the Rolls Court the morning of the attack he called at the Registrar's Office, inquiring for the chambers of the registrar who had charge of an order dismissing an application made by Dodwell to the Appeal Court; but, perhaps happily for the learned registrar, he had not yet arrived, and Dodwell left before the hour for the commencement of business.

The March number of the *Scottish Law Magazine* contains several interesting articles. The first, on Stair and Argyle, records one or two incidents in the life of Viscount Stair, and the son of that Marquis of Argyle who was beheaded in 1681, which are unrecorded in the usual historical treatises. "On Certain Principles affecting the liabilities of Masters and Servants" is a continuation of an able discussion commenced in a former number. "Implied Entry" is a well written article upon a subject of considerable importance in Scotch law. The other essays are local or selected. The editorial departments are of somewhat less than usual interest. The notes of decisions of the Scotch courts are of only local value. The number, as a whole, is not quite up to the average.

That railway companies carry passengers' luggage as insurers may be considered as settled by *Macrow v. Great Western Railway Company*, L. R., 6 Q. B. 612, although the question has never been expressly decided by a Court of Appeal. But in *Talley v. Great Western Railway Company*, L. R., 6 C. P. 44, it was held by the Court of Common Pleas that if luggage be placed in a railway carriage with the passenger, with his assent, and he retains control over it, the company's liability as insurer ceases, and they become liable for negligence only; and this view of the law has been affirmed by the Court of Appeal in the recent case of *Berghelm v. Great Eastern Railway Company*. The facts were these: The plaintiff went with his wife to the Liverpool-street station of the defendants' railway, intending to go to Yarmouth, and the bag which was the subject of the action was placed in a first-class carriage in which the plaintiff and his wife were to travel, with his assent. He asked a porter whether the bag would be safe while he and his wife went to luncheon, and was told that it would be. The travelers, having lunched, returned to the carriage, and just as the train was starting discovered that the bag was lost. The jury found that the porter had acted within the scope of his employment in putting the bag into the carriage, that neither the plaintiff nor the company had been guilty of negligence, and Mr. Justice Manisty directed a verdict for the company. The plaintiff appealed from this ruling, and the Court of Appeal took time to consider. Lord Justice Cotton, in delivering judgment for the company, appears to have rightly distinguished the case of a passenger retaining control of his luggage and the ordinary case of luggage being consigned to a van. But the strong point for the plaintiff appears to have been, that the porter promised him that his bag would be safe. With regard to this, however, it seems that the porter would have no authority to give such a promise, so that the judgment appears to be quite correct. The case is rather an important one, not so much from the difficulty of the question of law involved, as from the frequency with which railway passengers absolve the companies from their liability as insurers. And there are few lines upon which a railway porter will not, on the slightest hint from a passenger, place luggage in a railway carriage. — *Law Times*.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, MARCH 23, 1878.

CURRENT TOPICS.

THE Court of Appeals of this State resumed its sitting on the 18th inst. On the 19th it handed down several decisions, among which was a judgment of affirmance in the case of *Lange v. Benedict*, wherein the question of the liability of a judge for false imprisonment under an erroneous sentence was involved. The court also made an order amending the third one of the rules regulating the admission of attorneys, so that an applicant for admission who holds a degree in law from any law school out of the State which maintains a course of instruction covering at least two academic years of not less than eight months each, and gives its degrees only after public examination, is to be allowed the time spent in such law school in lieu of an equal period of clerkship in the office of a practicing attorney in this State. This amendment is a very proper one as it permits students who desire to do so to pursue a portion of their educational course at institutions of standing outside of the State. As the rules stood before the amendment, graduates of the Harvard law school, where the training is certainly not less rigid and thorough than in the best of our local institutions, were required to spend as many years in fitting themselves for practice as beginners, a manifestly unfair requirement. The rules for admission to the bar are now about what they ought to be, and we trust they will receive no legislative tinkering in behalf of any interest.

The message of Governor Robinson in returning without his approval the bill enacting the last nine chapters of the Code of Civil Procedure, presents with great force the objections which have been raised to the completed work of the revision commissioners. The first point he raises is that the bill was not constitutionally passed, in that the reading of it before passage was dispensed with in the Senate. He claims that the "last reading" of a bill, referred to in section 15 of article 8 of the Constitution, is not satisfied by a reading of the title merely, but that the entire bill must be read unless that formality is dispensed with by unanimous consent. The second ground is that the last nine chapters are not

needed to render the system of procedure complete, this being in answer to the claim made by the friends of the new Code that the proposed law is necessary to give us a harmonious, consistent procedure. The necessity of amendment admitted by those who favor the Code is made a further ground of objection, as it shows that the friends of the law do not believe that it is what it ought to be. Numerous specific objections are also raised, the principal of which are that the proposed law legalizes champerty; that it furnishes a long and clumsy substitute for the action of replevin; that it increases the grounds for which an arrest can be made, and renders them uncertain; that it unduly enlarges the powers of surrogates; that it substantially destroys the present mode of recovering possession of land by summary proceedings. The governor further says, that the act, while professing to be a code of procedure, and to deal only with the maintenance of rights, constantly oversteps its proposed limits and deals with the law of rights itself. As instances of this he refers to the incorporation therein of the civil damage act, and a change made in that act so as to give a person suffering damages from a breach of contract, resulting from intoxication, a right of action against the vendor of the liquor causing such intoxication, and to the abrogation of chapter 88 of the laws of the present session, authorizing an arrest upon a judgment for wages of females employed in the city of New York. The changes as to costs and allowances and as to fees of referees are animadverted upon, as are also the verbal alterations where no change of meaning is intended. In conclusion, the governor recommends the repeal of the thirteen chapters already in force.

Mr. Throop has published a review of the objections raised by the governor, wherein he takes issue with him upon the ground of the constitutionality of the passage of the bill. He claims that constitutional provisions as to legislation not in the form of a condition, and not accompanied by a declaration that a failure to observe them shall make the attempted legislation void, are merely directory, and supports his claim by reference to the cases of *Miller v. State*, 8 Ohio (N. S.), 483; *Pim v. Nicholson*, 6 id. 178, and *People v. Supervisors of Chenango*, 8 N. Y. 317, 328. The various specific objections of the governor are well met, and the insertion of the civil damage law with the alleged change justified. The abrogation of the "working woman's act" is shown not to be effected as alleged, inasmuch as by section 3317 of the proposed Code it is provided that "for the purpose of determining the effect of this act upon other acts," etc., the act is deemed to have been enacted on the second day of June, 1876. The abolition of limitations upon allowances and referees' fees he does

not consider a sufficient reason why the bill should be vetoed. The points made by Mr. Throop are very strong ones. The new Code has been submitted to the people and the profession for many months, and the result is that an overwhelming majority of the legislature has approved of it, and to judge from the petitions presented, a very large proportion of the profession is of the same way of thinking. That there are defects in the provisions of the proposed act, and infelicities of expression, no one denies, but these do not seem to be sufficient to warrant the legislature in changing its settled purpose to bring into a harmonious condition the statute law of the State.

In the legislature during the past week the following bills of interest to the profession were introduced: One providing that railroad receivers shall be subject in the conduct of their roads to the same liabilities as the corporation itself would have been, the liabilities to be paid out of the earnings, and one providing for the repeal of the thirteen chapters of the Code of Civil Procedure now in force. A resolution was introduced in the assembly, proposing an amendment to the Constitution, abolishing the New York Court of Common Pleas and the New York Superior Court, and transferring the jurisdiction of such courts to the Supreme Court. A bill providing for the taking of testimony of convict witnesses was vetoed by the governor.

The case of *Lange v. Benedict*, decided by the Court of Appeals on the 19th inst., an abstract of which appears in another part of the present number, finally determines a question of very great importance to judicial officers and litigants. The plaintiff in this case, a gentleman of respectable standing, was indicted for embezzling mail bags, a somewhat venal offense, and tried at a court at which defendant presided. He was convicted, the jury assessing the value of the bags embezzled at less than \$25. The penalty prescribed by statute in such case was \$200 fine or one year imprisonment. Defendant, however, sentenced him to both the fine and imprisonment. He paid his fine and applied by writ of *habeas corpus* for his release from imprisonment. The writ was returnable before defendant, who was yet holding the term of the court at which the conviction was had. Upon the return defendant set aside the former sentence and re-sentenced plaintiff to one year's imprisonment. This act was declared by the United States Supreme Court to have been without authority of law (*Ex Parte Lange*, 18 Wall. 168), and plaintiff was released. Thereafter he brought this action against defendant for damages by reason of his false imprisonment, setting up the facts of the case, and that

the act of the defendant was willful and without authority. A demurrer was interposed on the ground that the complaint did not state facts sufficient to constitute a cause of action, it being claimed that defendant was not liable for the consequences of any act done by him as a judge of a court of general jurisdiction. The demurrer was overruled at Special Term (11 Alb. L. J. 22), but was sustained at General Term (14 Alb. L. J. 818). The Court of Appeals have affirmed the judgment of the General Term, and have thereby asserted the principle that a judge is irresponsible civilly for almost every act he may do while on the bench. Perhaps such a rule is necessary to secure independence to the judiciary, but it would seem that a person injured by a gross abuse of judicial power, such as the act committed by defendant was, should not be remediless.

A law has been passed in California adopting the cumulative plan of voting in elections in private corporations. A stockholder for each share of stock may cast one vote for each director or manager to be elected, or may give as many votes as there are directors for one person or may distribute the votes among several. The object of this law is to prevent the entire control of a corporation passing into the hands of a few men who may temporarily hold the stock or proxies to vote thereon. As a means of securing minority representation, and thus protecting the interests of small shareholders, it seems to be well fitted, and we trust that a similar measure may some time be tried here. It is also applicable to corporations having no capital stock.

NOTES OF CASES.

IN Hill v. City of Boston, 122 Mass. 844, plaintiff brought action to recover for a personal injury sustained by him from a defective staircase in a public school-house belonging to the defendant, at which he was attending as a pupil. The duty of providing the school-house properly furnished was imposed upon defendant by a general law. The court held that plaintiff could not recover upon the ground that no private action, unless authorized by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage. The question has most commonly arisen in actions for defects in highways and bridges by reason of which persons passing over them have received injuries. And, in the absence of statute, no private action lies against a public or municipal corporation for a neglect to repair whereby injury results. See *Williams' case*, 5 Rep. 72 b, 73 a.

Anonymous, Moore, 180, pl. 321; *Russell v. Men of Devon*, 2 T. R. 667; *McKennon v. Penon*, 8 Exch. 319; *Gibson v. Mayor of Preston*, L. R., 5 Q. B. 218; *Bartlett v. Crozier*, 17 Johns. 439, 454; *Freeholders of Sussex v. Strader*, 8 Harrison, 108; *West v. Brockport*, 16 N. Y. 161, 167, note; *Thomas v. Sorrell*, Vaugh. 830. In *Hamilton Comrs. v. Mighels*, 7 Ohio St. 109, a county was held not liable to a witness who, while attending court, was, through the negligent construction of the court-house, thrown into the cellar and injured. In *Eastman v. Meredith*, 86 N. H. 284, a voter attending a town meeting in the town house was injured by the floor, which was negligently constructed, giving way, and the court held that, assuming it to be the duty of the town to provide a safe and suitable place for a town meeting, plaintiff had no right of action. *Bigelow v. Randolph*, 14 Gray, 353, was a case, like the principal one, where a scholar attending school was injured by falling into a dangerous excavation in the school-house yard, negligently left unguarded, and it was held that no action would lie. But where by a wrongful act of a municipal corporation in performing its duty a direct injury is done to plaintiff's property beyond the lawful limits of the public work, the corporation is liable. *Haskell v. New Bedford*, 108 Mass. 208; *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765; *Brownlow v. Met. Bd. of Works*, 18 id. 768, and 16 id. 546. See, however, as in conflict with the principal case, *Pittsburgh v. Greer*, 22 Penn. St. 54; *Humphrey v. Armstrong*, 56 id. 204; *County Commrs. v. Duckett*, 20 Md. 468; *Barnes v. Dist. of Columbia*, 91 U. S. 540; *Nebraska City v. Campbell*, 2 Black, 590; *Chicago v. Robins*, id. 418.

In the case of *West Philadelphia Pass. R. R. Co. v. Whipple*, 5 Weekly Not. Cas. 68, decided by the Supreme Court of Pennsylvania on the 28th of January last, a point of some interest to those who ride in street cars was passed upon. A woman became a passenger on a crowded street car, and being unable to obtain a seat, held the hands of a friend, testifying as an excuse for not holding on to a hand strap within her reach, provided for the use of standing passengers, that it was inconvenient and would have disarranged her dress. She was thrown down and injured by the sudden stopping of the car by a wheel-rest at the terminus of the route. The court, at trial, submitted to the jury the questions of negligence and contributory negligence, and instructed them that if the plaintiff could not conveniently reach the hand-strap, but took hold of the hands of a fellow passenger, it was for the jury to judge from all the evidence whether or not this was sufficient precaution, and all that a prudent woman would do under the circumstances. The Supreme Court held that the instruction was not

erroneous, saying that, though, "Possibly a woman may be so fantastically and foolishly hooped, wired, and pinned up, as to deprive her of her natural power to help herself; but if so, the question is one of fact and not of law, and so we incline to leave it, instead of imposing upon our brethren below the difficult duty of prying into the artificial stays of the plaintiff's case." The conclusion reached by the court is the reasonable one, for it would hardly do to say, as a matter of law, that to dress in accordance with the ordinary habits and usages of society would constitute such negligence as would relieve a carrier of passengers from liability for injury resulting from its negligence, because the passenger was unable, on account of her dress, to protect herself to the utmost extent.

In *Blackwell v. Old Colony Railroad Co.*, 122 Mass. 1, it is held that no action lies to recover damages for the obstruction of a navigable stream by the building of a bridge across the same, whereby the owner of a parcel of land and a wharf above the bridge is prevented from coming to the wharf from the sea in vessels, although his wharf is the only one above the bridge used for business purposes and he is thereby compelled to abandon the use of his wharf for such purposes and to transport his goods at an enhanced expense. The court says that the case has no analogy to those in which an obstruction on a navigable stream sets back the water upon the plaintiff's land, or, being against the front of his land, entirely cuts off his access to the stream and thereby causes a direct and peculiar injury to his estate, or in which the carrying on of an offensive trade creates a nuisance to the plaintiff. See, to the same effect, *Blood v. Nashua & Lowell R. R. Co.*, 2 Gray, 137, where a bridge was built across a stream in such a manner as to obstruct it, plaintiff owning a saw-mill above the bridge, and it was held that he could not recover damages because it was more difficult and expensive to float logs to his mill, that being an injury suffered by him in common with the public, but he could recover for a setting back of the water upon his mills, that being an inconvenience special and peculiar to himself. In *Brighman v. Fairhaven*, 7 Gray, 271, the obstruction was also a bridge across a navigable stream, and the same conclusion was reached in an action by a landowner bordering on the stream above the bridge. In *Fall River Iron Works Co. v. Old Colony, etc., R. R. Co.*, 5 Allen, 221, it was held that if the public nuisance complained of merely caused an obstruction to navigation, the plaintiffs had no private remedy, though the injury sustained by them was by reason of their proximity to the nuisance much greater in degree than that sustained by the others. See, also, *Lyon v. Fishmongers Co.*, L. R., 1 App. Cas. 662.

LEGAL EFFECTS OF ADULTERY BY AN INSANE HUSBAND OR WIFE.*

MARRIAGE when valid constituting a status, as well as a civil contract at common law, the question of whether adultery committed by an insane party is or not a legal cause for divorce has been discussed in several cases in this country, but unfortunately with great contrariety of opinion. The subject is somewhat novel even in so old a jurisprudence as that of England, there being but two reported cases, the first of which was virtually not decided at all, the court accepting for its guidance a suggestion from an unreported case. In our younger jurisprudence we already have five cases reported, in three of which the court stayed the proceedings. Of the remaining two the court in the one instance granted dissolution, in the other remarked that it might, if the proceedings were continued and the evidence established the charge contained in the libel.

In our earliest case, that of *Broadstreet v. Broadstreet*, 7 Mass. 473, A. D. 1811, the libel charged adultery in the wife on a day certain, and prayed a divorce from the bonds of matrimony. But it appearing that the wife was insane at the time and had ever since continued so, the libel was dismissed. In *Mansfield v. Mansfield*, 13 Mass. 412, A. D. 1816, a libel was filed by the wife for a divorce, upon the ground of adultery. The husband not appearing, his default was entered, but it being suggested to the court that the husband, since the fact alleged, had become insane, the default was discharged in order that a guardian might be appointed for him, the court remarking that further proceedings might then be had; and if sufficient cause appeared, a divorce might be decreed. In *Matchin v. Matchin*, 6 Barr. 332, Gibson, C. J., after an elaborate discussion of the superior ill effects of the wife's adultery upon society, over those of the husband, took the broad ground that the wife's insanity would not be a defense to a libel for adultery, for the reason that its effects might be to impose a spurious offspring upon the husband, and that consequently the husband was entitled to a divorce. At the same time he held that such insanity would be a valid defense to an indictment for the adultery. The first part of his judgment is thus made to rest on grounds of public policy alone; the second on that natural equity every where applied to the acts of the insane, when criminally adjudicated.

In *Nichols v. Nichols*, 31 Vt. 328, which arose upon a libel for divorce because of adultery committed by a wife whose insanity at the time was admitted, and a guardian *ad litem* appointed to an-

swer for her, Chief Justice Redfield took occasion to comment in most severe terms upon the principle laid down in *Matchin v. Matchin*, remarking that he was surprised that such an opinion should ever have found admission into the reports, and should be shocked at the prospect that it could ever gain general countenance in the American Republic. Accordingly he held that "general insanity is a full defense for all acts which by the statute are grounds of granting divorce. In regard to severity and desertion, there could be no question. There is wanting the consenting will, which is indispensable to give the acts the quality, either of severity or desertion. The case is the same in regard to acts of sexual intercourse with one not the husband. If done by force or fraud, no one could pretend that it formed any ground of dissolving the bonds of matrimony. And insanity is even more an excuse than either force or fraud. It not only is not the act of a responsible agent, but in some sense it might be fairly regarded as superinduced by the consent or connivance of the husband, since he has the right, and is bound in duty to restrain the wife, when bereft of reason and the power of self-control, from the commission of all unlawful acts, both to herself and others."

This is undoubtedly sound reasoning, assuming the husband to have known of the wife's insanity, and to have neglected to exercise a diligent supervision over her conduct. But suppose him absent by business engagements for long periods of time from home, as in the case of a naval officer or commercial traveler, and his wife, unbeknown to him, becoming insane and committing adultery, could negligence or connivance be imputed to him? Marriage does not produce omniscience. How then can a man be held culpable for not foreknowing and preventing an act of sexual intercourse committed by his wife when at a distance from him, without his connivance in that act being first proved? It is easy to speak of the husband's duty in such a case, but circumstances may show that he was powerless to exercise his authority, and if so, then he should be absolved from responsibility, since *impossibilia nulla fit obligatio*.

It will be perceived that the court in the above case, as in *Broadstreet v. Broadstreet*, before cited, appears to apply the analogy of crime to the charge of adultery alleged against an insane wife, and draws thence the natural inference that since she is *non compos* and cannot in law commit a crime, she cannot by parity of reason commit legal adultery. And much the same view is taken in *Wray v. Wray*, 19 Ala. 522, where it was again held that adultery committed by an insane wife is no ground for a divorce. But is it necessary to assume that a lunatic cannot commit a tort because he cannot commit a crime, when, as is well settled, the ingredient of

*From advance sheets of Prof. Ordonaux's "Commentary on the Lunacy Laws."

will or intention is not indispensable to the establishment of a tort, and consequently need not be proved? Thus an infant of tender years is responsible in damages for torts to property or the person. *Bullock v. Babcock*, 8 Wend. 891. So is a lunatic, for in either case the *quo animo* is immaterial. If, therefore, we divest ourselves of all idea of crime as associated with adultery, when committed by a lunatic, and treat the question as a tort in general, whether committed by a sane or insane person, we shall be forced to the conclusion that upon principle and in analogy to the practice of courts of law and equity, there is no reason why a lunatic should not be a respondent in a suit for divorce. Marriage is a civil contract, and adultery a breach of it, and at law a lunatic is liable on a contract or for a tort. In *Parnell v. Parnell* 2 Hagg. Cons. R. 170, a lunatic husband was permitted to file a libel against his wife for adultery. Suppose there had been recrimination on her part, could she have been estopped from prosecuting her libel against him on account of his insanity?"

In *Bawden v. Bawden*, 2 Sw. & Tr. 417, the court refused to allow a husband to proceed with a petition against his wife, who was a lunatic, for the dissolution of their marriage on the ground of adultery alleged to have been committed by her previous to her lunacy. In this, the first reported case of its kind in England, the court could find no precedent by which to guide itself, but an unreported decision in the court of Arches to the effect that a suit for divorce *a mensa et thoro* could not be maintained against a lunatic. In *Mordaunt v. Mordaunt*, 89 L. J. Prob. & Mat. 57, which arose in 1870, and is the second reported English case, the Judge Ordinary made an order upon the petition and evidence of the respondent's insanity, staying further proceedings until she should recover. Upon appeal to the full court, there was a division of opinion upon the question, the Judge Ordinary and one judge holding that the insanity of the respondent, so long as it should continue, would be a bar to the suit, and therefore that the order ought to be affirmed, while the Chief Baron, dissenting, held that the court had power only to stay the proceedings so long as there might be a reasonable probability that the respondent would recover. But that when her recovery became hopeless, the petitioner ought to be allowed to proceed, and therefore that the order ought to be rescinded.

Despite the irreconcilable conflict of opinions represented by the foregoing authorities, one fact remains patent and uncontradicted, and that is that in all the above cases a breach of the civil contract of marriage was admitted to have taken place; the legal effect of which was made to rest upon the decision of the question whether the status of the person whose misconduct or misfortune had caused

injury to another, could be a complete defense in a suit for a dissolution of the contract.

Now, it is a well-settled principle that, whenever any tort is committed and damage has ensued thereby, the question of discretion or intention cannot be raised in defense of the action, but only in mitigation of damages, for *ubi jus ibi remedium*. And it seems but just that the person whose misconduct or misfortune has caused an injury to another should bear the loss, or make reparation. The fact that the injured party is the husband of the wrongdoer does not, as we know, destroy his right of action in the case of adultery committed by a sane wife. Upon what principle should it then, in the case of an insane wife? Is it because she cannot make answer while in that state to the libel filed against her? If so, then a stay of proceedings might be granted, but the suit itself would not thereby abate. The wrong done the husband is as great in one case as in the other, for the insanity of the wife cannot in any sense destroy the effects of her adultery. The breach of contract is complete without regard to the *quo animo*. Nothing on her part can efface it.

Again, it should be remembered that, beside the wrongfulness of the act *per se*, she may in addition bear him a spurious progeny to share with his lawful heirs in his estate. Adultery is thus seen to be both *damnum et injuria*, a legal wrong coupled with a damage. It is a breach of the contract and therefore a tort done to the husband and to his progeny. It would seem, therefore, that equity could hardly refuse some remedy to a husband thus wronged; nor can that remedy justly be any thing less than full protection to himself against the risks of a spurious progeny, to be imposed upon him by the legitimization which a continuance of the marriage state would impart to any such offspring. It is plain that the equities in such a case are mostly on his side, and when, consequently, without fraud, or connivance on his part with a third person to debauch his insane wife for the express purpose of creating a case of divorce against her, she of her own disposition invites or consents to improper advances terminating in adultery, it would be against public policy, and a great wrong to the family to deny him and them the protection against spurious offspring which alone could be secured by a separation.

If marriage, however, were purely a civil contract, then its breach by either party would justify a dissolution. But it is recognized in all Christian countries as something more than a contract, and by the *jus gentium* it is also constituted a special status. Hence it is doubtful whether any court could, by mere implication of power, and in the absence of special legislative permission, decree any higher remedy for adultery committed by an insane wife, than a judicial separation *a mensa et thoro*. A dis-

solution of a marriage once valid is a judicial act which must rest upon the authority granted by the law-making power. It can be applied only to those who intentionally and therefore criminally violate the marriage contract. For a divorce *a vinculo*, although a civil act, carries with it a criminal effect, since it is in the nature of a personal penalty affixed to a personal wrong. But since a lunatic has no legal capacity to commit an act involving personal punishment, he can do nothing which carries with it a criminal effect. And inasmuch also as insanity is not a ground for divorce at common law, any more than any other disease, so wrongful acts committed by one afflicted with it are equally impotent as causes justifying a dissolution of the marriage contract.

In cases, however, where a libel for divorce is filed against a lunatic wife on the ground of adultery, a stay of proceedings should be granted, as was done in *Mordaunt v. Mordaunt*, in order to give the respondent sufficient time for recovery, and thus to make a defense to the charge. From the very nature of the offense, the respondent must be the one most able to meet such a charge, and thus to instruct counsel in her defense. And it is only when her disease has proved itself incurable from lapse of time, that a decree should be entered for a limited divorce, since that does not disturb the status absolutely, but only suspends its operation, meanwhile securing maintenance for the wife, protection to the husband, and in case of recovery, giving opportunity for reconciliation, if the parties themselves should see fit to apply for a revocation of the decree under the statute.

That the adult human being is constantly subjected to the appetite for self-preservation and procreation are facts universally recognized. They are among the imperative instincts of our nature and must not, therefore, be criticised under standards of conduct applicable to purely intellectual acts. While reason may repress outward demonstrations of salacity, it does not necessarily extinguish thereby the sexual æstrum underlying it. Being the expression of a general law operating throughout all animal organisms, every human being occasionally experiences the organic appetite now under discussion.

In the insane, with the weakening of the intellectual powers there frequently goes an increase of the animal propensities, which then may attain to the most exceptional and degrading proportions. But whether in the sane, who can control themselves by an effort of the will, or in the insane, who cannot, the sexual appetite in either class is in the nature of a febrile delirium, which may easily pass into an uncontrollable impulse.

In many cases, therefore, it must be conceded that

an insane person may become a demandant for sexual gratification, not because he or she are insane, but because they are human beings under duress to a common appetite, and have at the same time lost their powers of self-control. The appetite may or may not be increased by the insanity, but the power of controlling or regulating it unquestionably is. Under such circumstances adultery might be committed with full knowledge of the act and of its consequences by an insane person, and it could not be said to be the act of a mind incapable of assenting, or of a mind deprived of the power of willing, since it might exhibit both in the act committed. It would follow from this that where any woman is not a judicially declared lunatic, or in the custody of an asylum, or where there are no conspicuous proofs or even indications of insanity, and the other party is ignorant of the mental condition, an act of sexual intercourse, committed with an insane woman without force or fraud, is not legally a rape. Hence, where a man had carnal connection with a woman of mature age, good size and strength, but who was shown by the testimony to be in a state of dementia, not idiotic but approaching to it, and it appeared that there was neither force nor fraud used by him, it was held by the Supreme Court of Michigan that this did not constitute a rape. *Crowell v. People*, 18 Mich. 427.

The word "will," as there remarked by Judge Cooley, "when employed in defining the crime of rape, is not construed as implying the faculty of mind by which an intelligent choice is made between objects, but rather as synonymous with inclination or desire, and in that sense it is used with propriety in reference to persons of unsound mind; and similarly, in *State v. Crow*, Western L. J., vol. 10, pp. 501-5, the court observed, that "both idiots and insane persons were to be considered as possessed of a will, so that it might be legally and metaphysically said that a carnal knowledge might be had of their person forcibly, and against their will. And if so, then they might by non-resistance, and where neither force nor fraud was employed against them, give a voluntary assent to an act of sexual congress, and thus deprive it of the character of a rape. In other words, they might desire the act and help to consummate it. It might be said then that to constitute rape, not only should the incapacity to assent be shown, but there must be some evidence also to disprove assent." This would seem to be the English rule as laid down in *Reg. v. Fletcher*, Bell's Cr. Ca. 63, which is in full accord with the judgment in *Crowell v. People*, before cited. These decisions would tend to establish the principle that a lunatic may consent to an act of sexual congress where neither fraud nor force are employed.

WHAT IS DUE PROCESS OF LAW.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

DAVIDSON, Plaintiff in Error, v. BOARD OF ADMINISTRATORS OF NEW ORLEANS AND CITY OF NEW ORLEANS.

An assessment of the real estate of plaintiff in error in the city of New Orleans for draining the swamps of that city was related in the State courts and is brought here by writ of error, on the ground that the proceeding deprives the owner of his property without due process of law.

1. The origin and history of this provision of the Constitution considered as found in Magna Charta and in the fifth and fourteenth amendments to the Constitution of the United States.
2. The difficulty and the danger of attempting an authoritative definition of what it is for a State to deprive a person of life, liberty, or property without due process of law within the meaning of the fourteenth amendment suggested, and the better mode held to be to arrive at a sound definition by the annunciation of the principles which govern each case as it arises.
3. It has already been decided in this court that due process of law does not require that the assertion of the rights of the public against the individual, or the imposition of burdens upon his property for the public use, should in all cases be done by a resort to the courts of justice. (*Murray v. Hoboken Co.*, 18 How., and *McMillan v. Anderson*, at this term.)
4. In the present case we hold that when such a burden or the fixing of a tax or assessment is by the statute of the State required to be submitted to a court of justice before it becomes effectual, with notice to the owners and the right on their part to appear and contest the assessment, this is due process of law within the meaning of the Constitution.
5. Neither the corporate agency by which the work is done, the excessive price allowed for the work by statute, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the Federal Constitution control the State authorities.

IN error to the Supreme Court of the State of Louisiana.

The facts appear in the opinion.

Mr. Justice MILLER delivered the opinion of the court.

On the 7th day of December, 1871, the petition of the City of New Orleans and the administrators thereof was filed in the Seventh District Court for the Parish of Orleans, setting forth an assessment on certain real estate, made under the statutes of Louisiana, for draining the swamp lands within the parishes of Carroll and Orleans; and asking that the assessment should be homologated by the judgment of the court. The estate of John Davidson was assessed for various parcels in different places for about \$50,000. The plaintiff in error, as widow and testamentary executrix of John Davidson, appeared in that court and filed exceptions to the assessment, and the court refused the order of homologation and set aside the entire assessment, with leave to the plaintiffs to present a new tableau.

On appeal from this decree the Supreme Court of Louisiana reversed it, and ordered the dismissal of the oppositions, and decreed that the assessment roll presented be approved and homologated, and that the approval and homologation so ordered should operate as a judgment against the property described in the assessment roll, and also against the owner or owners thereof. Mrs. Davidson then sued out the writ of error by which this judgment is now brought before us for review.

The objections raised in the State courts to the assessment were numerous and varied, including con-

stitutional objections to the statute under which the assessment was made, and alleged departures from the requirements of the statute itself. And although counsel for the plaintiff in error conceded, in the first sentence of their brief, that the only Federal question is whether the judgment is not in violation of that provision of the Constitution which declares that "no State shall deprive any person of life, liberty, or property without due process of law," the argument seems to suppose that this court can correct any other error which may be found in the record.

1. It is said that the Legislature had no right to organize a private corporation to do the work, and by statute to fix the price at which the work should be done.

2. That the price so fixed is exorbitant.

3. That there may be a surplus collected under the assessment beyond what is needed for the work, which must in that event go into the city treasury.

Can it be necessary to say that if the work was one which the State had authority to do, and to pay for it by assessments on the property interested, that on such questions of method and detail as these the exercise of the power is not regulated or controlled by the Constitution of the United States?

Of a similar character is the objection much insisted on, that under the statute the assessment is actually made before instead of after the work is done. As a question of wisdom — of judicious economy — it would seem better in this, as in other works which require the expenditure of large sums of money, to secure the means of payment before becoming involved in the enterprise; and if this is not due process of law it ought to be.

There are other objections urged by counsel which may be referred to hereafter, but we pause here to consider a moment the clause of the Constitution relied on by plaintiff in error. It is part of section one of the fourteenth amendment. The section consists of two sentences. The first defines citizenship of the States and of the United States. The next reads as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

The section was the subject of the very full and mature consideration of this court in the *Slaughter-House Cases*. In those cases an act of the Louisiana Legislature, which confided to a corporation created for the purpose, the exclusive right to erect and maintain a building for the slaughter of live animals within the city, was assailed as being in conflict with this section. The right of the State to use a private corporation and confer upon it the necessary powers to carry into effect sanitary regulations was affirmed, and the decision is applicable to a similar objection in the case now before us. The argument of counsel and the opinion of the court in those cases was mainly directed to that part of the section which related to the privileges and immunities of citizens, and as the court said in the opinion, the argument was not much pressed that the statute deprived the butchers of their property without due process of law. The court held that the provision was inapplicable to the case. 16 Wall. 36.

The prohibition against depriving the citizen or subject of his life, liberty, or property, without due process of law, is not new in the constitutional history of

the English race, it is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the fourteenth amendment in the year 1868.

The equivalent of the phrase "due process of law," according to Lord Coke, is found in the words "law of the land," in the great charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown. In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the States as further limitations upon the power of the Federal government, it is found in the fifth, in connection with other guarantees of personal rights of the same character. Among these are protection against prosecutions for crimes unless sanctioned by a grand jury, against being twice tried for the same offense, against the accused being compelled, in a criminal case, to testify against himself, and against taking private property for public use without just compensation.

Most of these provisions, including the one under consideration, either in terms or in substance, have been embodied in the Constitutions of the several States, and in one shape or another have been the subject of judicial construction.

It must be confessed, however, that the constitutional meaning or value of the phrase "due process of law," remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the Constitutions of the several States and of the United States.

It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by "law of the land" the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when in the year of grace 1868 there is placed in the Constitution of the United States a declaration that "no State shall deprive any person of life, liberty or property, without due process of law," can a State make any thing due process of law which by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail or has no application where the invasion of private rights is effected under the forms of State legislation. It seems to us that a statute which declared in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would, if effectual, depose A of his property without due process of law, within the meaning of the constitutional provision.

A most exhaustive judicial inquiry into the meaning of the words "due process of law," as found in the fifth amendment, resulted in the unanimous decision of this court that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts. *Murray v. Hoboken Land Co.*, 18 How. 272. That was an action of ejectment, in which both plaintiff and defendant asserted title under

Samuel Swartwout—the plaintiff by virtue of an execution, sale, and deed, made on a judgment obtained in the regular course of judicial proceedings against him, and the defendant by a seizure and sale by a marshal of the United States, made under a distress warrant issued by the solicitor of the treasury, under the act of Congress of May 20, 1820.

When an account against an officer who held public money had been adjusted by the proper auditing officer of the treasury, and the party was found indebted, and neglected or refused to pay, that statute authorized the solicitor of the treasury to issue a distress warrant to the marshal of the proper district, which from the date of its levy and the record thereof in the District Court, should be a lien on the property on which it was levied for the amount due, and made it the duty of the marshal to collect the amount by sale of said property or that of the sureties on his official bond. It was urged that these proceedings deprived Swartwout of his property without due process of law. "The objections," says the court, "raise the questions whether, under the Constitution of the United States, a collector of the customs, from whom a balance of account has been found to be due by accounting officers of the treasury, designated for that purpose by law, can be deprived of his liberty or property in order to enforce payment of that balance without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, secondly, whether the warrant in question was such due process of law?"

The court held that the power exercised was executive, and not judicial, and that the issue of the writ and proceedings under it were due process of law within the meaning of the Constitution. The history of the English mode of dealing with public debtors and enforcing its revenue laws is reviewed with the result of showing that the rights of the crown in these cases had always been enforced by summary remedies, without the aid of the usual course of judicial proceedings, though the latter were resorted to in the Exchequer Court when the officers of the government deemed it advisable. And it was held that such a course was due process of law within the meaning of that phrase as derived from our ancestors and found in our Constitution.

It is not a little remarkable that while this provision has been in the Constitution of the United States as a restraint upon the authority of the Federal government for nearly a century, and while during all that time the manner in which the powers of that government have been exercised has been watched with jealousy and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum of the more enlarged theater of public discussion. But while it has been a part of the Constitution as a restraint upon the power of the States only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact it would seem from the character of many of the cases before us and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test

of the decision of this court, the abstract opinions of every unsuccessful litigant in a State court, of the justice of the decision against him and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

But apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the Federal government or limitations imposed upon the States.

As contributing to some extent to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition as applicable to the case before us.

That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

It may violate some provision of the State Constitution against unequal taxation, but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that when the fourteenth amendment was adopted, the provision on that subject in immediate juxtaposition in the fifth amendment with the one we are construing was left out, and this was taken. It may possibly violate some of those principles of general constitutional law which, if we were sitting in review of a Circuit Court of the United States, as we were in the *Topeka Case*, 20 Wall. 655, we could take jurisdiction of. But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that where by the laws of the State the party aggrieved has, as regards the issues affecting his property, a fair trial in a court of justice, according to the modes of proceeding applicable to such case, that he has been deprived of that property without due process of law. This was clearly stated by this court, speaking by the Chief Justice, in the case of *Kennard v. Morgan*, 92 U. S. 480, and repeated in substance in the case of *McMillan v. Anderson*, at the present term.

This proposition covers the present case. Before the assessment could be collected or become effectual, the

statute required that the tableau of assessments should be filed in the proper District Court of the State, that personal service of notice with reasonable time to object should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with, and the party complaining here appeared and had a full and fair hearing in the court of the first instance, and afterward in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution.

One or two errors assigned and not mentioned in the earlier part of this opinion deserve a word or two.

It is said that plaintiff's property had previously been assessed for the same purpose and the assessment paid. If this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this or which forbids unequal taxation by the States. If the act under which the former assessment was made is relied on as a contract against further assessments for the same purpose, we concur with the Supreme Court of Louisiana in being unable to discover such a contract.

It is said that part of the property of plaintiff assessed is not benefited by the improvement. But this is a matter of detail with which this court cannot interfere if it were clearly so, but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds.

And lastly and most strongly it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, and some highly respectable authorities are cited to support the proposition, that while for such improvements as this a part or even the whole of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting in a State court, or perhaps in a Circuit Court of the United States, we might be called upon to decide it, but we are unable to see that any of the provisions of the Federal Constitution authorizes us to reverse the judgment of a State court on that question. It is not one which is involved in the phrase, "due process of law," and none other is called to our attention in the present case.

As there is no error in the judgment of the Supreme Court of Louisiana, of which this court has cognizance, it is affirmed.

Mr. Justice BRADLEY. In the conclusion and general tenor of the opinion just read, I concur. But I think it narrows the scope of inquiry as to what is due process of law more than it should do.

It seems to me that private property may be taken by a State without due process of law in other ways than by mere direct enactment or the want of a judicial proceeding. If a State, by its laws, should authorize private property to be taken for public use without compensation (except to prevent its falling into the hands of an enemy, or to prevent the spread of a conflagration, or in virtue of some other imminent necessity where the property itself is the cause of the public detriment), I think it would be depriving a man of his property without due process of law. The exceptions noted im-

ply that the nature and cause of the taking are proper to be considered. The distress-warrant issued in the case of *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, was sustained because it was in consonance with the usage of the English government and our State governments in collecting balances due from public accountants; and hence was "due process of law." But the court in that case expressly holds that "it is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as the executive and judicial power of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."—(p. 276.) I think, therefore, we are entitled, under the fourteenth amendment, not only to see that there is some process of law, but "due process of law," provided by the State law when a citizen is deprived of his property; and that in judging what is "due process of law" respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law;" but if found to be arbitrary, oppressive and unjust, it may be declared to be not "due process of law." Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular State may require.

PROOF OF WILLFUL BURNING IN ACTIONS FOR INSURANCE MONEY.

COURT OF ERRORS AND APPEALS OF NEW JERSEY,
NOVEMBER TERM, 1877.

KANE v. THE HIBERNIA INSURANCE COMPANY.

In an action on a policy of insurance against loss by fire, where the defense is that the property was willfully burned by the assured, the rule in civil, and not in criminal cases, as to the *quantum* of proof, applies, and a charge to the jury that the defendant is bound to establish the defense beyond a reasonable doubt, and by the same measure of proof that would be necessary to convict the plaintiff if he was on trial upon an indictment charging that offense, is erroneous. *Thurtell v. Beaumont*, 8 J. E. Moore, 612; 1 Bing. 339, disapproved.*

ON error to the Supreme Court. Kane brought an action of assumpsit against the insurance company on two policies of insurance (not under seal), against loss by fire. The defense was that the building insured was burned by design, with the knowledge and procurement of the plaintiff.

The defendant's counsel asked the court to charge the jury that, as to the defense of burning by design, while the burden of proof was on the defendant to establish this defense, it was only necessary to do so by the fair weight or preponderance of the evidence. The court refused so to charge, and charged the jury that, in order to make out such defense, the defendant was bound to establish the same beyond a reasonable doubt, and by the same measure of testimony that would be necessary to convict the plaintiff if tried under an indictment charging that offense.

The question of the correctness of this instruction was reserved and heard before the Supreme Court. *Kane v. Hibernia Insurance Company*, 9 Vroom, 441. The decision of the Supreme Court being adverse to the defendants, the case was removed by them to this court, by writ of error, on exceptions sealed at the trial.

For the plaintiff in error, *Joseph Coult* and *H. C. Pitney*.

Contra, *F. Voorhees* and *J. C. Ten Eyck*.

The opinion of the court was delivered by

DEPUTY, J. The writ of error brings up for review the propriety of the judge's charge.

It is conceded that there is a difference between civil and criminal cases in respect to the degree or quantity of evidence necessary to determine the verdict of a jury. In civil cases it is the duty of the jury to find for the party in whose favor the evidence preponderates; but in criminal cases, the accused should not be convicted upon any preponderance of evidence unless it generates full belief of the fact, to the exclusion of all reasonable doubt. 3 Greenl. Ev., § 29; Best on Ev., § 96. But it is contended that there is an exception to this general rule, where the issue in a civil case is one in which crime is imputed, and the guilt or innocence of a party is directly or incidentally involved. In such cases, it is said that the presumption of innocence is to have as great effect as in criminal trials, and that to justify a verdict against the party to whom crime is imputed, the evidence adduced must be such as would be sufficient to convict upon an indictment for the crime imputed. 2 Greenl. Ev., §§ 408, 426; 1 Taylor on Ev., 97, a.

This exception is most frequently invoked in actions of libel and slander, where a justification imputing crime is pleaded, and actions on fire policies, where the defense is that the property was willfully burned by the insured.

Actions of libel and slander on an issue upon such a justification, as civil actions, may be regarded as exceptional in character. A defendant in such an action, if he was warranted in giving publicity to the defamatory words by the occasion of publishing or uttering them, may discharge himself if he shows by a preponderance of evidence that the occasion was such as to make the communication a privileged communication. But if he published or uttered the defamatory words under other circumstances, in doing so he was a mere volunteer, without any personal or private interest in the subject-matter. In putting his justification on the ground of the plaintiff's guilt of the accusation, he undertakes to prove the plaintiff's guilt, which comprises not only the doing of the act, but also the intent, which the law denounces as criminal. As a matter of pleading, he is bound to plead with precision, a justification as broad as the accusation attempted to be justified, and containing all the ingredients necessary to the commission of the crime: and as a question of evidence, he is bound to make his proof co-extensive with the averments in his plea. Under such circumstances, it is neither impolitic nor unreasonable to require the truth of the accusation to be established by the same degree of proof as is required on the trial of an indictment. The mistake is in overlooking the exceptional character of this class of actions, and deducing from them a rule of evidence, to be applied in other civil cases, for the enforcement of contracts or the recovery of damages for injuries to the person or property, where the presence of the crime, if it appear

* See reference to recent cases on this subject, 15 Alb. Law Jour. 444.

in the facts relied on to make a case or a defense, is wholly fortuitous. The distinction between cases where the commission of crime is directly in issue, and where it is only incidentally involved, is recognized by Mr. Stephen in his excellent summary of the law of evidence. In cases where crime is directly in issue, the author states the rule to be, that the proof must be beyond a reasonable doubt, whether the action be civil or criminal; but where the guilt arises only incidentally in a case, he regards it as determining merely the burden of proof. Stephen on Ev., art. 94, p. 115.

In an action on a contract of insurance, a defense that the loss was caused by the willful act of the assured, does not necessarily involve a criminal accusation. It rests upon the legal maxim that no man shall be permitted to derive advantage from his own wrong. "It is," says Lord Campbell, C. J., "a maxim of our insurance law, and of the insurance laws of all commercial nations, that the assured cannot seek indemnity for a loss produced by his own wrongful act." *Thompson v. Hopper*, 6 E. & B. 171, 196. In that case, which was an action on a marine policy, a plea that the plaintiffs knowingly, willfully and improperly sent the ship to sea at a time when it was dangerous for her to go to sea in the state and condition in which she then was, and wrongfully and improperly caused and permitted the ship to be and remain on the high seas, near to the shore, in the state and condition aforesaid, without a master and without a proper crew to manage and navigate her, etc., and that the ship, by reason of the premises, was wrecked, was held to disclose a good defense. In delivering the judgment of the court, Lord Campbell said, "according to the statement in this plea, the plaintiffs' loss was caused by their wrongful act, and, if so, I think there was no necessity to characterize it as being either felonious or fraudulent." Knowledge and willfulness and a loss resulting directly and immediately from such wrongful act, are the essential elements of such a defense. *Dudgeon v. Pembroke*, L. R., 9 Q. B. 581; 1 Q. B. Div. 96; 2 App. Cas. 284; *Thompson v. Hopper*, E. & B. 1038.

Under a fire policy, the assured may recover for a loss occasioned by mere carelessness, without fraud or willful misconduct. But to make defense to the action, the defendants need not prove that the plaintiff had committed an indictable offense. It is sufficient if it be shown that the plaintiff purposely and wantonly set fire to the property insured. *Schmidt v. N. Y. U. M. F. Ins. Co.*, 1 Gray, 529. At common law, and independently of the act of 1859 (Rev., p. 242), a man might burn his own house without incurring liability to indictment, unless it was so situated with respect to the houses of others as to endanger their safety. 2 East's Pl. 1027, § 7; 1034, § 11; *State v. Fish*, 3 Dutcher, 323. After the act of 1859 became a law, a man might still, without criminal responsibility, burn his own house, if it was done without intent to prejudice the insurance thereon. Indeed, cases may arise where the assured may procure the destruction by fire of his property, with intent to defraud the insurer, and not be liable to indictment under the statute. Criminal laws are essentially local in their operation, and the incitement in a foreign jurisdiction to the commission of a crime in this State, is not indictable under our laws. Therefore, one who, in another State, procures another to enter this State and commit a crime, is not guilty of any offense punishable by the laws of this

State. *State v. Wyckoff*, 2 Vroom, 65. And yet it cannot be doubted that, before the act of 1859, an insurance company might successfully defend on the ground that the assured willfully caused the destruction of the property insured, and that such defense may be made where the assured is so circumstanced as not to be indictable under the statute. A contract for indemnity in such case would be absurd, and, so far as it related to a voluntary and intended loss, would be void in law. 1 Phillips' Ins., § 1046.

The doctrine that, in an action on a policy, the defense that the plaintiff had willfully set fire to the premises must be as fully and satisfactorily proved as if the plaintiff were on trial on indictment, originated in the case of *Thurtell v. Beaumont*, 8 J. B. Moore, 612; 1 Bing. 339. This ruling is adopted by Mr. Greenleaf and Mr. Taylor, and is strongly approved by the latter writer. 2 Greenl. Ev., § 418; 1 Taylor's Ev. (5th ed.) § 7, a. It is disapproved by Mr. Wharton, and is vigorously assailed by Mr. May, the author of *May on Insurance*, in an article in the *American Law Review*. 2 Whart. Ev., § 1246; 10 Am. Law Rev. 642.

The decision on this point, in *Thurtell v. Beaumont*, was made on an application for a rule, and without much consideration. It has never received approval in the English courts, although, as a rule of evidence, occasions have repeatedly arisen for its adoption and application. The cases decided upon the English Carriers' Act (11 Geo. IV, and 1 Wm. IV, ch. 68), and the Bribery Act (17 and 18 Vict., ch. 102), are cases in which a rule requiring the same measure of proof in civil as in criminal cases, where the facts in support of a civil liability would tend to establish a criminal charge, would be expected to be applied, if any such rule existed.

The Carriers' Act relieves a carrier from responsibility for the loss of or injury to goods in certain cases, unless the loss or injury arose from the felonious acts of his servants. In several cases the question has been before the English courts, whether the evidence was sufficient to bring the case within this exception. *G. W. Railway Co. v. Rimell*, 18 C. B. 575; *Metcalf v. L. & B. & S. C. R. Co.*, 4 C. B. (N. S.) 307; *Vaughton v. L. & N. W. R. Co.*, Law Rep., 9 Exch. 93; *McQueen v. G. W. R. Co.*, Law Rep., 10 Q. B. 569. In none of these cases was *Thurtell v. Beaumont* cited, or any reference made to the necessity of establishing the issue by the weight of evidence required in criminal cases. On the contrary, it is apparent, from the observations of the judges, that the issue was treated of as one to be determined by the simple weight of evidence, as in other civil cases.

By the Bribery Act (17 and 18 Vict., ch. 102), it was provided that any person who, directly or indirectly, by himself, or any other person, in his behalf, should give or promise any money, etc., to any voter, to induce him to vote, etc., should be guilty of a misdemeanor, and should also be liable to forfeit the sum of £100 to any person who should sue for the same.

In *Cooper v. Slade*, reported in 6 E. & B. 447, and in 6 H. of L. Cas. 748, the action was for a penalty under this act. The judge (Baron Parke), at the trial, charged the jury that if they were satisfied, upon the evidence, that the defendant did, by himself, or any other person on his behalf, promise money to the voter to induce him to vote, they ought to find for the plaintiff. This direction was held, by the House of Lords, to be a right direction. On the review, the case was discussed, largely, on the sufficiency of the evi-

dence to sustain a verdict against the defendant. *Thurtell v. Beaumont* was not cited, nor was the case considered by the courts as if the sufficiency of the evidence to sustain a criminal accusation was at all involved. The only judge who adverted to the rule of evidence as to the degree of proof necessary to the finding of a verdict, was Justice Willes, in the House of Lords. He asked that he might be excused for referring to an authority "in support of the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict, and then cited, at length, a passage from *Newis v. Lark*, Plowd. 412, and referred to Best on Ev. (2d ed.) 114. The passage cited from Plowden is one in which certainty in pleading is contrasted with sufficiency of proof, and it is said that "where the matter has gone so far that the parties are at issue, * * so that the jury is to give a verdict one way or the other, then, if the matter is doubtful, they may find their verdict upon that which appears the most probable." The reference to Best is the paragraph (§ 95) in which the author adverts to the "strong and marked difference as to the effect of evidence in civil and criminal proceedings," and states the rule to be that, in civil cases, a mere preponderance of probability—due regard being had to the burden of proof—is a sufficient basis of decision. These observations of the learned judge are entitled to peculiar force, from the fact that they related to an action upon a statute which made the same acts from which a civil liability resulted, also the ground of a conviction upon an indictment.

It may safely be said that *Thurtell v. Beaumont*, in principle, stands alone and unsupported in the English courts, except in actions of libel and slander, which are to be regarded as exceptional, and resting upon considerations peculiar to the nature of the actions and of the injuries for which they are brought.

In the courts of this country, the principle adjudged in *Thurtell v. Beaumont* has received but slender support, except in libel and slander cases. The weight of authority is decidedly against the soundness of the rule there propounded, in its application to actions on policies of insurance, as well as other civil actions, where the issue is such that, for its support, a case must be made such as would afford ground for an indictment. In *Gordon v. Parmelee*, 15 Gray, 413, it was held that in an action on a promissory note, the defense that the note was obtained by false and fraudulent representations, might be sustained by a preponderance of evidence, as in other civil cases, and that it was not incumbent on the defendant to establish it by proof beyond a reasonable doubt, although the defense was based on a charge of fraudulent representations such as might be the subject of a criminal prosecution. In *Bradish v. Bliss*, 35 Vt. 328, the action was in trespass for burning the plaintiff's building, and the evidence showed that the defendant, if guilty of trespass, had set fire to the building designedly, and was guilty of the crime of arson. The court, nevertheless, held that, it being a civil cause, the issue must be determined by the fair preponderance of evidence. A similar decision was made in *Munson v. Atwood*, 30 Conn. 102, which was an action on a statute which gave the right to recover the treble value of property feloniously taken. In trover, where the evidence was such as to involve a charge of larceny, a direction to the jury that the evidence, to justify a verdict against the defendant, must satisfy them of the truth of the charge

beyond a reasonable doubt, was held to be erroneous. *Bissel v. Wert*, 35 Ind. 54.

The decisions in actions on policies of insurance against loss by fire are mainly to the same effect. In *Schmidt v. N. Y. U. M. Fire Ins. Co.*, 1 Gray, 529, the defense was, that the plaintiff had purposely set fire to the property insured, and burned it; and it was held that the judge properly refused to instruct the jury that they must be satisfied, beyond a reasonable doubt, of the truth of this defense. The criticism on this case, in the court below, that the instruction actually given was, in substance, equivalent to an instruction that the defense must be established beyond a reasonable doubt, and that the case, if it does not inferentially recognize the rule in *Thurtell v. Beaumont*, is of no value as an authority against it, though warranted by some expressions of the judge, in his opinion, is shown to be untrue, in fact, by the opinion of the same judge, in *Gordon v. Parmelee*, 15 Gray, 413. In the latter case, he adverts to the case in 1 Gray, and declares it was not the purpose of the court to sanction any exception to the rule, or to say that, in any civil action, the jury were not to decide by the preponderance of the proof or the weight of the evidence; and he closes his opinion by saying that "in the opinion of the court, it is better that the rule be uniform, leaving the instruction, that the jury must be satisfied of the guilt of the party beyond a reasonable doubt, to apply solely to criminal cases." In the following cases, also, in actions on fire policies, where the defense was a willful destruction, by the assured, of the property insured, the rule of evidence adopted in *Thurtell v. Beaumont* was repudiated, and the correct rule declared to be that, in civil cases, the verdict should be determined by the preponderance of the evidence, without regard to the fact that in the defense was involved a charge which might be made the ground of a criminal prosecution. *Scott v. Home Ins. Co.*, 1 Dill. C. C. 105; *Huchberger v. Merchants' Fire Ins. Co.*, 4 Bissel's C. C. 285; *Washington Ins. Co. v. Wilson*, 7 Wis. 169; *Blaeser v. M. M. Ins. Co.*, 37 Wis. 81; *Rothschild v. Amer. Cent. Ins. Co.*, 62 Mo. 356; *Ætna Ins. Co. v. Johnson*, 11 Bush, 587; *Hoffman v. W. M. & F. Ins. Co.*, 1 La. Ann. 216; *Wightman v. Same*, 8 Rob. 442.

I fully concur in these decisions, and the reasoning on which they are founded.

In actions where usury was pleaded, it has been said that the defense must be established beyond a reasonable doubt. *Conover v. Van Mater*, 3 C. E. Green, 481; *Taylor v. Morris*, 7 Id. 606. This language was used, perhaps inconsiderately, to express the quantity of evidence that, under the circumstances, should be required to defeat the plaintiff's security, without intending to assert that, as a rule of law, the same measure of proof should be required in civil as in criminal cases. So also in suits on fire policies, on a defense like that in the present case, judges, in their instructions to juries, have commented on the gravity of the charge contained in such a defense, and have put the presumption of innocence in the scales as an element to weigh in favor of the plaintiff and decide the issue, if the evidence was not entirely satisfactory. The charge of Judge Davis, in *Huchberger v. Merchants' Fire Insurance Company*, and of Judge Dillon, in *Scott v. Home Insurance Company*, and of Chief Justice Whelpley, in *Powers v. Market Fire Insurance Company*, in the Morris Circuit, are examples of this

mode of dealing with the subject in the practical administration of the law. But in each of these cases the judge was careful to instruct the jury that the rule of law in criminal cases, with respect to the *quantum* of proof, was not to be applied.

A judge may make such comments on the evidence as he deems proper, and may advise and instruct the jury with respect to the degree of proof they should require to decide the issue under the circumstances of the particular case. But a charge that, as a question of law, proof beyond a reasonable doubt is required, is quite a different thing. While it is impracticable to frame a satisfactory definition of the expression "reasonable doubt," yet the effect of a charge, in this language, is a matter of almost every day's observation. Every one familiar with administration of justice can recall instances in which defendants, under such an instruction, have been pronounced not guilty, when the evidence of guilt was quite convincing.

The importance of preserving the distinction between civil and criminal cases increases with the growth of the criminal law. Almost every tortious act is by statute made indictable, if done willfully or maliciously, and the courts should be reluctant to adopt, in civil cases, the rules peculiar to criminal law, lest wrong-doers be enabled to avoid civil liability, as well as escape criminal responsibility, under cover of the rules of criminal prosecution, the object of which is punishment only.

The judgment should be reversed.

Judgment reversed.

INFRINGEMENT OF TRADE-MARKS.

NEW YORK SUPREME COURT, SPECIAL TERM, JANUARY, 1878.

ENOCH MORGAN SONS' CO. V. SCHWACHHOFFER.

Plaintiff had for many years made and sold a soap named by him "Sapolla." Each cake sold was inclosed in two wrappers, a tin-foil and a blue one, the wrappers containing the name of the soap and certain printed words and cuts. Defendant offered for sale a soap he called "Saphia." Each cake was inclosed in a tin-foil and a blue wrapper, containing printed words and figures differing entirely from those on plaintiff's wrappers, but having a general resemblance and calculated to deceive the public into a belief that the soap was that manufactured by plaintiff. Held, that plaintiff was entitled to an injunction restraining defendant from vending his soap in the tin-foil and blue wrapper.

For the accomplishment of a fraud in such cases as this, two circumstances are required: First, to mislead the public, and, next, for defendant to preserve his own individuality.

ACTION to restrain defendants from infringing plaintiff's trade-marks. Plaintiff had for many years previous to the commencement of the action manufactured a soap designed for cleaning and polishing, which was named "Sapolla." It had extensively advertised this preparation, and it became known in the market and by numerous consumers under the name mentioned. The soap was sold in cakes of a convenient size. Each cake was inclosed in two wrappers, one a square sheet of paper covered with tin-foil, and the other a strip of paper about an inch and a half wide, which was blue outside. Each wrapper contained the name "Sapolla," and cuts and printing referring to the article and its use. The devices on the wrappers were registered as trade-marks. Defendant, after plaintiff's article became well known, began the manufacture of a similar article, which he named "Saphia Transparent." He offered it for sale in cakes similar in size to those made by plaintiff,

inclosed in two wrappers (tin-foil and blue) of the same size and shape of plaintiff's, but containing different cuts and printed words. The general appearance of the packages made by defendant and plaintiff was the same, and the general public would be easily led into purchasing one for the other. Such other facts as are material will appear in the opinion.

John Henry Hull and C. A. Seward, for plaintiffs.

Kugelman & Starrsborough, for defendant.

LAWRENCE, J. It is quite difficult in actions of this character, to precisely draw the line between those cases in which the plaintiff is entitled to relief and those in which relief should be denied. The decisions are conflicting, and many of them irreconcilable, but in this case, after fully considering the evidence, I am of the opinion that the plaintiffs are entitled to a portion at least of the relief which the complaint demands.

Upon principle no man should be allowed to sell his goods as the goods of another, nor should he be permitted so to dress his goods as to enable him to induce purchasers to believe that they are the goods of another. In the consideration of this case, I shall lay out of view the United States statute in relation to trade-marks, because that provides that "nothing in this chapter shall lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had, if the provisions of this chapter had not been enacted."

I do not therefore regard the plaintiffs as being compelled, in order to obtain the relief they seek in this action, to show that there has been an imitation of the trade-mark, which the plaintiffs have filed in the patent office.

It would seem that the true blue is laid down in the case of *Edelston v. Vick*, 23 English Law and Equity Reports, pp. 51 and 53, where Vice-Chancellor Wood, adopting the language of Lord Langdale, in *Groft v. Day*, 7 Beavan, pp. 84 and 87, says: "That what is proper to be done in cases of this kind depends on the circumstances of each case. * * * That for the accomplishment of a fraud in each case, two circumstances are required, first to mislead the public, and next to preserve his own individuality." Commenting further upon the language of Lord Langdale in *Groft v. Day*, the vice-chancellor proceeds: "Now in that case of *Groft v. Day*, there was, as Lord Langdale said, many distinctions between the two labels, and in this case before me just as in that of *Groft v. Day*, any one who takes upon himself to study the two labels, will find even more marks of distinction than were noticed in argument. But in this case as in that, there is the same general resemblance in color. Here there is the same combination of colors, pink and green. There is the same heading, "Her Majesty's Letter Patent" and "Solid Headed Pins" and the name D. F. Taylor, with the words "exclusively manufactured" upon the two labels, which are of precisely the same size, and the scrolls in the same form, "and exclusive patentee" in an exactly similar curved line, nor does it rest only with the general resemblance of the outer wrappers: The papers in which the defendant's pins are stuck bear also a very great similarity; they are as like as can be to the papers in which the plaintiff's pins are stuck."

Then, after stating that he agrees that there must be an intent to deceive the public, the vice-chancellor

holds, that the defendants, both in the outer and inner wrappers, made a palpable imitation, with the intent to deceive the public, and he accordingly restrained them. I have referred to this case at length because it seems to me to be peculiarly in point, but there are several authorities in our own courts which uphold the same doctrine. In *Williams v. Spence*, 25 How. Pr. Rep. 307, Monell, J., says: "The only question to be determined therefore in this case is whether the labels, devices and hand-bills used by the defendants, as set forth in the complaint, are calculated to, and do deceive the public into the belief that the soap that they are selling is the soap made and sold by the plaintiffs. * * *. The oral evidence, that the labels, devices and hand-bills used by the defendants are calculated to deceive the public also preponderates, and an inspection of the respective labels, devices and hand-bills satisfies me that the public would be readily deceived and purchase the defendant's soap under the belief that they were purchasing the plaintiffs'."

In *Lea v. Wolf*, 13 Abbott (N. S.), 391, Mr. Justice Ingraham says: "*The color of the paper, the words used, and the general appearance of the words when used, show an evidence designed to give a representation of those used by the plaintiffs.* It is impossible to adopt any conclusion other than that the intent was to leave purchasers, from the general appearance of the article, to suppose that it was the original Worcestershire sauce which they were buying." See also *Cook v. Starkweather*, 18 Abbott (N. S.), 292. And in *Lockwood v. Bostwick*, 2 Daly, 521, it was held, "that a party will be restrained by injunction from using a label as a trade-mark, resembling an existing one in size, form, color, words and symbols, though in many respects different, if it is apparent that the design of the imitation was to depart from the other sufficiently to constitute a difference when compared, and yet not so much so that the difference would be detected by an ordinary purchaser unless his attention was particularly called to it, and he had a very perfect recollection of the other trade-mark." And in *Kinney v. Busch*, 16 Am. L. Reg. (N. S.) 597, Mr. Justice Van Brunt says: "A careful inspection of the labels in question shows beyond a doubt that those of the defendant were adopted in order to deceive the public into supposing when they purchased the cigarettes of the defendant's manufacture they were purchasing those of the plaintiffs. I am satisfied from the evidence in this case that the intention of the defendant has been from the first to make an article, as nearly as possible resembling that manufactured by the plaintiffs, and to put it off upon the public as the same article."

I am also satisfied that it was the intention of the defendant, in adopting the blue and tin foil wrappers, and in printing them on the directions for use in language so closely resembling that employed by the plaintiffs, to impose upon the public and to lead purchasers to believe that in purchasing the defendant's article they were in fact obtaining the sapolio of the plaintiffs. In this connection the wonderful similarity of the color of the inside of the tin foil wrapper, used by the defendant, with that used by the plaintiffs, should not be forgotten. The whole case, to my mind, shows an intention on the part of the defendant to avail himself of the reputation which the plaintiffs had acquired in the market for their sapolio, by their enterprise and ability and by the large expenditures which they had made in bringing the sapolio to the attention of the public.

It appears that the plaintiffs have been for many years engaged in manufacturing sapolio, that the article has acquired a great reputation, and that the plaintiffs have expended very large sums of money in advertising. The evidence shows that the defendant, after analyzing a cake of sapolio, and ascertaining how it was made, set about making an article similar in character, color and appearance to that of the plaintiffs. This he may possibly have a right to do, but when the court finds that the defendant, after having possessed himself of the secret of the manufacture of the plaintiffs, has in addition coined a name much resembling sapolio, in appearance, and which he admits is a fancy name, having no particular derivation or signification, and has then proceeded to encase his cakes of saphia in wrappers also closely resembling the plaintiffs' both in their external and internal appearance, as to color, size and partially as to inscription and directions for use, the court has in my judgment the power to interfere, and should exercise its power. It is claimed that the plaintiffs cannot have an exclusive right to use tin foil or ultra marine blue colored paper, in putting up their article, as such paper is much used for ordinary commercial purposes. This is true, but the cases cited show that the courts will interfere where it is apparent that there is an imitation of the plaintiff label, whether as to color, shape or inscription, which imitation is calculated and intended to deceive the general public. The evidence satisfies me that the blue wrapper as used by the defendant is calculated to deceive purchasers, and I think that it is very clearly proven that the ordinary purchaser is deceived by the similarity of the dresses in which the soaps are put upon the market.

A critical and careful examination of the two packages will undoubtedly reveal distinctions and differences between the labels, and the devices thereon are different; but there is such a general resemblance, that, to borrow the language of the vice-chancellor in *Edleston v. Vick*, *supra*, "the court or jury would be bound to presume that it was not a fortuitous concurrence of events which has produced this similarity; it would be irrational not to rest convinced that this remarkable coincidence of appearance, external and internal, is the result of design."

In the case of *Abbott v. Bakers and Confectioners' Tea Association*, Weekly Notes, 1872, p. 31, an injunction has been issued restraining the defendants from issuing wrappers which were in imitation of those of the plaintiffs. On appeal the Lord Chancellor said, "that though no one particular mark was exactly imitated, the combination was very similar, and likely to deceive; that it was true that there was no proof that any one had been deceived, or that the plaintiffs had incurred any loss, but where the similarity is obvious, that was not of importance." The appeal was therefore dismissed. See case reported below. Weekly Notes, 1871, p. 207. This last case seems to be decisive of the question now under consideration. See, also, *Lockwood v. Bostwick*, 2 Daly, 521; *Godillot v. Hazard*, 49 How. 10.

I am, therefore, of the opinion that the plaintiffs are entitled to an injunction restraining the defendant from vending saphia in the blue packages in which it is now sold. By this I do not mean to be understood as holding that the defendant has not the right to manufacture and also to sell saphia, nor to restrain him from the use of that name, or of the figure or device upon the label; but I do intend that he shall abstain

from dressing his goods in wrappers so closely resembling the plaintiffs', as to enable him to deceive the public and perpetrate a fraud; that he shall not sell saphia as and for espolio. In other words, he must sell under his own colors and not under those of the plaintiffs.

Judgment accordingly.

RECENT AMERICAN DECISIONS.

SUPREME JUDICIAL COURT, MASSACHUSETTS,
MARCH, 1878.

HABEAS CORPUS.

When proceedings of court ordering imprisonment will not be reviewed on. — An action was brought in the Superior Court against William Gorman, the petitioner, upon a bond signed "W. P. Gorman." Petitioner told the officer serving the process that he was not the party who signed the bond, but he made no defense and judgment was taken by default. An action was then commenced in the Municipal Court against the petitioner, founded upon the judgment obtained in the Superior Court. The petitioner appeared and offered to prove at the trial that he did not sign the bond, and was not the defendant, W. P. Gorman. The judge declined to hear such evidence, and ordered judgment to be entered for the plaintiff. Upon this judgment an execution was issued against "W. P. Gorman, otherwise known as William Gorman," and the petitioner was arrested. A petition for *habeas corpus* was then brought in this court. At a hearing before a single justice the petitioner proved that he was not the defendant, W. P. Gorman; that he never signed the bond, and owed the plaintiff in the actions nothing, and so notified the plaintiff's attorney and the officer making the arrest. The court found as a fact that the petitioner was not the person who signed the bond, and the case was reserved upon report for the consideration of the full court. This court remanded the prisoner, holding as follows: The judgments of the Superior Court in the original suit, and of the Municipal Court, were rendered by tribunals having jurisdiction in the premises, and stand good until reversed or annulled by a course of proceedings proper for the purpose, and the regularity of them will not be examined into on *habeas corpus*. The petitioner's defense that he did not execute the bond should have been made by him in the original suit. By making default he admitted the allegations in the declaration. *Petition of Gorman.*

LIEN.

For keeping horse: valid notwithstanding horse is used for racing. — Action of replevin to recover a mare, etc., tried in the Superior Court, which found that the plaintiff was entitled to recover, unless the defendant had a lien upon the property replevied, on the ground that the mare was placed by her owner in the hands of the defendant to be kept, handled, improved and trained; and, further, that up to the time the mare was taken on the replevin writ she had remained in the defendant's possession for that purpose, which, if nothing else appeared, would entitle him to a lien. But the court further found as a fact, upon the whole evidence, that the mare was placed in the hands of the defendant to be kept, trained and improved, so that she might be used for running races for bets and wagers in this Commonwealth, and also that she was so used

while in the defendant's possession. The court therefore ruled that the defendant had no lien on the property replevied, and found for the plaintiff. The defendant alleged exceptions, which were sustained by the Supreme Court, which held that "even if the contract between these parties was illegal (which is not meant to be intimated), the law will not assist the plaintiff to regain possession of the mare, without paying the defendant for his services." *Harris v. Woodruff.*

SURETYSHIP.

Dealing of creditor with collateral securities. — Plaintiff had a judgment which he was restrained by injunction from enforcing. Defendants were principal and surety on the bond given to procure such injunction. The bill upon which the injunction was issued was dismissed and this action was brought. It appeared that after the bond had been filed the plaintiff received from the principal on the bond two notes, with the understanding and agreement, as found by the court, that if they should not be paid at maturity, he, the plaintiff, would then discharge the said judgment. These notes were not paid. One of these notes were given by the plaintiff to Elisha Atkins & Co. as collateral, but not being paid at maturity was put in suit by the plaintiff in the name of Elisha Atkins, and judgment was obtained and execution issued, but was in no part satisfied. The other note was deposited by the plaintiff at the Elliot Bank, where, not being paid at maturity, it was taken up and paid by him. It was contended on behalf of the surety that he had a defense to the action by reason of the negotiation of the notes; but the court below ruled that the negotiation of the notes did not prevent plaintiff from recovering. That court found that the condition of the bond had been broken, and that judgment should be entered for the plaintiff. The defendant alleged exceptions, which were overruled, this court holding as follows: "The notes delivered to the plaintiff were not collateral security, but were received as a conditional payment. The plaintiff had a right to attempt to collect them, and he is not precluded, by having had one of them discounted with the help of his own credit, and by having another prosecuted to final judgment in the name of a friend, but for his own benefit, from relying upon his original cause of action, the notes having never been paid. His offer to return the notes that had been discounted, and to assign the judgment to the defendant, was sufficient to restore him to his original cause of action." *Lord v. Bigelow.*

RAILROAD.

Injuries done to property in operating mortgaged railroad a part of running expenses. — In an action against a railroad company and its trustee for injury done by said company to plaintiff's property after said company had mortgaged its road, it appeared that there were funds arising from the earnings of the road in the hands of the trustee. The question in the case was whether the mortgage so changed the relation of the corporation to its earnings that they could not be attached on trustee process. The Superior Court charged the trustee upon the answer, and an appeal was taken by the trustee to the Supreme Court, which affirmed the judgment, holding that the claim of the plaintiff for injury done to her property by negligence of the defendant after September 1, 1876, would, when paid, be properly included in the operating expenses of the road, and, while the corporation

continued in the use, management and control of the mortgaged property, the income of the road was liable to attachment by trustee process to secure such claim. *Smith v. Eastern Railroad Co.*

RECENT ENGLISH DECISIONS.

CORPORATION.

Fraudulent prospectus: liability of directors for fraudulent statement of agent: principal and agent.—A company which had been formed to work a mine having been compelled to cease working for want of funds, money was advanced to the company by some of the directors, and among them by Barnett and Baldwin. Afterward at a general meeting of the company held in order, *inter alia*, to provide for the existing deficit and for working expenses, the directors were authorized by the meeting to issue debentures on such terms and for such amount as they in their discretion might think fit. The directors accordingly authorized the secretary to employ a firm of brokers to place the debentures. The brokers prepared and issued a prospectus, bearing the names of Barnett and Baldwin and of Bell and others as directors, and containing statements as to the condition and prospects of the company, on the faith of which the plaintiff and others subscribed and paid for debentures. The money thus raised was paid to the company's bankers, and part of it was applied by the directors on behalf of the company to repay the advances made by Barnett and Baldwin. The debentures having become worthless, the plaintiff brought an action for damages against Barnett, Baldwin and Bell, in respect of the statements in the prospectus, some of which were alleged to be fraudulent. The jury found as to all three defendants that the prospectus contained statements of facts which were false to the knowledge of the brokers, and by which the plaintiff was induced to part with his money; that none of the false statements were made by Barnett or Baldwin or Bell personally, or by the authority of either, but that the statements were within the authority of the brokers as agents. As to Barnett (who had been absent from England while the debentures were being issued) the jury found that he had left authority to the directors to cause a prospectus to be issued to raise money on debentures, but not to make any false statements; that it was within the scope of their authority to issue a prospectus, but such only as the draft which Barnett had prepared before he left England, and which contained no false statements; that Barnett received benefit from the fraud of the brokers, *viz.*, the repayment of the money advanced by him to the company, but without knowledge of the fraud. As to Baldwin the jury found that he received benefit from the fraud; which the court took to mean that, though he was not aware of the false statements contained in the prospectus before it was issued, he became aware of them before he was repaid the money which he had advanced to the company. As to Bell the jury found that he received no benefit. Upon these findings, *held*, that the brokers were really the agents not of the directors but of the company, the directors being intervening agents, and that the finding of the jury upon this point was contrary to the evidence; that the repayment of the moneys to Barnett and Baldwin, though in some sense consequent upon, had no necessary connection with the fraudulent statements in the prospectus; that

Barnett and Baldwin were not the principals of the brokers so as to bring the former within the rule that a principal is answerable where he has received a benefit from the fraud of an agent acting within the scope of his authority; and that judgment must, therefore, be entered as well for Barnett and Baldwin as for Bell. *Weir v. Barnett*, L. R., 8 Ex. D. 32.

EXTRADITION.

Extradition Act, 1870 (33 & 34 Vict., c. 52), ss. 2, 6. treaty incorporated with and limiting operation of act no British subject to be surrendered: treaty with Switzerland.—By the Extradition Act, 1870 (33 and 34 Vict. c. 52), s. 2, where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may by Order in Council direct that this act shall apply in the case of such foreign state, and may, by the same or any subsequent order, limit the operation of the order—and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient. By s. 6, where the act applies in the case of any foreign state, every fugitive criminal of that state who is in, or is suspected of being in, any part of Her Majesty's dominions, shall be liable to be apprehended and surrendered in manner provided by this act. A treaty having been made between this country and the Swiss government under the above act, which provided that no Swiss should be delivered up by Switzerland to the government of the United Kingdom, and no subject of the United Kingdom should be delivered up by the government thereof to Switzerland; and an Order in Council having been made, which directed that the act should apply in the case of the treaty: *Held*, that the treaty must be taken to be incorporated with, and to limit the operation of the act, and that no British subject in this country could be surrendered to the Swiss government. *The Queen v. Wilson*, L. R., 3 Q. B. D. 42.

LIBEL.

Criminal information: publication by editor of newspaper without knowledge of proprietors: Lord Campbell's Act (6 & 7 Vict., c. 96), s. 7.—At the trial of a criminal information against the defendants for a libel published in a newspaper of which they were proprietors, it appeared that each of them managed a different department of the newspaper, but that the duty of editing what was called the literary department was left by them entirely to an editor whom they had appointed, named G. The libel in question was inserted in the paper by G. without the express authority, consent, or knowledge of the defendants. The judge having directed a verdict of guilty against the defendants: *Held*, by Cockburn, C.J., and Lush, J., that there must be a new trial, for upon the true construction of 6 & 7 Vict., c. 96, s. 7, the libel was published without the defendants' authority, consent, or knowledge, and it was a question for the jury whether the publication arose from any want of due care and caution on their part. By Mellor, J., dissenting, that the defendants, having for their own benefit employed an editor to manage a particular department of the newspaper, and given him full discretion as to the articles to be inserted in it, must be taken to have consented to the publication of the libel by him, that 6 & 7 Vict., c. 96, s. 7, had no application to the facts proved, and that the case was properly withdrawn from the jury. *The Queen v. Holbrook*, L. R., 3 Q. B. D. 60.

UNITED STATES SUPREME COURT ABSTRACT,
OCTOBER TERM, 1877.

LIFE INSURANCE.

1. *When statements by agents made before policy issued do not affect conditions of policy.*—By the conditions of a life insurance policy the liability of the company was released upon the failure of the insured to pay the annual premium when due. And it was declared that no agent of the company could waive such forfeiture or alter any condition of the policy. In an action upon the policy, *held*, that this condition would not be overcome by proof that before the policy was issued an agent of defendant had informed insured that he would always be notified in season to pay the premium; that insured depended upon that notification, which was not given, and for that reason did not pay a premium when due. Judgment of Circuit Court, Rhode Island, reversed. *Union Mut. Life Ins. Co., plaintiff in error, v. Mowrey*. Opinion by Field, J.

2. *Estoppel: promise of agent as to payment of premium on life insurance.*—The previous representation of the agent could in no respect operate as an estoppel against the company. An estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact; to a present or past state of things. If the representation relate to something to be afterward brought into existence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances, of which neither party can have any certain knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made. (*White v. Ashton*, 51 N. Y. 280; *White v. Walker*, 81 Ill. 437; *Faxton v. Faxton*, 28 Mich. 150.) *Ib.*

MARITIME LAW.

1. *Collision: defense in case of: rate of compensation.*—Freedom from fault is a good defense in a cause of collision, even when the suit is promoted to recover compensation for injuries received by an unoffending party, but the innocent party, if the collision was occasioned by the fault of the other vessel or vessels, is always entitled to full compensation for the injuries received, unless the loss exceeds the amount of the interest which the owners have in the offending ship or ships and the freight pending at the time of the collision. 9 Stat. at Large, 765. *The Atlas*, 3 Otto, 307. Decree of Circuit Court, S. D., New York, in one case affirmed, and in others modified and affirmed. *Steamboat City of Hartford v. Rideout*, and two other cases. Opinion by Clifford, J.

2. *Appeal: on question of fact: burden of proof.*—Where the appeal involves a question of fact, the burden in such a case is on the appellant to show that the decree in the subordinate court is erroneous, and this court will re-examine the whole testimony in the case, as the express requirement of the act of Congress is that the Supreme Court shall hear and determine such appeals, and it is as much the duty of the court to reverse the decree from which the appeal is taken, for error of fact, if clearly established, as for error of law. (*The Baltimore*, 8 Wall. 382; *Maria Martin*, 12 id. 40; *The Lady Pike*, 21 id. 8.) *Ib.*

3. *Rule governing liability of owners of ships in case of collision.*—Owners of ships and vessels are not liable, under existing laws, for any loss, damage or injury by collision, if occasioned without their privity or knowledge, beyond the amount of their interest in such ship or vessel and her freight pending at the time the collision occurred; but the decree in a proceeding *in rem* against the vessel is not a decree against the owner, nor will it render the owner liable in such a case for any greater amount than what the act of Congress limiting the liability of such owners allows. Such a decree in such a case is merely the ascertainment of the damage, interest, and cost which the libellant has sustained by the collision, and which he is entitled to recover, provided the interest of the owners in the colliding vessel or vessels is sufficient to pay it, and not otherwise. *Ib.*


PAYMENT.

1. *Payment of less than claimed on unliquidated debt if accepted as satisfaction discharges debt.*—While the payment by a debtor of a part of his liquidated debt is not a satisfaction of the whole, unless made and accepted upon some new consideration, where the debt is unliquidated and the amount is uncertain, this rule does not apply. In such cases, the question is whether the payment was in fact made and accepted in satisfaction. Judgment of Court of Claims affirmed. *Baird, appellant, v. United States*. Opinion by Waite, C. J.

2. *Claim on government audited and paid for at less than sum claimed.*—A government contractor made a claim upon the government for an account of uncertain amount, which he stated to be \$151,588.17. The government allowed \$97,507.75, stating the principles upon which the adjustment was made, and gave to the contractor a draft for the amount found due which was received and collected without objection. More than five years thereafter the contractor brought action against the government to recover the residue claimed by him. *Held*, that the adjustment by the government was an offer to pay the balance stated in satisfaction of the claim. The acceptance of the money afterward without objection was equivalent to an acceptance of the payment in satisfaction. *Ib.*

3. *Action for part only of indivisible demand.*—Where a party brings an action for a part only of an entire indivisible demand and recovers judgment, he cannot subsequently maintain an action for another part of the same demand. (*Warren v. Comings*, 6 Cush. 104.) *Ib.*

STATUTORY CONSTRUCTION.

Statute of Tennessee adding territory to city: debts previously contracted.—By an act of the legislature of the State of Tennessee, adding to the city of Memphis certain adjoining territory, it was provided that such territory should not be taxed to pay any part of the debt of the city contracted prior to the passage of the said act. Before the act was passed, the city had entered into a contract with a firm for the paving of certain streets, and work was done and materials furnished, but the greater part of the work was done and materials furnished after the passage of the act. *Held*, that the debt for the pavements was contracted before the passage of the act, and the added territory was not liable to taxation for its payment. Judgment of Circuit Court, W. D. Tennessee, affirmed. *United States ex rel. Brown, plaintiff in error, v. City of Memphis*. Opinion by Strong, J. 

COURT OF APPEALS ABSTRACT.

ACTION.

Against ex-supervisor for failure to account for town moneys: must be in name of town.—An action against a supervisor who has gone out of office, to recover for moneys belonging to the town which have come into his hands, and for which he has failed to account, must be brought (Laws 1866, chap. 534) in the name of the town, and an action in the name of the succeeding supervisor therefor is not maintainable. Judgment below reversed. *Hagadorn v. Rauw, appellant.* Opinion by Allen, J.

[Decided February 22, 1878.]

CONTRACT.

1. *Construction of: market price.*—A clause in a contract wherein defendants agreed to sell blankets for plaintiff, providing that the blankets should not be "sold for less than those made by D. & S.," held, to mean that defendants were authorized to sell plaintiff's goods at the same prices at which the goods of D. & S. were sold or offered in the market. Either actual sales of the blankets of D. & S., or their market value as ascertained by *bona fide* offers to sell, established the market price. Judgment below reversed. *Harrison, appellant, v. Glover.* Opinion by Andrews, J.

2. *To fix price offer to sell must be in the present.*—But the offer to sell must be a present offer not necessarily binding in law but in honor, and a promise to make a sale in the future, the negotiation not being complete, would not establish a price. Accordingly when a purchaser asked an agent of D. & S. if he had better buy plaintiff's blankets at 30 cents, and the agent told him he had better not, that he would see the purchaser in two or three days, and would sell as low as any one, held not to establish a price. *Ib.*

[Decided February 12, 1878. Reported below, 9 Hun, 196.]

CORPORATION.

Action against, to recover dividends: not maintainable by one not holding stock.—S. held certain shares in a Vermont corporation, upon which assessments were made. The assessments not being paid, the shares were declared forfeited, and were sold by the company, and certificates given to new holders. O., who took title under S. claimed that the assessment and sale were invalid, demanded to be treated as a shareholder, and being refused, brought action on trover against the company for a conversion of the shares. Thereafter, dividends were made on the shares and paid to the new shareholders. Held, that O. could not, while the suit in trover was pending, maintain an action against the corporation for the dividends upon the shares claimed by him. Judgment below affirmed. *Hughes, appellant, v. Vermont Copper Mining Company.* Opinion by Rapallo, J.

[Decided January 29, 1878. Reported below, 7 Hun, 677.]

JUDGE.

Liability of judge for judicial acts: not liable civilly for erroneously sentencing to imprisonment.—Defendant was United States district judge, and plaintiff was tried at a Circuit Court held by him upon an indictment for embezzling mail bags. The jury found plaintiff guilty, and that the value of the mail bags was less than \$25. The penalty prescribed in such case was a fine of \$200 or imprisonment for one year. Defendant as judge sentenced plaintiff to pay a fine of \$200

and be imprisoned for one year. Plaintiff was imprisoned five days and he paid the sum of \$200 to the clerk of the court as a fine, and the same was paid by the clerk to the government. Plaintiff procured a writ of *habeas corpus* which was returned before defendant, who was holding the same term of court at which plaintiff was sentenced. Defendant, upon the return, vacated and set aside the sentence, and as a part of the same judicial act and order, passed judgment anew on plaintiff and re-sentenced him to be imprisoned for the term of one year, and plaintiff was imprisoned. Under proceeding taken by plaintiff for that purpose, to which defendant was not a party, the re-sentence of plaintiff was set aside by the Supreme Court of the United States as being without authority of law. In an action for imprisonment under the re-sentence, brought by plaintiff against defendant, held that the act of defendant was done by him as a judge, and he was protected by his judicial character from the action brought by plaintiff. Judgment of General Term affirmed. *Lange, appellant, v. Benedict.* Opinion by Folger, J.

[Decided March 19, 1878. Reported below, 8 Hun, 362.]

SLANDER.

Accusation of larceny: stealing from town.—Defendant said concerning plaintiff, who was a candidate for supervisor, "he would be a pretty man to be elected supervisor; when he was highway commissioner he stole a thousand dollars from the town, and if he was elected supervisor, where he would have the handling of so much money, he would steal eight thousand." Held, that it was not error to refuse to hold as a matter of law that the words could not have charged larceny or could not have been so understood, and a refusal to grant a nonsuit was proper. Judgment below affirmed. *Hayes v. Ball, appellant.* Opinion by Church, C. J. Miller, J., dissented.

[Decided February 5, 1878.]

COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, March 19, 1878.

Judgment affirmed with costs—*Lange v. Benedict*; *Booth v. Boston and Albany Railroad Company*; *Mehan v. Syracuse, etc., Railroad Company*; *Bowman v. Keenan*; *Upham v. Ireland*; *Douglass v. Ireland*; *Lawrence v. Merrifield*; *Sparrowhawk v. Sparrowhawk*; *New v. Nicoll*.—Judgment affirmed—*Polinsky v. The People*; *Blake v. The People*; *Lesser v. The People*.—Judgment reversed and new trial granted, costs to abide event—*Field v. Field*; *Winterunte v. Cooke*.—Order granting new trial reversed, and judgment at Circuit affirmed with costs—*Walsh v. Hartford Fire Insurance Company*.—Order granting new trial reversed, and judgment on report of referee affirmed with costs—*Birdsall v. Clark*.—Order affirmed with costs—*Barton v. Speir*.—Order dismissing appeal vacated—*Mackey v. Lewis*.—Judgment affirmed as to title, and judgment on the accounting reversed, and proceedings remitted for further accounting on principles stated in the opinion, without costs to either party in this court—*Madison Avenue Baptist Church v. Baptist Church in Oliver street*.—Judgment reversed, and judgment for plaintiff on demurrer, with leave to defendants to answer within twenty days after notice of the filing of the remittance, costs to abide the event of the action.—*Townsend v. City of Brooklyn* (two cases).

AMENDMENT TO RULES REGULATING THE ADMISSION OF ATTORNEYS.

THE Court of Appeals on the 19th inst. made the following order:

Ordered, That Rule 3 of the rules for the admission of attorneys, etc., which went into effect October 1st, 1877, be and the same is hereby amended so as to read as follows:

RULE 3. No person shall be admitted to an examination as an attorney unless he shall have served a regular clerkship of three years in the office of a practicing attorney of the Supreme Court, after the age of eighteen years. An allowance of one year shall be made to applicants who are graduates of any college or university. Any portion of time not exceeding one year for graduates receiving the foregoing allowance, and two years for other applicants, actually spent in regular attendance upon the law lectures, or the law school connected with any college or university of this State, having a department organized with competent professors and teachers, in which instruction is regularly given, shall be allowed in lieu of an equal period of clerkship in the office of a practicing attorney of the Supreme Court, and any person who holds a degree in law from any law school out of this State, which maintains a course of instruction covering at least two academic years of not less than eight months each, and gives its degrees only after public examination, shall be allowed the time spent in such law school, in lieu of an equal period of clerkship in the office of a practicing attorney of the Supreme Court; but in no case shall an applicant be entitled to an examination as an attorney without having served a clerkship in the office of a practicing attorney of the Supreme Court for the period of at least one year.

NEW BOOKS AND NEW EDITIONS.

STEWART'S NEW JERSEY DIGEST.

A digest of the decisions of the Courts of Law and Equity of the State of New Jersey from 1790 to 1876; embracing all the cases reported in the regular reports of the State, and also in the reports for the District and Circuit Courts of the United States for the District of New Jersey; in two volumes. By John H. Stewart, Counselor at Law. Trenton, N. J., 1877.

THIS is an excellent work. The compiler was, under a statute of the State of New Jersey passed in 1876, appointed by the Supreme Court to prepare a digest of the decisions of the courts of that State. The latest New Jersey digest in existence at that time was one made in 1844, so that the vast bulk of the case law of the State was in a chaotic mass scattered through numerous volumes of reports, and only accessible after considerable research. Mr. Stewart, however, with a commendable diligence set about his task, and before the close of the year in which he was appointed completed the first volume, and by the end of the year 1877 had concluded his entire work. In it he has embraced, in addition to the cases appearing in the regular reports of the State, those in the Supreme Court of the United States arising in or affecting New Jersey, together with those in the regular reports of the District and Circuit Courts of the United States for New Jersey and of the adjoining districts of New York, Pennsylvania and Delaware, and also those reported in the *National Bankrupt Register* and the *Legal Intelligencer*. It will be seen, therefore, that every

legal decision in the State, and in which its citizens are liable to have had an interest, is noticed in these volumes. The work of digesting is thoroughly well done, the statements of principle being clear, concise and accurate, and the arrangement being the best that could be devised. A table of cases overruled, etc., is given, in which is included references to the decisions of other States approving or criticising those of New Jersey, and it speaks well for the judiciary of that State that very few decisions made by them have received unfavorable criticism in other jurisdictions. The work contains an excellent index, which facilitates a reference to its contents, and a table of cases wherein every case is given under the name of the defendant, as well as under that of the plaintiff. Various matters of interest to the profession are included in the digest, for instance the rules of the higher courts, lists of the judiciary, etc. The bench and bar of New Jersey are fortunate in having so excellent a compilation of the case law of their State.

SAYLER'S AMERICAN FORM BOOK.

Saylor's American Form Book, containing the most improved legal forms and instruments for the use of professional and business men; also a statement of the law of deeds, mortgages, chattel mortgages, exemptions from executions, interests, mechanics' liens, wills; with forms for every State and Territory. By J. R. Saylor, Counselor at Law. Cincinnati, Robert Clarke & Co., 1878.

The object of this work, as announced by the publishers, is to provide a comprehensive, clear and reliable form book for professional and business men in the several States of the Union. Forms for all the more important classes of transactions, and especially such as require to be performed with legal precision, are given, with such instructions and directions as the practice and laws of the respective States relating to the same seem to demand. The forms cover all the subjects usually included in form books, and so far as we have been able to examine them, appear to be reliable. The synopsis of the laws of the several States relating to deeds, mortgages, etc., have been carefully prepared and accurately state the statutes as they now exist. The work will be found useful in every lawyer's library.

CORRESPONDENCE.

RETROSPECTIVE CONSTRUCTION OF STATUTES OF LIMITATION.

To the Editor of the Albany Law Journal:

SIR: By way of note to the interesting article in the *JOURNAL* of the 9th March, commenting on the case of *The People v. Lord*, 12 Hun, 282, and ably reviewing numerous authorities on the question, I would call the attention of "F. P. M." to the case of *Mayor and Council of Hagerstown v. Schner*, 37 Md. 180, in which the whole subject was elaborately discussed. The action was instituted by Schner against the town to recover damages for the destruction of his hardware store by a mob on the night of the 25th May, 1862, during the war. The suit was brought under the provisions of the Code, giving a remedy against cities or counties in such cases. It was instituted on the 4th May, 1867, not quite five years after the injury. Under the Statute of Limitations of the State, in force at the time of the destruction, this action would have been barred after three years, to wit, on the 26th May, 1865. In the winter of 1866 the Legislature passed an act

amending the article of the Code giving the remedy in this particular case, so as to provide "that any cause of action that may have *heretofore* arisen under this Article shall be prosecuted within the period of five years from the time of such cause accruing and not after; and all causes *hereafter* accruing shall be prosecuted within the period of three years from the time of the accrual of the same." The suit having been brought more than three years and less than five after the cause of action accrued, the only question was the power of the Legislature to extend the time of limitations in such cases.

On the part of the city it was contended that where the statute has become a flat bar, under pre-existing laws, it is beyond the constitutional power of the Legislature to pass an act extending the time: the right to plead the statute becomes a vested right. A large number of authorities were cited, among them, *Cooley on Const. Lim.* 357, 365, *et seq.*; *Girdner v. Stephens*, 1 Helskell, 230; *Gospel v. Wheeler*, 2 Gallison, 105; *Baughner v. Nelson*, 9 Gill, 299; *Sedgwick on Stat. & Const. Law*, 659, and very many others.

The plaintiff contended that there is no constitutional prohibition against the enlargement or suspension of the term of limitations in actions of tort, relying on 9 Gill, 309; *Foster v. Bank*, 16 Mass. 245; *Welch v. Wadsworth*, 30 Conn. 149, and many others. Also that the principle, at any rate, has no application to this class of cases, because the statutory liability is a liability of counties and towns, public political corporations created by the Legislature and subject to its control and jurisdiction. The authorities in support of this position are numerous. *State v. B. & O. R. R.*, 12 Gill, and *Johns*, 436; *Regents v. Williams*, 9 id. 400; *Dartmouth College case*, 4 Wheat. 518; *People v. Morris*, 13 Wend. 331; *Davidson v. Mayor, etc.*, 27 How. Pr. 342, *et als.*

In their opinion the court say they "have encountered great difficulty in arriving at a satisfactory determination of this question, and it was in consequence of it that a reargument was ordered." "The annulling of this act must assume that it is not within the scope of legislative power to pass a law which will have the effect to revive as between private individuals a cause of action which was completely barred by limitations before its passage. It must be conceded that the weight of authority elsewhere sustains this proposition. But it is not clear the Maryland decisions would allow its adoption here. Upon this point we express no opinion." The learned judge then enters into a discussion of the general question involved, defining vested rights to be "those rights to which a party may adhere, and upon which he may insist without violating any principle of sound morality. There can be no vested right to do wrong." But, say the court, "between public bodies and private citizens there is a wide and substantial distinction with respect to vested rights protected from legislative power. Public corporations are created by the Legislature for political purposes, with political powers to be exercised for purposes connected with the public good, subject at all times to the control of the Legislature with respect to their duration, powers and rights." 10 How. 534. "It would be difficult to conceive how such corporations could have or acquire any vested rights not subject to legislative control." The result was that the court sustained the act and the judgment for the plaintiff was affirmed.

HAGERSTOWN, March 12, 1878.

H. K. D.

OBITUARY.

GRENVILLE TREMAIN.

Grenville Tremain, one of the ablest and most brilliant of the younger members of the New York State Bar, died at his residence, in this city, on the 14th instant, after a brief illness. He was the son of the well-known lawyer, Lyman Tremain, and was born at Durham, Greene Co., N. Y., on the 19th of April, 1845. He was graduated at Union College, pursued his professional studies in the office of Peckham & Tremain, of this city, and at the Albany Law School, from which institution he was graduated in 1867. He subsequently became a partner of the firm of Peckham & Tremain and at once took an active and leading part in the business of his profession. He was corporation counsel of the city of Albany for several years, and in 1877 was the Republican candidate for Attorney-General of the State. No man in the profession had a higher promise of success than he a week before his death. Possessed of all the qualifications that go to make an eminent lawyer, enjoying the entire confidence of the bench and the bar, and having a large and lucrative practice, nothing seemed to be wanting to render his position the best that could be desired. His early death is, therefore, particularly to be regretted, not only by his relatives and friends, but by the profession to which he belonged and the community in which he had spent the greater portion of his life.

HENRY A. TAILER.

Henry A. Tailer, a prominent member of the New York City Bar, died on the 15th inst., at his residence in that city. He was born in New York in 1833, and received his education at Columbia College. Having been graduated from that institution at the head of the class of 1852, he passed the next two years in Europe, studying civil law at the universities of Bonn and Heidelberg. He also acquired an excellent knowledge of German and French, and was thoroughly acquainted with the best literature in both languages. Upon returning to New York, Mr. Tailer studied law in the office of Kent, Eaton & Kent. After having been admitted to the bar, he became a partner of the firm at the death of Mr. Kent. The firm then was Eaton, Davis & Tailer, and since the retirement of J. C. Bancroft Davis, has been Eaton & Tailer.

NOTES.

IN the case of *Lee v. Kaufman*, just decided in the United States Circuit Court, for the Eastern District of Virginia, the court sustains a demurrer of plaintiff to a plea of a want of jurisdiction interposed by the United States Attorney-General, the plea being that the United States was indirectly the defendant, and could not be sued. The ruling is that, if the sovereign power intervenes in a suit in which it is not a defendant on the record, with an objection that it cannot be sued, the court will look into the grounds of its right to intervene, and that accordingly the government in this suit must stand upon the strength of its title and not upon its exemption from suit.

A bill reported from the House committee on expenditures of the Department of Justice provides that in cases involving large amounts in which the United States may be a party in interest, and in cases of the United States against individuals for high crimes and misdemeanors, a district attorney may employ assistant counsel, but not more than one attorney or firm of attorneys in one case. Another bill reduces the compensation of clerks of District and Circuit Courts when one person holds both offices from \$7,000 to \$3,500 after the payment of necessary expenses.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, MARCH 30, 1878.

CURRENT TOPICS.

A POINT of very great importance was passed upon in the Circuit Court of the United States for the Eastern District of Virginia on the 15th inst., in the case of *Lee v. Kaufman*. The plaintiff brought action of ejectment to recover the well-known Arlington estate, near Alexandria, Virginia, which was, by the will of its owner, who died in possession in 1857, devised to the wife of General Robert E. Lee, with remainder to the plaintiff. In 1864, under acts passed by Congress for the collection of direct taxes in the insurrectionary States, the land was sold for the payment of a tax assessed upon it, and bid in for a sum largely in excess of the amount of the tax, by the United States, which at once took possession. At the time of the commencement of this action the land was occupied by defendant Kaufman, and about two hundred others. No part of the sum in excess of the tax for which the estate was bid in was ever paid to plaintiff or any one interested in the estate. After the commencement of the action the United States, which had not been made a party, intervened, claiming to be the owner of the land, and to occupy it in the exercise of its sovereign and constitutional powers, and suggested that the court had no jurisdiction of the subject in controversy, and moved that the declaration in the suit be set aside and all proceedings stayed and dismissed. The plaintiff demurred to the suggestion of the government. Judge Hughes, before whom the motion for a stay was made and argued, has delivered an elaborate opinion in which the whole subject presented by the motion is learnedly discussed. The court says that although an intervention of the government in this manner in a cause pending between other parties is unusual in this country, it is sanctioned by authority (*Florida v. Georgia*, 17 How. 478; *Maxwell's Lessee v. Levy*, 2 Dall. 381; *The Exchange*, 7 Cranch, 117) and is the settled practice in England. *Legh v. Rose*, 8 Mees. & Welsby, 579. Upon the questions of law presented by the suggestion and demurrer, namely: (1) Whether the suggestion was of itself sufficient to defeat the jurisdiction of the court over the

cause, and (2) whether, supposing it had not that effect *ipso facto*, the court might look into the grounds on which the intervention was made, the first question was answered in the negative, the court holding that the executive cannot on mere prerogative forbid the hearing of a citizen's plea. As to the second question Judge Hughes says that he is not at liberty, sitting as an inferior court, to hold that the fact of the Federal government being claimant by record title of the property which is made the subject of an indirect suit against it, in possession of it and in the actual use of it for public purposes, defeats the jurisdiction of the court to look into the grounds of the government's title and decide the action upon the merits. To so hold, he says, would be to overrule the Supreme Court in the cases of *Meigs v. McClung's Lessee*, 9 Cranch, 11; *Wilcox v. Jackson*, 18 Pet. 498; *Gresar v. McDowell*, 6 Wall. 263; and *Cooley v. O'Connor*, 12 id. 391. This ruling of the Supreme Court has been sustained by decisions of other courts: *Elliot v. Van Voorst*, 8 Wall. Jr. 801; *Dreux v. Kennedy*, 12 Lou. 489; *French v. Bankhead*, 18 Gratt. 183; *Polack v. Mansfield*, 44 Cal. 36.

Mr. Stephens of Georgia introduced in the House on Monday a bill for the reorganization of the Supreme Court of the United States. The main features of the bill are those providing for the division of the United States into fifteen judicial circuits and the appointment of six additional Supreme Court judges. The Chief Justice is to divide the Supreme Court into five sections of three judges each, one of whom is to be a presiding justice, and the business of the court is to be parceled out among those sections. The success of this bill would be a deplorable matter. While it might expedite business, it would dissipate the authority and the influence of the court.

It is announced that the law in reference to divorce in Connecticut has been so amended that the marriage contract can hereafter be dissolved only in cases of adultery, fraudulent contract, willful desertion for three years, seven years' absence unheard from, habitual intemperance, intolerable cruelty and imprisonment for an infamous crime in the State prison. These reasons seem to be sufficiently numerous, but the law of Connecticut is much more rigid than it has heretofore been.

The bill introduced in the English Parliament for the abolition of the action for breach of promise of marriage has led to a considerable discussion of the subject in the press of that country. The opponents of the bill have presented many cogent reasons against a change in the law, among which, is the

very general existence of such a right of action in different countries and ages, and under different systems of jurisprudence. It was recognized in the Roman law. Under the title *de sponsalibus*, in the Pandects of Justinian, it is stated that the action existed in Latium, and Servius Sulpicius in a work entitled *de Dotibus* says the action was maintainable when the Lex Julia conferred upon all the people of Latium the rights of citizenship. The canon law treated of promises of marriage with great seriousness, even admitting that in *foro conscientie* spiritual compulsion might be employed to enforce performance; but in later times the rule was relaxed by the Popes, and damages adjudged in lieu (*ex litteris de Sponsalibus*). In Sweden the power to decree performance of a promise to marry was retained so late as the year 1810, when it was abrogated. The Oriental Church, following the Israelitish doctrine, viewed a breach of promise in the light of a breach of marriage (Concil. Trullana 692, can. 98). An action of this kind will lie, according to French law, provided special damage be proved (Code Nap. and decisions thereon). By the law of Italy, this right of action arises whenever the formalities specified in Article 54 of the Code are complied with. The Prussian Code renders the breach of a legally constituted agreement to marry actionable, and, under certain circumstances, a penal offense. In one respect, the French, German, and Italian law, differs from that prevailing here, and in England, in that it does not admit injury to the feelings as an item of damage. And the rule permitting such an element of damage is, perhaps, the cause of most of the injustice that arises under the operation of our law. If the plaintiff could recover only such pecuniary damage as she has actually suffered, there would be no objection to the law as it now exists here.

The New Code, or that part of it that the governor vetoed, has not yet been voted upon in the Senate, to which it was returned. The opponents of the measure in both houses are preparing for a vigorous contest, and its friends will need all the strength they can muster, to overcome the veto. And work is being done very vigorously outside the legislature in the way of obtaining petitions against the proposed law, and in publishing editorial and other articles in those newspapers which are supposed to have an influence on legislation. It is impossible, at this time, to say what will be the result of all this, but both sides appear to be confident of success.

It is announced from New York that the next annual conference of the Association for the reform and codification of the Law of Nations will be held at Frankfort, Germany, on the 20th of August, 1878. Numerous matters of interest will be brought before

the conference and it is to be hoped that the United States will be well represented.

The Senate committee on judiciary have reported, without recommendation, a bill to repeal the bankrupt law. The views of the members of the committee were not at all harmonious, but a majority directed the report made, and several who did not favor repeal consented that the bill should be reported without recommendation. If the feeling of the committee is an index of that of the Senate the passage of the bill by that body seems certain. The House is sure to take like action on the matter and the only hope of those interested in a perpetuation of the law is in delaying action in one or the other of the two houses. We sincerely hope they may not be able to do so, for the great majority of the people, both business men and lawyers, have become convinced that the bankrupt law is productive of more harm than good, not only to business interests but to those of the legal profession. In one or two instances the courts have severely animadverted on the opportunities for fraud it affords. *Matter of Allen*, 17 Alb. L. J. 170. In various ways it operates to injure the community, and even its friends admit that essential amendments are needed if it should remain in force. No two persons agree as to what amendments should be made, and the only solution of the difficulty is that proposed by the Senate committee, namely, unconditional repeal.

The State of Iowa, after an experience of several years under legislation not permitting capital punishment for murder, has restored the death penalty. This State is very favorably situated for testing whether it is better for the community to inflict death as a penalty for murder, having an agricultural community with fertile lands, and with no large centers of population so as to develop what is known in our great cities as the criminal class. If an experiment of this kind ought to succeed anywhere it is in Iowa, but we judge that it has not from the circumstance that the change mentioned has been made.

The Vanderbilt will case, which has for some months occupied most of the spare time of the surrogate of New York, has been productive at length of an opinion from that official, wherein the question whether the declarations or admissions of a legatee under the will tending to show undue influence, or the absence of testamentary capacity are admissible in evidence in behalf of the contestants, is elaborately and learnedly discussed. Numerous authorities, American and English, are examined, and the conclusion reached that the declarations and admissions should be excluded.

NOTES OF CASES.

In *Pittsburgh, Cinc. & St. Louis Railway Co. v. Krouse*, 30 Ohio St. 222, the conductor on a railroad train upon which plaintiff was a passenger had received from plaintiff a five dollar bill, out of which he was to take for fare twenty-five cents. Being unable to then procure change he kept the bill, telling plaintiff he would change it at the station at which plaintiff was to alight. Plaintiff left the train at the station, and the train was moving off with the conductor, who had not given up the bill or made change, when plaintiff climbed on the platform and asked for his change. The conductor handed back the bill and there was evidence that he told plaintiff to get off the train, which was moving with some speed, as quickly as possible. Plaintiff did so at a point beyond where passengers usually alighted, and was injured. No compulsion was used to cause plaintiff to leave, and no attempt was made to stop the train. The court held that the relation of passenger and carrier did not exist between plaintiff and the company at the time he was injured, and that the duties and obligations of the company toward him were only such as existed toward the general public; that the failure of the conductor to return the money before leaving the station did not exempt plaintiff from the exercise of proper care and prudence, and that if the conductor ordered or directed plaintiff to get off the train while it was in motion, at a place where it was not prudent to make the attempt, each order or direction, without compulsion, did not warrant the plaintiff to do a hazardous or imprudent act and impute the consequences to the company, and that whether plaintiff's act was an imprudent one, amounting to contributory negligence, was for the jury to determine. In *Filer v. N. Y. Cent. R. R. Co.*, 49 N. Y. 47, it is held that when a passenger upon a railroad, by the wrongful act of the company, is put to an election between leaving the cars while they are moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, the company is liable to the consequences of his choice, provided it is not exercised wantonly or unreasonably. To the same effect is *Delematyr v. Milwaukee, etc., R. R. Co.*, 24 Wis. 578. In *McIntire v. N. Y. Cent. R. R. Co.*, 37 N. Y. 288, a similar rule was held where a passenger was injured in attempting to pass from one car to another in a moving train, under direction of an employee of the company; in *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227, where a person who had purchased a ticket was struck by a train while crossing the track under the direction of the ticket agent; and in *Sweeney v. Old Colony R. R. Co.*, 10 Allen, 858, where a person was injured by a train in crossing the track after he had been told by the company's flagman that it was safe. See, also, *Gaynor v. Old*

Colony R. R. Co., 100 Mass. 208; *Penn. R. R. Co. v. Kilgour*, 32 Penn. St. 292; *Lambeth v. North Carolina R. R. Co.*, 66 N. C. 494.

In *Mut. Life Ins. Co. v. French*, 30 Ohio St. 240, a policy of life insurance contained the usual clause of forfeiture for non-payment of premiums. The premiums were payable one-half cash and the other half by a note. Upon the 6th of July, 1867, the day the premium was due, the agent of the company received the check of assured, dated July 25, 1867, for the half cash due, and a six months' note, giving the renewal receipt for a year. The note contained the clause "if not paid at maturity said policy is to be null and void." Neither check nor note was paid. The court held that the mere fact that the note was not paid at maturity did not of itself avoid the policy. It gave the insurance company the option of declaring a forfeiture, but this option must be asserted by clear and unequivocal acts. The clause of forfeiture, being inserted in the note for the benefit of the company, might be waived by failure to act, or other circumstances evincing an intention not to claim the benefit of the stipulation. Whether the company had exercised such option, or waived its rights, was held to be a question of fact for the jury, under all the circumstances of the case. This is an application of the rule that such a clause being introduced for the benefit of the insurance company merely makes the policy voidable at its election, and not absolutely void upon a mere payment of the note. See *Bouton v. Am. Mut. Life Ins. Co.*, 25 Conn. 542; *Jacobs v. Mut. Life Ins. Co.*, 5 Big. 48; *Wing v. Hervey*, 27 E. L. & Eq. 140; *Buckbee v. U. S. Mut. Ins. & Trust Co.*, 18 Barb. 541; *Sheldon v. Conn. Mut. Ins. Co.*, 25 Conn. 207; *Goit v. Nat. Prot. Ins. Co.*, 25 Barb. 189. In the case at bar the company retained the check and note and refused to return the same. The court held that this amounted to a waiver of the forfeiture. This is an application of the principle that forfeitures are not favored at law, and very slight circumstances are required to constitute a waiver. A receipt of premium after it is due has been often held to be a waiver. See *Froelich v. Atlas Life Ins. Co.*, 47 Mo. 406; *Sims v. State Ins. Co.*, id. 54; *Hodson v. Guardian Life Ins. Co.*, 97 Mass. 144; *Thompson v. St. Louis Mut. Life Ins. Co.*, 52 Mo. 469. And even an acknowledgment of the receipt of premiums has been held sufficient. *Teutonia Life Ins. Co. v. Anderson*, 77 Ill. 384; *Ill. Cent. Ins. Co. v. Wolf*, 37 id. 354; *Prov. Life Ins. Co. v. Fennell*, 49 id. 180. See, also, *Helms v. Ins. Co.*, 61 Penn. St. 707; *Fitzpatrick v. Ins. Co.*, 25 La. Ann. 443; *Ripley v. Ins. Co.*, 29 Barb. 552; *Co. Litt. 218 a*; *Shepp. Touchstone*, 153; *Lessee of Boyd et al. v. Talbert*, 12 Ohio, 212; *Smith v. Whitbeck et al.*, 18 Ohio St. 471; *Kellogg v. Union Co.*, 12 Conn. 7

LIABILITY OF MARRIED WOMEN FOR DEFICIENCY UNDER FORECLOSURE.

A CASE presenting peculiar and interesting questions of law has just been decided by the Court of Appeals of New York State, involving the liability of married women as mortgagees in foreclosure proceedings. We refer to the case of *Vrooman v. Harriet B. Turner*, impleaded. The gravamen of the complaint was that the defendant took a conveyance of certain premises in which appeared the following provision: "Subject, nevertheless, to the payment of a certain indenture of mortgage, bearing date the 5th day of August, 1873, made and executed by Charles E. Evans to John W. Eddy, to secure the principal sum of fifty-five hundred dollars and the interest thereon, and recorded in the office of the Register of the county of Kings, in Liber number 1166 of Mortgages, page 22, on the 9th day of August, A. D. 1873, which mortgage the party hereto of the second part hereby covenants and agrees to pay off and discharge, the same forming part of the consideration therefrom."

The case was tried below before a referee, who decided as matter of law, that the plaintiff was entitled to the usual decree for the foreclosure and sale of the mortgaged premises, and if the proceeds of such sale "be insufficient, that the plaintiff have judgment for the amount of said deficiency against Charles E. Evans, the mortgagor and obligor, and against Harriet B. Turner, who, by assuming the payment of the said mortgage as a part of the consideration of the conveyance of the mortgaged premises to herself, has become, and is in law, personally liable therefor."

On the trial the counsel of the defendant requested the referee to find that the covenant was not for the benefit of the separate estate of said defendant, which the referee declined to do, and an exception was taken.

The defendant appealed to the General Term of the Supreme Court for the Second Department, and largely rested her case upon the principles of law enunciated by the Court of Appeals in the cases of *Trotter v. Hughes*, 12 N. Y. 74; and *King v. Whitely*, 10 Paige, 465, claiming that they substantially decided that where, as in the present case, the grantor in a conveyance is not personally liable to the holder of the mortgage to pay the same, his grantee is not liable, although assuming in terms to pay the same. The defendant, however, in that case, did not undertake personally to pay the mortgage, and the judge at the General Term remarked that "the decision would have been fully as satisfactory if it had been placed on that ground. The questions presented and discussed in *Trotter v. Hughes* created much conflict of judicial opinion, but by the case of *Burr v.*

Beers, 24 N. Y. 178, it was held in general terms that a mortgagee could maintain a personal action against a grantee of mortgaged premises, who assumes to pay the incumbrance; that if one person makes a promise to another for the benefit of a third person, such third person may maintain an action upon the promise.

And thus, under the principles decided in *Burr v. Beers*, the General Term judge* held that the defendant, Harriet B. Turner, undertook to pay her own debt and that there was no reason in law or morals why she should not do it. On the question of coverture, he said: "We think that the coverture of the defendant was no defense to this action. The liability was contracted upon the purchase of real property by the defendant in her own name, which became her separate estate, and it was a contract to pay a portion of the purchase-money, and was therefore for the benefit of her separate estate."

Upon the question of liability of the defendant, Mrs. Turner, under the covenant *per se*, the respondent cited *Thorpe v. Keokuk Coal Co.*, 48 N. Y. 253; *Coster v. Mayor of Albany*, 43 id. 411; *Secor v. Lord*, 3 Keyes, 525; *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 id. 178; *Garnsey v. Rogers*, 47 N. Y. 233; and on the question of coverture, *Frecking v. Rolland*, 53 N. Y. 425, and *Maxon v. Scott*, 55 id. 247.

In the case under consideration, the defendant's grantor had not assumed the payment of the mortgage, and the prime question was whether, under the circumstances, covenant to assume the same constituted a cause of action. This question seems to be clearly decided in *King v. Whitely* and *Trotter v. Hughes*, that in such case it does not constitute a cause of action.

The case, *Lawrence v. Fox*, 20 N. Y. 268, cited by the respondent, only decided that, where one person loans money to another upon his promise to pay it to a third party, to whom the party so lending the money is indebted, the contract thus made by the lender is made for the benefit of his creditor, and the latter can maintain an action upon it, without proving an express promise to himself from the party receiving the money. The opinion of Judge Rapallo on the case of *Lawrence v. Fox* is very clear and satisfactory. In the course of his review of the case (see *Garnsey v. Rogers*, 47 N. Y. 233) he says he does not understand that that case went so far as to hold every promise made by one person to another, from the performance of which a third person would be benefited, gives a right of action to such third person, he being privy neither to the contract nor the consideration. In such cases the contract should have been made for his benefit. *Vide* the English cases of *Dutton v. Poole*, 1 Ventris, 318; *Price v. Eaton*, 4 Barn. & Adol. 433, and *Lilly v. Hays*, 5 Ad. & Ellis, 548. A case of much weight in favor of the appellant in the case under

consideration is that of *Merritt v. Green*, 55 N. Y. 270. We do not see that the case of *Burr v. Beers*, cited by the respondent, was of much avail, for in that case the defendant retained in his hands a portion of the purchase-money, agreeing to discharge with it the debt his grantor owed the plaintiff, and in this case, *Vrooman v. Mrs. Turner*, the defendant simply bought the interest her grantor (Sanborn) had, who held the premises subject to the mortgage, but was not liable for the payment of the same.

On the question whether Mrs. Turner was bound by the covenant contained in the deed from Sanborn, her grantor, wherein it is recited that she agrees to pay the mortgage, the appellant cited the following pertinent cases: *Chamberlain v. Parker*, 45 N. Y. 569; *Ballin v. Dillaye*, 37 id. 45; *White v. McNett*, 33 id. 371; and on the point as to affecting her separate estate, *Yale v. Dederer*, 22 N. Y. 450; *Corn Ex. In. Co. v. Babcock*, 42 id. 613.

The Court of Appeals, in deciding the questions raised, adverted to *King v. Whitely*, *supra*, decided in 1848, the first case on the precise question in the case under review, and in effect observes, that it was conceded by the Chancellor that if the grantor had been personally liable to the holder of the mortgage for its payment, the holder of such mortgage would have been entitled in equity to the benefit of the agreement recited in such conveyance, to pay off the mortgage, and to a decree over against the grantee for the deficiency. This would have been in accordance with a well-established rule in equity which gives to the creditor the right of subrogation to, and the benefit of any security held by a surety for the re-enforcement of the principal debt, and in the case supposed, and by force of the agreement recited in the conveyance, the grantee would have become the principal debtor, and the grantor would be a *quasi* surety for the payment of the mortgage debt. See *Halsey v. Reed*, 9 Paige, 446; *Curtis v. Tyler*, id. 432; *Burr v. Beers*, 24 N. Y. 178. In *King v. Whitely*, *supra*, the Chancellor in effect decided, that, if the grantor had been personally liable to the holder of the mortgage for the payment of the mortgage debt, the holder of it would have been entitled to the benefit of the agreement recited in such conveyance, on the principle of equity which gives to the creditor the right of subrogation of the security held by a surety in such cases, the grantee thereby becoming the principal debtor, and the grantor a *quasi* surety for the payment of the mortgage. *Halsey v. Reed*, 9 Paige, 446; *Curtis v. Tyler*, id. 432.

In his elaborate opinion, in *Vrooman v. Mrs. Turner*, Allen, J., in commenting upon the principle which governs such cases, observes: "The rule which exempts the grantee of mortgaged premises subject to a mortgage, the payment of which is assumed in consideration of the conveyance, as be-

tween him and his grantor, from liability to the holder of the mortgage when the grantee is not bound in law or equity for the payment of the mortgage, is founded in reason, and rests upon principle, and is not inconsistent with that class of cases in which it has been held that a promise to one for the benefit of a third party may avail to give an action directly to the latter against the promisor, of which *Lawrence v. Fox*, *supra*, is a prominent example." It has also been settled by several well-considered cases, that, to give a third party, who may derive a benefit from the performance of the promise, an action, two things must concur: 1st, an interest by the promisee to secure some benefit to the third party, and 2nd, some privity between the two, the promisor and the party to be benefited, and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally, or, in the language of Judge Rapallo: "To entitle him to an action the contract must have been made for his benefit. He must be the party intended to be benefited." *Vide Irish v. Ridge*, 41 N. Y. 21, and also *Merrill v. Green*, 55 id. 270. The courts seem disinclined to extend the doctrine of *Lawrence v. Fox* to cases not clearly within the principle of those decisions. There must be some obligation of the promisee in the third party to adopt and claim the promise as made for his benefit. Gray J., in the last cited case, remarks: "All the defendant had the right to demand in this case was evidence which, as between Halley and the plaintiff, was competent to establish the relation between them of debtor and creditor." See, also, *Doolittle v. Naylor*, 2 Bos. 225, and *Ford v. David*, 1 id. 569; *Farley v. Chambord*, 4 Cow. 482 (1825), affirmed in the Court for the Correction of Errors in 1827 *per totam curiam*, and reported in 9 Cow. 639.

In view of these several authorities it will be clearly observed that the General Term, in holding that the defendant, Mrs. Turner, "was bound to pay the whole consideration for the premises," and that it was "simply an agreement to pay her own debt," was giving the adjudicated cases on this general question, as the mariner would say, too much sea room. And thus Judge Allen, in closing his long opinion, concludes, that the court below erred in giving judgment against the appellant for the deficiency after the sale of the mortgaged premises, and that so much of the judgment as directed her to pay the same should be reversed, in which the court concurred, except Earl, J., dissenting.

The case thus decided is a clear and satisfactory exposition of the equitable principles governing the liability of grantees where the grantor has never assumed to pay the mortgage sought to be foreclosed.

In the view taken of the case under considera-

tion, the Court of Appeals did not pass directly upon the defense raised as to the defendant being a married woman and relieved from the covenant thereby. It was not necessary. We will, however, in addition to the authorities cited above, refer to the *Manhattan Brass and Manufacturing Company v. Henrietta Thompson*, 58 N. Y. 80, wherein Chief Justice Church has written an exhaustive opinion on that general question. His conclusions are as to when married women's contracts may be enforced: (1) When created in or about carrying on a trade or business of the wife. 85 Barb. 78; *Freckling v. Roland*, 53 N. Y. 422. (2) When the contract relates to or is made for the benefit of the separate estate. 36 N. Y. 600, and 87 id. 85. (3) When the intention to charge the separate estate is expressed in the instrument or contract by which the liability is created. 18 N. Y. 265; 22 id. 450; *Moxon v. Scott*, 55 id. 247.

The act of 1862 (Laws of N. Y., ch. 172, p. 343), in regard to married women, provides that they may trade or do business on their sole and separate account; and gives a married woman, possessed of real estate as her separate property, the right to do any act with reference to the same, with the same effect as if she were unmarried. She may also sue and be sued in the same manner as a *feme sole*. And as Davis, J., observes, in the case of *Quassac National Bank of Newburgh v. Charlotte A. Waddell*, 1 Hun, 181, the law takes off for her protection all the embarrassment of the married relation in respect of separate real estate, and makes her in regard to it a *feme sole, pro hac vice*, and it continues that peculiar condition in all matters having relation to separate property as well where she is sued as where she sues.

We have thus reviewed the points and the law presented in the case of *Vrooman v. Mrs. Turner* (not yet reported), and have presented authorities bearing upon the principal questions involved, and believe we have touched upon and cited all of the authorities of value on the general issues discussed.

JOHN F. BAKER.

RIGHT OF PHYSICIANS TESTIFYING AS EXPERTS TO COMPENSATION.

SUPREME COURT OF INDIANA, NOVEMBER, 1877.

BUCHMAN v. STATE.

While a physician or surgeon, when called upon, must attend and testify to facts within his knowledge for the same compensation in the way of fees as any other witness, he cannot be compelled to give a professional opinion without additional compensation. Accordingly a commitment of a physician for refusing to testify as an expert in a criminal case without reasonable compensation therefor held erroneous.

APPEAL from an order of commitment. The appellant, Dr. Buchman, was called to testify as a witness at the trial of one Hamilton for rape. He was asked whether or not, in female menstruation, there

is, sometimes, a partial retention of the menses after the main flow has ceased; he refused to answer unless reasonably compensated before testifying as a medical expert. He refused to answer another question, saying that this answer would depend upon his professional knowledge of the subject, and he would not give it without being paid.

The court held that the witness was required by law to answer the questions without compensation other than the ordinary witness fee, and the witness persisting in his refusal to answer, he was committed as for a contempt, and thereupon took this appeal.

WORDEN, J. The question presented, being a novel one in Indiana, so far as we are advised, and an important one, we have bestowed such time and care upon its consideration as its importance seemed to require.

It must be and is conceded that a physician or surgeon, when called upon, must attend and testify to facts within his knowledge, for the same compensation, in the way of fees, as any other witness. In respect to facts within his knowledge, he stands upon an equality, in reference to compensation, with all other witnesses. But the question presented is, whether he can be compelled to give a professional opinion without compensation other than the ordinary fees of witnesses.

In England, there is some diversity in the decisions in respect to the question whether an attorney or medical man is entitled to higher compensation for attendance as a witness than ordinary witnesses. This diversity, however, relates to witnesses required to testify to facts, and not to give professional opinions. In respect to professional opinions, we are not aware of any diversity of decision. In note 2 to section 810, 1 Greenl. Ev., 13th ed., it is said: "An additional compensation for loss of time was formerly allowed to medical men and attorneys, but this rule is now exploded. But a reasonable compensation paid to a foreign witness, who refused to come without it, and whose attendance was essential in the cause, will, in general, be allowed and taxed against the losing party. See *Loneragan v. The Royal Exchange Assurance*, 7 Bing. 725; S. C., id. 729; *Collins v. Godefroy*, 1 B. & Ad. 950. There is also a distinction between a witness of facts and a witness selected by a party to give his opinion on a subject with which he is peculiarly conversant from his employment in life. The former is bound as a matter of public duty to testify to facts within his knowledge. The latter is under no such obligation, and the party who selects him must pay him for his time before he will be compelled to testify. *Webb v. Patge*, 1 Car. & Kir. 23." The case of *Loneragan v. The Royal Assurance*, referred to in the above note, was not the case of a witness called to give a professional opinion, but the witness was a foreign sea captain, without whose presence the plaintiff's attorney "deemed it unsafe to trust the trial of the cause to written depositions, so long as he could prevail on the captain to remain in England to give his evidence personally on the trial before the jury; inasmuch as the demeanor and manner of Captain Moffatt's giving his evidence before the jury might have great weight with the jury, in addition to his intelligent and gentlemanly appearance." Tindal, C. J., said, amongst other things: "But the general rule has been that when witnesses attend under a subpoena, none receive any allowance for loss of time, except medical men

and attorneys. If that rule were to undergo revision, I cannot say that it would stand the test of examination. There is no reason for assuming that the time of medical men and attorneys is more valuable than that of others whose livelihood depends on their own exertions. But that rule is not applicable to the case of a foreign witness, who may refuse to attend if the terms he proposes are not acceded to. If he asks only what is reasonable, I cannot see why it should not be allowed, and be charged to the unsuccessful party."

The case which is supposed to have exploded the rule that attorneys and medical men are to have additional compensation for loss of time, is that of *Collins v. Godefroy*, cited in the above note. In that case Collins sued Godefroy, to recover a remuneration for plaintiff's loss of time, in attending as a witness, under a subpoena issued by Godefroy, in a case in which Godefroy was a party. The plaintiff attended six days as a witness, but was not called upon to give his evidence. Lord Tenterden, C. J., said: "If it be a duty imposed by law upon a party regularly subpoenaed to attend from time to time to give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without consideration. We think such a duty is imposed by law, and on consideration of the statute of Elizabeth, and of the cases which have been decided on the subject, we are all of the opinion that a party cannot maintain an action for compensation for loss of time in attending a trial as a witness. We are aware of the practice which has prevailed in certain cases of allowing as costs between party and party so much per day for the attendance of professional men, but that practice cannot alter the law. What the effect of our decision may be is not for our consideration. We think on principle that an action does not lie for a compensation to a witness for loss of time in attendance under a subpoena."

But, notwithstanding the case above noticed, the rule allowing professional men additional compensation was followed in England as late as 1862. In the case of *Parkinson v. Atkinson*, 31 L. J. (N. S.) 199, the master had allowed the expenses of an attorney who was called as a witness, but did not give professional evidence, on the higher scale allowed to professional witnesses. On motion for a rule to show cause why the taxation should not be reviewed, Earle, C. J., said: "We do not approve of the rule which is said to prevail in criminal cases, that if a surgeon is called to give evidence not of a professional character, he is only to have the expenses of an ordinary witness. We think the master was quite right in allowing the expenses of this witness on the higher scale." So, also, in the case of *Turner v. Turner*, Jurist, 1859, p. 839, the master allowed one Marcus Turner, a barrister, of London, one pound and a shilling a day for attendance as a witness. The Vice-Chancellor said: "The right of a professional man to one pound and a shilling per day was founded on the fact of his being abstracted from his functions. It was unnecessary to say what classes came within the definition 'professional man,' but there was no doubt that a barrister did, and if subpoenaed as a witness, he had a right to receive the remuneration, small or scanty as it was." The motion to vary the taxation was overruled.

The foregoing cases, however, do not decide the point involved here, and they have been noticed rather with a view of showing that they are not in conflict

with the right claimed by the appellant than as establishing that right. We come now to authorities more directly in point.

The case of *Webb v. Paige*, cited in the above note from Greenl. Ev., decided in 1843, was an action for negligence in carrying goods. A witness was called for the plaintiff to speak of the damage sustained by the goods, consisting of cabinet work, and the expense that would be necessary to restore or replace the injured articles. The witness demanded compensation, and Maule, J., in deciding the point, used the language set out in the latter part of the note above cited from Greenleaf. The witness, upon receiving an undertaking for his pay, was examined. This is the only English case that bears directly upon the point, of which we have any knowledge. The American cases are not numerous, and we proceed to notice such as there are.

In the *Matter of Roelker*, Sprague, 276, during a trial upon an indictment, the district attorney moved for a *captas* to bring in a witness, who had been subpoenaed to testify as an interpreter. But Sprague, J., said: "A similar question had heretofore arisen as to experts, and he had declined to issue process to arrest in such cases. When a person has knowledge of any fact pertinent to an issue to be tried, he may be compelled to attend as a witness. But to compel a person to attend because he is accomplished in a particular science, art or profession, would subject the same individual to be called upon in every case in which any question in his department of knowledge is to be solved. Thus the most eminent physician might be compelled, merely for the ordinary witness fees, to attend from the remotest part of the district, and give his opinion in every trial in which a medical question should arise. This is so unreasonable that nothing but necessity can justify it. The case of an interpreter is analogous to that of an expert. It is not necessary to say what the court would do if it appeared that no other interpreter could be obtained by reasonable effort. Such a case is not made as the foundation of the motion. It is well known that there are in Boston many native Germans and others skilled in both the German and English languages, some of whom, it may be presumed, might without difficulty be induced to attend for an adequate compensation."

In the case of *The People v. Montgomery*, 18 Abb. Pr. (N. S.) 207, Montgomery was indicted for murder. The district attorney had procured the attendance of Dr. Hammond as a witness to testify professionally in the case, who was paid, or was to be paid, the sum of \$500, for his attendance and services as such witness. This was complained of as an irregularity. The court said, E. D. Smith, P. J., delivering the opinion: "We do not see that the calling of Dr. Hammond as a witness and the payment to him of a sufficient sum to secure his attendance at the court during the trial was in any respect an irregularity, or did any wrong to the prisoner. It seems to us that the district attorney was acting in the line of his duty as public prosecutor in securing the attendance of a proper medical witness of high repute to meet the distinguished medical experts, which he knew the prisoner expected to call on his side. * * * The district attorney, it is true, might have required the attendance of Dr. Hammond on subpoena, but that would not have sufficed to qualify him to testify as an expert with clearness and certainty upon the questions

involved. He would have met the requirements of the subpoena if he had appeared in court when he was required to testify and give proper impromptu answers to such questions as might then have been put to him in behalf of the People. He could not have been required, under process of subpoena, to examine the case, and to *have used his skill and knowledge to enable him to give an opinion upon any points of the case*, nor to have attended during the whole trial and attentively considered and carefully heard all the testimony given on both sides, in order to qualify him to give a deliberate opinion upon such testimony, as an expert, in respect to the question of the sanity of the prisoner. Professional witnesses, I suppose, are more or less paid for their time, services and expenses, when called as experts in important cases, in all parts of the country."

These cases go far to establish the position contended for by the appellant. But, on the other hand, the case of *Ex parte Dement*, decided by the Supreme Court of Alabama, and reported in 6 Cent. L. J. 11, decides that a physician or surgeon may be compelled to testify as an expert, where the testimony is relevant to a cause pending before a judicial tribunal, without being paid as for a professional opinion.

Having thus considered the cases that have come under our notice bearing on the subject, it may be well to look at the works of text writers, for they furnish at least some evidence of what the law is. In 1 Taylor's Med. Jur., p. 19, it is said: "Before being sworn to deliver his evidence, a medical or scientific witness may claim the payment of his customary fees, unless an arrangement has already been made between him and the solicitors who have sent him a subpoena. These fees are generally made matter of private arrangement between the witness and the attorney." This clearly implies that he is to be paid his customary fees for an opinion, and that he may demand payment before delivering his evidence. But we doubt whether he could make the demand before being sworn, for he might be called upon to prove some fact within his knowledge.

In The Jurisprudence of Medicine in its Relations to the Law of Contracts, Torts and Evidence, by John Ordronaux, §§ 114, 115, it is said: "But once put upon the stand as a skilled witness, his (the physician's) obligation to the public now ceases, and he stands in the position of any professional man consulted in relation to a subject on which his opinion is sought. It is evident that the skill and professional experience of a man are so far his individual capital and property, that he cannot be compelled to bestow it gratuitously upon any party. Neither the public, any more than any private person, have a right to extort services from him in the line of his profession without adequate compensation. On the witness stand, precisely as in his office, his opinions may be given or withheld at pleasure, for a skilled witness cannot be compelled to give an opinion, nor be committed for contempt if he refuses to do so. * * * As the result of the foregoing conclusions, it may be said that a witness who is called in an action to depose to a matter of opinion, depending on his skill in a particular trade, has, before he is examined, a right to demand from the party calling him a compensation for his services; for there is a wide distinction between a witness thus called and a witness who is called to depose to facts which he saw." Then follow the re-

marks of Maule, J., in the case of *Webb v. Paige*, which have already appeared in this opinion.

In 2 Phil. Ev., 4th Am. Ed., p. 828, it is said: "With respect to compensation for loss of time, the general rule is that it ought not to be allowed; though some compensation has usually been allowed to medical men and attorneys, but not others. And there seems to be a reasonable distinction between the case of a witness called to depose to a fact, and one who is called to speak to a matter of opinion, depending on his skill in a particular profession or trade; the former is bound, as a matter of public duty, to speak to the fact which has occurred within his knowledge, but the latter is under no such obligation, and is selected by the party to give his opinion merely, and he is entitled, therefore, to demand a compensation for loss of time."

In 1 Redf. on Wills, note 44 to pl. 81, pp. 154-5, the author says: "The following propositions may be of interest: 1. It is clear that experts are not obliged to give testimony upon mere *speculative* grounds, and where they have no personal knowledge of the facts in the case. If they have had personal knowledge of the testator it may fairly be regarded as amounting to the knowledge of facts. But unless this is the case, a medical witness is not obliged to obey the ordinary witness subpoena, and will not be held in contempt for disobeying it. This has been so ruled at *nisi prius* in England within the last few years. 2. The expert is not obliged to examine books and precedents, with a view to qualify himself to give testimony; nor is he obliged to examine into the facts of cases by personal inspection of individuals, whose state may be the subject of controversy in the courts. 3. It being purely matter of conventional arrangement between professional experts and those who desire to employ them as witnesses, both in regard to their acting as such, and also their making preparation to enable them to give such testimony, it virtually places a price upon such testimony in the market, and its price is likely to range somewhat according to its ability to aid one or the other of the parties litigant. The tendency of this is to make it partisan and one-sided, as a general thing."

Judge Redfield in no manner dissents from the above propositions as legal ones, but suggests, not that experts are not entitled to be paid, but that the law should be so changed "that this class of witnesses should be selected by the court, and that this should be done wholly independent of any nomination, recommendation or interference of the parties, as much so, to all intents, as are the jurors. To this end, therefore, the compensation of scientific experts should be fixed by statute, or by the court, and paid out of the public treasury, and either charged to the expense of the trial, as part of the costs of the cause, or not, as the legislature should deem the wisest policy." Iowa has legislated upon the subject, so that the court is to fix the compensation with reference to the time employed, and the degree of learning or skill required. *Snyder v. Iowa City*, 40 Iowa, 646.

These elementary authorities, and the cases of *Webb v. Paige*, and *In the Matter of Roelker*, *supra*, clearly and unmistakably point to the conclusion that the appellant was not bound to give his professional opinion without having been paid therefor. It would seem on general principles that the knowledge and learning of a physician should be regarded as his property which ought not to be extorted from him in

the form of opinions without just compensation. As it was said by this court of an attorney in the case of *Webb v. Baird*, 6 Ind. 13: "To the attorney, his profession is the means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services from a particular class, in effect imposes a tax to that extent upon such class—clearly in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation upon all the citizens. * * * The idea of one calling enjoying peculiar privileges, and therefore being more honorable than any other, is not congenial to our institutions. And that any class should be paid for their particular services in empty honors is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights."

In *Israel v. The State*, 8 Ind. 467, it was held that the services of witnesses, in criminal cases, were not "particular services," within the meaning of the Constitution. This is conceded. Witnesses who know any thing of a case, however high or low, rich or poor, learned or unlearned they may be, or whether occupying public or private stations in life, all stand upon an equality in this respect and must attend as witnesses without other compensation than that provided by law. This is a burden that falls upon all alike. The witnesses are bound to attend, and, in the language of some of the authorities before cited, "speak to the facts which have occurred within their knowledge." But the case decides nothing upon the point here involved. The case of *Blythe v. The State*, 4 Ind. 526, however, is exactly in point in principle. There Blythe, an attorney of the court, was appointed to defend a pauper on the charge of a larceny. Blythe denied the right of the court to demand his professional services without compensation, and refused to act. For this refusal the court adjudged him guilty of contempt. This court held, under the provision of the Constitution above set out, that he was not bound to perform the service.

In *Webb v. Baird*, 6 Ind. 13, Baird had been appointed to defend a pauper on a criminal charge and had performed the service, and the question involved was whether he was entitled to compensation from the county. Judge Stuart said in delivering the opinion of the court, that "the law which requires gratuitous services from a particular class, in effect imposes a tax to that extent upon such class—clearly in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation upon all the citizens."

But if the professional services of a lawyer cannot be required in a civil or criminal case without compensation, how can the professional services of a physician be thus required? Is not his medical knowledge his capital stock? Are his professional services more at the mercy of the public than the services of a lawyer? When a physician testifies as an expert by giving his opinion, he is performing a strictly professional service. To be sure he performs that service under the sanction of an oath. So does the lawyer when he performs any service in a cause. The position of a medical witness testifying as an expert is much more like that of a lawyer than that of an ordinary witness testifying to facts. The purpose of this

service is not to prove facts in the cause, but to aid the court or jury in arriving at a proper conclusion from facts otherwise proved. Is not this also the province and business of an attorney? And are not the services of each equally "particular?" All attempts to make a difference in the two cases are but losing sight of the substance and grasping at the shadow.

If physicians and surgeons can be compelled to render professional services by giving their opinions on the trial of criminal cases without compensation, then an eminent physician or surgeon may be compelled to go to any part of the State, at any and all times, to render such services without other compensation than such as he may recover as ordinary witness fees from the defendant in the prosecution, depending upon his conviction and ability to pay. This, under the general principles of law and the Constitution of the State, he cannot be compelled to do. If he knew facts pertinent to the case to be tried, he must attend and testify as any other witness. In respect to facts within his knowledge, his qualifications as a physician or surgeon are entirely unimportant. In respect to facts, as before stated, he stands upon an equality with all other witnesses; and the law, as well as his duty to the public, requires him to attend and testify for such fees as the legislature have provided. Not so, however, in respect to his professional opinions. In giving them he is performing a "particular" service, which cannot be demanded of him without compensation. The 13th section of the Bill of Rights, provides that in all criminal prosecutions, the accused shall have the right to have compulsory process for obtaining witnesses in his favor. This provision has no bearing upon the question involved. The term "witness," as thus used, was used in its ordinary sense as embracing those who know, or are supposed to know some fact or facts pertinent to the cause. But the physician or surgeon, when giving his professional opinion in a court, does not, as above stated, occupy the position of a witness testifying to facts. He performs the service under oath, to be sure, and this is the only circumstance from which he can be called a witness at all. So the judge upon the bench, the lawyer at the bar and the jury in the jury box, all perform their service under oath.

It is unnecessary to determine, in this case, whether all classes of experts can require payment before giving their opinions as such. It is sufficient to say that physicians and surgeons, whose opinions are valuable to them as a source of their income and livelihood, cannot be compelled to perform service by giving such opinions in a court of justice without such payment. The commitment of appellant for contempt was erroneous and the judgment of the court below is reversed.

Biddle, C. J., and Niblack, J., dissented.

STATE LEGISLATION IMPAIRING OBLIGATION OF CONTRACTS.

SUPREME COURT OF MISSOURI, MARCH, 1878.

STATE OF MISSOURI V. MILLER.

By an act of the legislature of Missouri, passed previous to 1843, a town was authorized to raise for a public purpose \$15,000 by the grant of a lottery privilege. Under such act the town officers granted to G. the right to maintain a lottery for the sum of \$250, payable semi-annually, commencing January 1, 1843, until \$15,000 was paid, which would be in 1870. In 1849 G. not having made

the stipulated payments, the town officers made a new contract with him, releasing him from payment of the sums due and providing that he should have a right to maintain the lottery upon the payment of \$250 semi-annually, until the balance unpaid of the \$15,000 should be paid, which would be in 1877. This contract was declared valid by an act of the legislature passed in 1855. Held, that the contract authorizing the continuance of the lottery until 1877 was by the act of the legislature in 1855 made a valid one and created a vested right in G., which could not, under the constitutional provision against impairing the obligation of a contract, be interfered with by State legislation.

Held, also, that the ratification of the contract between the town officers and G. by the legislature made that contract the act of the State, and that the law ratifying it was not invalid under a constitutional provision forbidding retrospective legislation.

A PPEAL by defendant from a judgment of the St. Louis Court of Appeals, affirming a judgment in favor of plaintiff. The facts appear in the opinion.

NORTON, J. This is a proceeding in the nature of *quo warranto* exhibited by the attorney-general on behalf of the State, to the St. Louis Circuit Court, in which it is alleged that defendants, without warrant, and in violation of law were engaged in selling lottery tickets under a pretended franchise, and praying that they be required to appear and show by what authority they were acting. Defendants appeared and alleged in their answer that by virtue of a contract entered into on the 1st of June, 1842, by one Gregory with the trustees of the town of New Franklin, and a modification thereof made on the 11th of April, 1849, as ratified by an act of the general assembly, passed in December, 1855, they were fully authorized to enjoy the privilege of selling tickets and conducting a lottery in the State till the year 1877, they having acquired by purchase and assignment from the representatives of said Gregory all the rights accruing to him under said contracts. It was also averred that the general assembly passed an act in 1833, incorporating the town of New Franklin, in which it was provided that it might through its trustees raise by lottery the sum of \$15,000 for the purpose of building a railroad from said town to the Missouri river. That in 1836 another act was passed authorizing the said trustees to contract with any person to have said lottery drawn in any part of the United States on such terms as they might consider the most advantageous. Also another act, passed in 1839, whereby the trustees were empowered to apply the proceeds of said lottery in constructing a macadamized, instead of a railroad. It was also provided by this act that the governor might, by proclamation, authorize the trustees to raise by lottery a sum not exceeding \$15,000 to complete the work. That under a proclamation thereafter issued by the governor, giving the requisite authority, the said trustees, on the 1st of June, 1842, made a contract with one Walter Gregory, by which they sold and transferred to him the said lottery privilege and all rights to control the same, and appointed him the sole manager thereof. In consideration of which the said Gregory agreed to assume the management of said lottery and to pay the trustees, in installments, \$250 on the first day of January, 1843, \$250 on the first day of June, 1843, and so on, paying the sum of \$250 semi-annually till the said sum of \$15,000 was fully paid. The said Gregory further agreed to pay all expenses, costs and charges growing out of the management of said lottery, to sustain all hazards, risks and losses and pay all prizes drawn or decided in said lottery. That the contract was modified by another made on the 11th April, 1849, between said Gregory and the board of trustees, whereby the said Gregory, on the payment of \$500, was released from

all payments under the contract of June 1, 1842, till the 15th June, 1851, when the semi-annual payments of \$250 on the said contract were then to begin and continue until the additional sum of \$13,400 was fully paid.

That the general assembly, by an act passed in December, 1855 (Sess. Acts 1855, p. 487) among other things, provided "that all contracts made by the said trustees for the purpose of raising the amount of money authorized to be raised by the said act of incorporation and the acts amendatory thereof, for the purpose of constructing a rail or macadamized road, from the bank of the river to said town be and the same are hereby declared to be legal, and may be carried out according to the true intent and meaning of the parties thereto."

Upon a trial in the Circuit Court, judgment of ouster was rendered against the defendants, which, on appeal to the St. Louis Court of Appeals, was affirmed, from which defendants have appealed to this court. It is contended by respondents that the judgment is right:

1. Because there was not in being any valid contract conferring upon defendants the right to conduct a lottery.

2. Because the privilege of conducting a lottery conferred by the act of 1833, had been forfeited by misuser and a misapplication by the trustees of the town of New Franklin of the moneys derived from it.

Anterior to the adoption of the Constitution of 1865 there was nothing in the organic law prohibiting the legislature from establishing lotteries. Until then they had the right to pass laws authorizing or forbidding the sale of lottery tickets. Under the Constitution of 1820, the general assembly had the power to authorize the town of New Franklin, through its trustees, to raise money by means of a lottery, and this we understand to be conceded. Nor is it denied that the act of 1836, empowering the said trustees to contract with any other person for the drawing and management of the lottery, was a legitimate exercise of legislative power, nor is the validity of the contract entered into by the trustees with Gregory in June, 1842, questioned, its binding force having been sanctioned by this court heretofore in the cases of *State v. Morrow*, 12 Mo. 299; *State v. Morrow*, 26 id. 131, and *State v. Hawthorne*, 9 id. 389. It is, however, claimed by respondent that under the contract of 1842 the defendants as assignees of Gregory had no right to operate a lottery after the year 1870, as at that time the whole sum of \$15,000 authorized by this means would have been realized. It is insisted on the other hand by the defendants that the contract of 1842 was so modified by the contract of 1849 as to continue the time for conducting the lottery till the year 1877, and that if the contract of 1849 was tainted with any infirmity it was cured by the confirmatory and validating act of December, 1855.

The question then presents itself, were the defendants engaged in selling lottery tickets under any valid contract made with the State or its agencies when this proceeding was instituted? It is not an open question that, under the contract of 1842, the defendants, as the assignees of Gregory, could rightfully manage and carry on a lottery till 1870. The cases above cited put this question to rest. Was the contract of 1842 so modified by the contract of 1849 as to continue this right till 1877? It is insisted by respondent that the

contract of 1849 had no such effect, because it extended the time for conducting the lottery from five to seven years, in violation of the acts of 1842 and 1845, which prohibited the sale of lottery tickets in the State, and was therefore void. This argument, if sound, would prove that the contract of 1842 was also void, because the legislature in 1836 passed an act prohibiting the sale of lottery tickets, which was in full force when the contract of 1842 was entered into. This court pronounced that contract valid, notwithstanding the existence of the act of 1836. We are not to presume that the court overlooked that act when the validity of that contract was the direct question before them in two cases.

It is also said that the contract of 1849 is void because it is not supported by any consideration. Whether this be so or not can make no difference, if, by the act of 1855, it was validated—ratified by the State speaking through the general assembly. It is declared in the Acts of 1855, p. 467, "that all contracts made by the trustees of the town of New Franklin for the purpose of raising the amount authorized in the act of incorporation * * * be, and the same are hereby declared to be legal and may be carried out according to the true intent and meaning of the parties thereto." The words of this act are unambiguous. At the time of its passage but two contracts had been made by the trustees—one in 1842, the other in 1849. Besides these, no others were in existence to which the language of the act could be applied. The legislature could not have referred alone to the contract of 1842, because they used the word "contracts," which embraced not only that but all others. The contract of 1842 needed no legislative ratification to support it, because long prior thereto it had been upheld by the judgment of this court. The contract of 1849 had not at that time undergone judicial scrutiny, nor had its legality been passed—and the presumption is that the general assembly, because of the existence of doubts as to its validity, intended to remove them and make that clear which before was questionable. We are unacquainted with any principle of construction which would justify us in applying the act of 1855 to the contract of 1842, which needed no aid or support to the exclusion of that of 1849 which, the argument of respondents tends to show, did require confirmation to give it force and effect. Both are embraced in the terms of the act, and we cannot do violence to it by giving to the words it contains a more restricted meaning than they import. It is settled that a subsequent ratification by the State of a contract made by one of its own agencies is equivalent to a previous authorization. *Stein v. Franklin Co., supra.*

The contract of 1849 was so made because by the act of 1833 the town of New Franklin became a public as contradistinguished from a private corporation; and such public corporations are called into being at the pleasure of the State, and neither the charter nor act of incorporation is in any sense a contract between the State and the corporation. The same voice which speaks them into existence may speak them out. 2 Dill. Mun. Corp., § 80. Such corporations are the auxiliaries of the government in the important business of municipal rule, and cannot have the least pretension to sustain their privilege or their existence upon any thing like a contract between them and the legislature. Ang. and Ames on Corp., § 81. When the State, however, does create such agency, and through it contracts with a third person whereby rights become vested in

such persons, it is then beyond its power to divest them for such contract *pro hac vice* the contract of the State, the obligation of which it cannot impair without trampling under foot that provision of the Constitution which declares that no State shall pass any law impairing the obligation of a contract, and if such agency make a contract with a third person touching a subject in reference to which the State has authorized it to contract, and such contract is imperfectly made, it is within the power of the State to validate it.

If, therefore, the contract of 1849 was not, as is contended, in conformity to law, the act of 1855 declared it to be legal, and that it should be carried out "according to the intent and meaning of the parties thereto."

If the general assembly in the act of 1855, instead of referring in general terms to all contracts made by the trustees of the town of New Franklin, had incorporated in the act the contracts of 1842 and 1849, in the very words in which they were expressed, they would not have been rendered more valid than they are under the act which includes both of them by the expression therein contained. Both stand upon the same footing and are to be regarded as the contracts of the State, which it, no more than an individual, can violate.

It is also urged that the act of 1855 is obnoxious to that provision of the Constitution which declares that the legislature shall not pass any law retrospective in its operation. The cases to which we have been cited in support of this view are cases in which the legislature undertook to make acts valid between individuals which were void in their inception, as, for instance, that a deed executed by A to B, though void when made, should be held valid; or that a deed made by an insane person should be legal and binding. The principle decided in such cases has no application here, for the reason that the State, as one of the contracting parties, had the same right to consent to the modification of the contract made in 1849, as it had to confer original authority on the town of New Franklin through its trustees to enter into the contract of 1842. *H. & St. Joe R. R. v. Marion Co.*, 31 Mo. 303; *Barton Co. v. Watson*, 47 id. 189; *Stein v. Franklin Co.*, 48 id.

It is further urged that, because of the misuser of the money paid to the trustees under this contract, the assignees of Gregory have lost all rights acquired by them and that the State can claim a forfeiture of the privilege granted on that account.

The evidence in the case clearly shows that the trustees did not apply the funds realized to the object for which they were intended, and which this breach of duty might have been addressed to the legislature as a cogent reason for the withdrawal of the bounty bestowed or the total destruction of the town of New Franklin as a municipality. It does not follow that the State through a proceeding in *quo warranto* can for such cause forfeit and take away the right acquired by the assignees of the Gregory contract so long as the power conferred by the act of 1835 upon the trustees to contract with other persons for drawing and managing said lottery remained unexecuted by them. The State, through its legislature, could have taken from the town of New Franklin the right to raise money in that way, such right being a mere bounty, subject to recall or repeal without such repealing law, being obnoxious to the prohibition against the passage of a law impairing the obligation of contracts.

When, however, this power is executed and a contract concluded whereby a third person acquired the

right to conduct and manage a lottery, another and different question is presented, and the rights thus acquired become vested by the act of the State and cannot be taken away except by the terms of the contract. *State v. Miller*, 50 Mo. 129; *Clark v. Mitchell et al.*, 64 id. 576. The contract in question imposed no obligation on Gregory or his assigns to look to the application of the money which the town of Franklin was authorized to raise.

His obligation was to pay semi-annually the sum of \$250 to the trustees, in consideration of which he acquired the right to exercise the privilege of conducting a lottery until such payments amounted to the sum of \$15,000, and we are at a loss to perceive on what principle the right thus acquired can be taken away because the town of New Franklin, through its trustees, wasted or misapplied the payments. Neither he nor his assigns had power over the town or its trustees. His duty was to pay, and theirs to make the proper application. If, even, the defendants stood in the place of the trustees, and were responsible for their acts, it might, under the doctrine as laid down in 2 Dill. Mun. Corp., § 720, well be doubted whether the privilege or franchise could be forfeited in this proceeding. It is there stated "that in no instance have the courts of this country declared forfeited the charter or franchises of a municipal corporation for the acts of misconduct of its agents or officers." That this was done by English courts prior to the revolution of 1686 is well known. The case of the city of London is the most conspicuous historical example. It is believed that such a remedy is not applicable to our corporations created as they are by statute for the benefit, not of the officers or a few persons, but of the whole body of the inhabitants and the public.

We have been driven to our conclusions by former adjudications of this court, the correctness of which we do not question. As to the impolicy of the act of the general assembly in granting the privileges it did to the town of New Franklin, whereby the sale of lottery tickets has for years been authorized, against the sense of the people of the State and to the debauchery of the public morals, we have nothing to do. Nor have we any thing to do with the fact that the trustees, in making the Gregory contracts, and the legislature in validating them, have acted unwisely and continued till the year 1877 a business yielding large profits and gains to one contracting party and comparatively small to the other. We are to look to the contract, and if fairly made, uncorrupted by fraud and untainted by illegal considerations, it is our duty to enforce and uphold the legal rights which it confers. Security to the rights of person and property demands a strict adherence to this rule, and it cannot be overleaped even though the purpose be to cancel either a supposed or real great evil.

We are of the opinion that the judgment of the Court of Appeals, as well as that of the Circuit Court should be reversed and the complaint dismissed, which is accordingly hereby done, in which the other judges concur, except Judge Napton, who did not sit.

POWER OF COUNTY COURT TO STAY ACTIONS AGAINST ASSIGNOR UNDER STATE INSOLVENT LAWS.

A QUESTION of considerable importance, under the law of the State, relating to assignments for the benefit of creditors, which does not appear to have

been heretofore passed upon, was decided by Judge Russell, county judge of St. Lawrence county, in the case of *Buller v. Thompson*. The question arose on a motion to stay creditors from maintaining action in the Supreme Court against the assignor under general assignment for benefit of creditors. The moving counsel presented the theory fairly, supported by affidavits, establishing the facts that this was a case where a due and orderly disposition of the assigned property would pay the creditors in full, and leave a surplus to the assignor; that the General Assignment Act of 1877 committed the care and custody of the assigned property, the marshaling of the assets, and the collection of the claims, to the County Court, substantially as the Bankrupt Act of the United States does to the District Court; that the assignor, having committed his property to a trustee for creditors, without preference, who would be paid in full, should not have the residuum, which might come to him after payment of his debts imperiled or diminished by the enhancement of his obligations by bills of costs or expenses of litigation. The county judge held that these views were not correct, saying that the laws of New York cannot be said to contemplate and provide for the assignment of property of a debtor, who can pay his obligations in full to an assignee who shall be able to hold that property beyond the reach of legal process, and thus secure to the assignor time for the payment of his debts, which otherwise he would not be able to secure.

The rights of the creditor to sue is one of those civil rights which should not be taken away by implication. The act of 1877 in no manner suspends the rights of the creditor; it does not afford to the debtor the ultimate relief of a discharge from his debts, nor does it provide for any stay. Herein it differs from the Bankrupt Act; that looks not only to the fair distribution of the debtor's property, but also to his final discharge from antecedent obligations, and expressly provides for *ad interim* stays. By pursuing his remedy by action, the creditor does not and cannot interfere with the trust, if the assignment be valid; he cannot attack the property assigned, and hence he does not interfere with the objects for which the trust was created. No power is conferred upon the County Court to deprive him of the right to secure his debt out of property acquired by the debtor subsequent to the assignment; as the law does not favor general assignments by solvent debtors, the presumption is that the creditor will need such property to satisfy at least a portion of his claim. The motion was denied.

EXCUSES FOR NON-FULFILLMENT OF CONTRACT FOR PERSONAL SERVICE—ILLNESS CAUSED BY IMPRUDENCE.

ENGLISH HIGH COURT OF JUSTICE, EXCHEQUER DIVISION, TUESDAY, JANUARY 23, 1878.

K — *v. RASCHEN AND ANOTHER*, 38 L. T. R. (N. S.) 38.

Plaintiff was engaged by the defendants as a clerk at £120 per annum, and was to have one month's notice of dismissal. He began his duties on the 2d July, and served till the 1st of August. He was then obliged by illness to be absent till the 2d September, when he tendered his services, which were refused. He had in the meantime received on the 26th August a letter from the defendants terminating the engagement. In an action brought by him for wages from the 1st August to the 20th September, it was held that the plaintiff was en-

titled to wages for that period, and that it was no answer to his claim that the illness was caused by an act of misconduct on his part, which occurred before the contract, and which he did not know, at the time of the contract, would lead to his illness, and render him incapable of performing his work.

THIS was an action brought in the Lord Mayor's Court of London by the plaintiff, who was a mercantile clerk, to recover the sum of £16 13s. 4d., alleged to be due to him from the defendants, his employers, and the particulars stated the claim to be for the amount of his wages and salary at £120 a year, from the 1st August to the 20th September, 1877, according to an agreement between them dated the 27th June, 1877. The plaintiff had been employed under that agreement at the above-mentioned salary of £120, subject to increase in events which did not occur, and the employment was to be determinable on either side by one month's notice. He served under the contract from the 2d until the 30th July, when he was unwell. He obtained the permission of his employers to absent himself from work until the 6th August. He remained away, however, and was under medical treatment, and was unable to return to his employment until the first week in September, when he returned and tendered his services, which the defendants refused; and they had, moreover, in the meantime, namely, on the 20th August, given him notice, by letter of that date, terminating the employment, and stating that, as they could not do without a clerk to fill his place, they had engaged another person. They refused to pay him the amount claimed by him for wages during his absence, on the ground that he had, by his own misconduct, rendered himself incapable of performing his duties, and therefore was not entitled to any remuneration. The illness under which the plaintiff was suffering arose from venereal disease. The learned Common Serjeant of the City of London nonsuited the plaintiff, but a rule was afterward obtained on his behalf calling upon the defendants to show cause why a verdict should not be entered for the plaintiff for the sum claimed, on the ground that there was no evidence at the trial in support of the defendants' plea.

Reed now showed cause on behalf of the defendants, and contended that in a contract of service capacity to serve is a condition precedent to the right to sue, and there is no right to sue unless the service is performed, or the inability to perform it arises otherwise than through the plaintiff's own act or default, as, for instance, by accident or the act of God. Even if the defendants did not know at the time they dismissed him that he had himself put it out of his power to serve, they may rely on that defense at the trial. See *Spotswood v. Barrow*, 5 Ex. 110; 10 L. J. 228, Ex. If the plaintiff put it out of his own power and rendered himself unable to continue his services, the defendants were at liberty to rescind the contract, or to sue for a breach of it. It seems to be assumed in all the cases that, though temporary illness which arises through the act of God is an excuse for the non-performance of services, the servant would not be excused where it arises, as it did in the present case, through his own misconduct. [HAWKINS, J.—The misconduct of the plaintiff in the present case occurred before the contract.] The incapacity to work followed immediately upon, and could be traced to, the misconduct. In *Cusker v. Stones*, 28 L. J. 25, Q. B.; 1 El. & El. 248, a plea similar to that in the present case was held good, Lord Campbell, C. J., there saying: "The plea is that the plaintiff was not, during any part of the

time for and in respect of which such wages are claimed, ready and willing or able to render, and did not, in fact, during any part of such time, render the agreed or any service! We think the gist of the plea is that the plaintiff, during the time in question, was not ready and willing to render, and did not render, any service in the sense that he voluntarily or willfully refused or omitted to serve. If so, he could not claim his wages in consideration of his service, for the breach goes to the whole consideration. He could recover if he were ready and willing to serve, if he had been able to do so and was only temporarily prevented by the visitation of God." So in *Boast v. Firth*, 19 L. T. Rep. (N. S.) 284; L. Rep., 4 C. P. 1; 38 L. J. 1, C. P., the learned judges (M. Smith and Brett, JJ.) confine the cases where illness excuses performance to those in which the illness is caused by the visitation of God. No doubt a temporary illness without the servant's own default would not suspend his right to wages, or constitute a breach of contract. But here this is not such a case, for the illness was caused by the plaintiff's own act, not to put it even as his own misconduct. In fact, all the cases support the proposition that to excuse performance the illness must arise without any default on the servant's part. The defendants were entitled to dismiss him the moment he absented himself beyond the six days' leave, as it was then equivalent to intentional absence, which, together with the moral misconduct, justified the dismissal. He cited also *De Bernardy v. Harding*, 8 Ex. 822; 22 L. J. 340, Ex.; *Chandler v. Grieves*, 2 H. Bl. 606 (note); *Taylor v. Caldwell*, 8 L. T. Rep. (N. S.) 356; 32 L. J. 164, Q. B.; 3 B. & S. 82; *Cort v. The Ambergate, etc., Railway Company*, 17 Q. B. Rep. 144; 20 L. J. 480, Q. B. Glyn, for the plaintiff, *contra*.

CLEASBY, B.—Some little difficulty has arisen here owing to the form of the pleading. The plaintiff in this case entered into the service of the defendants and was employed by them under an agreement by which he was to be paid a salary of £120 per annum, and by the agreement he was to have one month's notice in case of dismissal. The plaintiff entered upon his duties on the 2d July, and there is nothing to show that, at the time he entered into the agreement and subsequently thereto, upon his duties under it, he concealed from his employers any thing which he ought to have disclosed, or that he knew that he would not be able to perform his duties in the defendants' service. Therefore, the contract is not tainted by a knowledge on his part of any circumstances which would render him unable to perform it. After a month's service illness supervened, and the plaintiff was unable to continue his attendance at the defendant's office. The question is whether or not illness is such an excuse as to disentitle him to recover wages during his absence from the employment in consequence of it. I think, *prima facie*, illness is to be attributed to the act of God, and we are not justified in going back for any length of time, and entering into an investigation as to what may have been the cause of it. We ought not, I think, to extend the effect of disability arising from illness. The illness which rendered him unable to perform his duties for a time came upon him unexpectedly, and we cannot go back to first causes and into the question of how it arose. The maxim, "*causa proxima non remota spectatur*" is applicable here. As to how precisely the disease arose, there may be various different opinions, and there might be the greatest uncertainty as to the cause or matter which originally

brought it about. It was a misfortune which could not have been foreseen at the time the contract was made, and I think the plaintiff is entitled to say that it is a reasonable excuse for his absence from his duties, and that our judgment should be given for the plaintiff, setting aside the nonsuit, and entering the verdict for him for the £16 13s. 4d., the amount of damages claimed by him in this action.

HAWKINS, J.—I am of the same opinion. If the plaintiff had been aware, at the time of the making of the contract, that he would be incapacitated by illness from performing his duties, I am not prepared to say that he could recover in this action. But there is nothing to show that he knew any thing of the illness which he subsequently suffered from until after the agreement had been entered into. There was no cross-examination on that point, and no question was put to get out of him, and there was no evidence to show that he had any suspicion of the misfortune which subsequently overtook him, or that he was aware that the seeds of the disease existed in him at that time. Now I base my opinion upon that fact, and I think, under these circumstances, that he is entitled to the amount claimed. The misconduct alleged in the pleadings is his staying away without a reasonable excuse. How can it be called misconduct if a man stays away, on the advice of a doctor, in order to get himself cured? The third plea is similar to the one set up in *Cuckson v. Stones* (*ubi sup.*); and as to that Lord Campbell, C. J., says: "We think that the gist of the plea is that the plaintiff, during the time in question, was not ready and willing to render, and did not render, any service, in the sense that he voluntarily and willfully refused or omitted to serve. If so, we think he could not claim the wages to be paid to him in consideration of his service." Now, in the present case, the plaintiff did not voluntarily and willfully refuse to serve, but was compelled to absent himself by an illness which came upon him during the time of service, and which was not the result of any misconduct that occurred after the agreement was made. As a matter of fact, I conclude that the malady was contracted before he entered into the defendants' service; and he did not improperly obtain admission there. At the time that he entered into the contract, which he did honestly, he neither believed nor knew that he would not be able to fulfill it. In my opinion, therefore, the plaintiff is entitled to have the verdict for the amount claimed entered for him.

Nonsuit set aside, and judgment entered for the plaintiff.

Leave to appeal was refused.

RECENT AMERICAN DECISIONS.

SUPREME COURT OF WISCONSIN, FEBRUARY, 1878.*

ALTERATION OF INSTRUMENT.

Changing from "order" to "bearer" material.—An alteration of a promissory note by the holder, changing it from a promise to pay to the order of M., to a promise to pay M. or bearer, would be material. A promissory note altered by a trespasser, against the will of the holder, remains valid as originally written. *Union National Bank, etc. v. Roberts*. Opinion by Ryan, C. J. Decided February 28, 1878.

ATTORNEY AT LAW.

Employed to draw mortgage acts as attorney not as notary: evidence.—An attorney at law, employed to draw an assignment of a mortgage, acts as an attorney, and not as a notary merely; and the court should not permit him, as a witness, to testify against his client as to disclosures made to him by the latter in the course of such employment. *Getzlaff v. Seliger*. Opinion by Ryan, C. J. Decided February 28, 1878.

CONSTITUTIONAL LAW.

1. *Improvement of navigable streams under State authority: right to take tolls.*—That provision of our State Constitution (Art. IX, § 1) which declares that "the river Mississippi, and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the State as to the citizens of the United States, without any tax, impost or duty therefor," does not deprive the legislature of power to authorize the clearing out of the channel and construction of works in a navigable stream, at points where its waters are either unnavigable or only partially navigable, for the purpose of improving the navigation, and the charging of a reasonable toll as compensation for such improvements. *The Wisconsin River Imp. Co. v. Manson*. Opinion by Cole, J.

2. *Validity of State law authorizing improvement and tolls.*—The act of 1853 incorporating the plaintiff company, with power to improve the navigation of the Wisconsin river between certain termini, by erecting and maintaining dams and piers at points where they should seem necessary, etc., and to collect tolls upon all lumber, etc., which should pass over or through any improvements so made, with a proviso that such tolls should be no greater than were reasonable in consequence of such increased facilities of navigation, is valid. The mere fact that plaintiff's improvements occupy the entire breadth of the channel, so that the river cannot be used as a highway without passing through or over them, is no defense in an action for tolls. *Ib.*

3. *State authority cannot be called in question until Congress exercises its powers.*—Until Congress exercises its power over the subject, improvements authorized by the law of the State cannot be called in question by a private person on the ground that they conflict with the paramount authority of Congress over the public navigable waters of the United States. *Ib.* Decided February 28, 1878.

CONTRACT.

Between two parties for the benefit of a third one.—It is the settled law of this State, that when one person, for a valuable consideration, engages with another (whether by simple contract or by covenant under seal) to do some act for the benefit of a third person, the latter may maintain an action against the promisor for breach of the engagement. After knowledge of and assent to such engagement by the person for whose benefit it is made, his right of action on it cannot be affected by a rescission of the agreement by the immediate parties thereto. *Bassett v. Hughes*. Opinion by Lyon, J. Decided February 28, 1878.

LIBEL.

What words are actionable per se.—Words were published in a newspaper charging that plaintiff, dur-

* From O. M. Conover, Esq., State Reporter. To appear in 43 Wisconsin Reports.

ing the canvass before a State election, delivered speeches at certain points in the State, in which he "made the most fanatical and incendiary appeals to the Roman Catholic voters to cast their suffrages against" a certain candidate; that such voters "spurn the appeals of this dirty Reform politician;" that plaintiff "smells so badly that decent men avoid him when they pass him on the street;" that "he has attempted a lower depth of degradation than any leading politician ever before attempted in Wisconsin;" and that "as for this fellow (naming the plaintiff), no American, no patriot can speak of him without contempt and indignation." Held, that these words are *prima facie* libelous. *Cottrill v. Cramer*. Opinion by Lyon, J. Decided February 5, 1878.

OFFICER.

Paid by fees cannot charge public for wages paid assistants.—Officers take their offices *cum onere*, and services required of them by law, for which they are not specifically paid, must be considered compensated by the fees allowed for other services. *Crocker v. Brown & Co.*, 35 Wis. 284. Under the statutes regulating the compensation of sheriffs, they cannot charge the county for the board and services of a turnkey or deputy sheriff in taking charge of the county jail and performing the duties of jailer. *Tay. Stats.*, ch. 187, and § 147, ch. 13. *Hartwell v. Supervisors of Milwaukee*. Opinion by Cole, J. Decided February 28, 1878.

PARTNERSHIP.

Claim of firm cannot be applied to pay private debt.—One partner, without the consent, express or implied, of his copartners, cannot apply a claim of the firm to the payment of his individual debt, even in order to retain for the firm its debtor's custom; and such attempted application, with knowledge of the facts by such debtor, will not defeat an action at law upon the claim, by the firm or its assignee. (*Viles v. Bangs*, 36 Wis. 131.) *Cotzhausen v. Judd*. Opinion by Lyon, J. Decided February 6, 1878.

STATUTE OF FRAUDS.

1. *Burden of proof.*—In an action for breach of a contract to sell and deliver goods, plaintiff must show a contract valid under the statute of frauds. *Bacon v. Eceles*.

2. *What acts of vendee necessary to ratify void contract: acceptance.*—No acts of the vendee of goods by contract otherwise void by the statute, constitute an acceptance of the goods, within the meaning of the statute, unless they vest the title in the vendee. Where, therefore, the vendee insures the goods *in transitu*, pays the freight, and, intending to accept the goods if found to be such as ordered, takes them into his possession for examination, and then, within a reasonable time, refuses to accept them, as not conforming to the order, this is not an acceptance within the meaning of the statute, if the goods are not in fact such as the order called for. (*Smith v. Stoller*, 26 Wis. 671, distinguished.) *Ib.* Opinion by Lyon, J. Decided February 5, 1878.

RECENT ENGLISH DECISIONS.

LIBEL.

1. *Calling a man "a convicted felon" and "a felon editor": justification, that he had been previously convicted: reply, punishment undergone: demurrers.*—It is no justification for a libel which calls a man "a felon editor" to show that he had been convicted of felony,

and sentenced to a term of imprisonment on a certain charge. His actual guilt in fact must be shown, and also, since 9 Geo. 4, c. 32 (per Brett and Cotton, L. J., Bramwell, L. J., giving no opinion on the matter), that he has not undergone the punishment awarded him. The same holds of a libel that calls a man "a convicted felon," if a jury should find that the libel meant any thing more than merely that he had been convicted on a charge of felony at some past time. Per Brett and Cotton, L. J.: 9 Geo. 4, c. 32, was passed, among other reasons, in order to restore convicts affected by it, after they had suffered the punishment awarded them, to their full civil rights and status. Ct. App. Jan. 24, 1878. *Leyman v. Latimer*, 37 L. T. Rep. (N. S.) 821.

2. *Privilege: report of judicial proceedings: ex parte application dismissed: want of jurisdiction.*—An *ex parte* application was made to a police magistrate in open court by certain persons who had been employed by the plaintiff upon a railway, for a summons against the plaintiff under the Masters and Servants Act, 1867 (30 & 31 Vict., c. 141), on the allegation that he had not paid them their wages, though he had received funds to enable him to do so. The magistrate refused to grant their application, on the ground that the facts as stated by them did not bring the case within his jurisdiction to do so, and afforded no ground for criminal proceedings. The defendants, who were newspaper proprietors, published a fair report of the proceedings before the magistrate, which contained matter defamatory to the plaintiff. Held, that the defendants were protected by the privilege which attaches to all fair and impartial reports of judicial proceedings, and that such privilege was not taken away either by the fact that the magistrate decided that he had no jurisdiction, or that the application was made *ex parte*. Common Pleas Div., Jan. 30, 1878. *Uail v. Hales*, 38 L. T. Rep. (N. S.) 65.

PARTNERSHIP.

Dissolution: right of each member of late firm to use the trade name: fancy article: spurious compound.—M. and C., who had traded together in copartnership, and manufactured and sold an article known in the market as C.'s Fluid, dissolved partnership, and each commenced the same business on his own account, C. in his own name, and M. under the name of C.'s Fluid Company. On a bill filed by C. to restrain M. from trading under the name of C.'s Fluid Company, and from manufacturing and selling as C.'s Fluid an alleged spurious compound, held (affirming the decision of Bacon, V. C.), that as M. had under the partnership articles the right to manufacture and sell C.'s Fluid, he could not be restrained from selling a spurious article as C.'s Fluid, so long as he did not induce the public to believe that the article sold by him was the article manufactured and sold by C. Ct. App. Nov. 27, 1877. *Condy v. Mitchell*, 37 L. T. Rep. (N. S.) 766.

SHIPPING.

Collision between ships of same owner: Merchant Shipping Act, 1862, § 54: rights of parties.—The Merchant Shipping Acts do not create any new rights, but restrain existing rights by limiting liability. The right of the underwriters of a lost ship for damages against a wrong-doer is merely to make the same claim that the insured might have made. In the case of a collision between two ships belonging to the same owner, by which one was totally lost, through the exclusive

fault of the other, *held* (reversing the judgment of the court below), that the underwriters could make no claim against the sum paid into court, under the Merchant Shipping Act, 1862 (25 & 26 Vict., c. 63), s. 54, the insured being himself the person who had caused the damage. (*Yates v. Whyte*, 4 Bing. N. C. 272, approved and followed.) House of Lords, Dec. 13, 1877. *Simpson v. Thomson*, 38 L. T. Rep. (N. S.) 1.

SURETYSHIP.

Bill of exchange: indorser: creditor dealing with after-acquired security: surety thereby discharged.—A surety is entitled to the same benefit from a security acquired by the creditor subsequently to the contract of suretyship as he would have been if it had been in existence at the time such contract was entered into, and if the creditor so deals with such security that he cannot give it up to the surety in the same condition as it was when he acquired it, the surety is discharged. A., as B.'s surety, indorsed bills, drawn by B. to C. Subsequently B. gave C. a lien, in respect of such bills, upon goods of his in C.'s possession. B. having written to C. authorizing him to deliver up such goods to D., C. undertook to do so upon D.'s paying him a less sum than the amount of the bills. *Held*, that A. was thereby released. High Ct. Justice, C. P. Div., Dec. 21, 1877. *Campbell v. Rothwell*, 38 L. T. Rep. (N. S.) 33.

UNITED STATES SUPREME COURT ABSTRACT,
OCTOBER TERM, 1877.

MUNICIPAL BONDS.

1. *Bond with overdue coupons not dishonored paper so as to let in defense against bona fide holder.*—Where to a municipal bond which has several years to run, an overdue and unpaid coupon for interest is attached, that fact does not render the bond and the subsequently maturing coupons dishonored paper, so as to subject them, in the hands of a purchaser for value, to defenses good against the original holder. Judgment of Circuit Court of Iowa affirmed. *Cromwell, plaintiff in error, v. County of Sac*. Opinion by Field, J.

2. *Bona fide purchaser for value takes free from all infirmities.*—A bona fide purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin; the only exceptions being where the paper is absolutely void for want of power in the maker to issue it, or where the circulation is prohibited by law for the illegality of the consideration. Municipal bonds payable to bearer are negotiable instruments and subject to the same rules as other negotiable paper. (*Murray v. Lunder*, 2 Wall.; *National Bank of North America v. Kirby*, 108 Mass. 497.) Ib.

3. *Notice to purchaser from bona fide holder.*—A purchaser of a municipal bond from a bona fide holder who had obtained it for value before maturity, takes it equally freed as in the hands of such holder, though he may have had notice of infirmities in its origin. Ib.

4. *Purchaser at less than par value may recover.*—A purchaser of a negotiable security before maturity, unless personally chargeable with fraud in the purchase, can recover the full amount of the security against the maker, though he may have paid less than its par value, whatever may have been its original infirmity. (*Stoddard v. Kimball*, 6 Cush. 471; *Allaire v. Hartshorne*, 1 Zab. 635; *Williams v. Smith*, 2 Hill, 301; *Chicopee Bank v. Chapin*, 8 Metc. 40; *Lay v. Wiseman*, 36 Iowa, 305.) Ib.

5. *Conflict of law: rules as to interest.*—When the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will govern. (*Brannan v. Hursell*, 112 Mass. 63; *Marietta Iron Works v. Lottimer*, 26 Ohio St. 621; *Monnet v. Sturges*, id. 384; *Kilgore v. Powers*, 5 Blackf. 22; *Phinney v. Baldwin*, 16 Ill. 108; *Ethysre v. McDaniel*, 28 id. 201; *Spencer v. Maxfield*, 16 Wis. 185; *Pruyn v. Milwaukee*, 18 id. 367; *Kohler v. Smith*, 2 Cal. 597; *McLane v. Abrams*, 2 Nev. 199; *Hopkins v. Crittenden*, 10 Tex. 189; *Keene v. Keene*, 3 C. B. [N. S.] 144; *Morgan v. Jones* [Exch.], 20 Eng. Law and Eq. 454; *Pearce v. Hennessey*, 10 R. I. 223; *Lash v. Lambert*, 15 Minn. 416; *Searle v. Adams*, 3 Kan. 515; *Kitchen v. Branch Bank*, 14 Ala. 233; *Miller v. Tiffany*, 1 Wall. 298; *Depeau v. Humphreys*, 20 Mart. [La.] 1; *Chapman v. Robertson*, 6 Paige, 627, 634; *Peck v. Mayo*, 14 Vt. 33; *Hutters v. Old*, 11 Ia. 1.) Ib.

6. *Judgment does not change rate of interest in Iowa.*—Municipal bonds in Iowa, drawing ten per cent interest before maturity, draw the same interest, under the law of the State, after maturity, and coupons attached to such bonds draw six per cent after maturity. Judgments in that State entered upon such bonds and coupons draw interest for the amount due on the bonds at the rate of ten per cent a year, and upon the amount due upon the coupons at the rate of six per cent a year. (*Hand v. Armstrong*, 18 Iowa, 324; *Lucas v. Pickel*, 20 id. 490.) Ib.

TAXATION.

Purchase under tax sale by party bound to pay taxes is but payment: what is voluntary payment: payment under mistake of law.—Plaintiff in error was trustee of a land company having a contract for the sale of lands in Kansas, which were illegally assessed. The company were, under the contract, bound to pay all taxes on the lands. The illegal assessment not being paid, the lands were sold and bid in for the county. By the laws of Kansas, if lands sold for taxes are bid in for the county, the county treasurer is authorized to issue a tax certificate to any person who shall pay into the county treasury an amount equal to the cost of redemption at the time of payment. And if any lands sold for taxes are not redeemed within three years from the day of sale, the clerk of the county may execute a deed to the purchaser, on the presentation to him of the certificate of sale. And if the assessment shall be discovered to be invalid, the amount paid on such sale shall be refunded to the purchaser on the return of the certificate, and also the amount of subsequent taxes and charges paid by him. In 1872 the plaintiff in error paid into the county treasury the sums due for taxes, interest, etc., on the said lands in Dickinson county, which had been sold for taxes, and received tax certificates therefor, without making any protest; not being aware at that time that the lands were exempt from taxation, but supposing that the taxes were legal and valid. After a decision in the case of *Railroad Company v. Prescott*, the plaintiff offered to return the tax certificates to the county treasurer, and demanded a return of the money paid, which was refused; and suit was brought to recover the same. *Held*, (1) that plaintiff was not a purchaser of the lands, but his acquisition of the tax certificates was but a payment of the taxes; (2) that the payment was voluntary so as to defeat the action; (3) and that the mistake in paying the tax was one of law, and not one of fact. Judgment of Circuit Court of Kansas

affirmed. *Lamborn, plaintiff in error, v. County Commissioners of Dixon.* Opinion by Bradley, J.

2. *Recovery on ground of mistake: must be mistake of fact.*—Mistake, in order to be a ground of recovery, must be a mistake of fact, and not of law. Such, at least, is the general rule. 3 *Parsons on Contracts*, 398; *Hunt v. Rousmaniere*, 1 Pet. 15; *Bilbie v. Lumley*, 2 East, 469; 2 *Smith's Lead. Cas.* 398; 6th ed., 458; notes to *Marriot v. Hampton*. A voluntary payment, made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, cannot be revoked; and the money so paid cannot be recovered back. (*Clarke v. Dutcher*, 9 Cowen, 674; *Ege v. Koonts*, 8 Barr, 109; *Boston and Sandwich Glass Co. v. Boston*, 4 Metc. 187; *Benson v. Monroe*, 7 Cush. 125; *Milnes v. Duncan*, 6 B. & C. 671; *Stewart v. Stewart*, 6 Cl. & Fin. 968; and see cases cited in note to 2 *Smith's Lead. Cas.* 403, 404; 6th ed., 466; *Marriot v. Hampton*.) *Ib.*

WITNESS.

1. *When judgment reversed for lack of evidence.*—When the Court of Claims sends to us as part of its finding of fact on any particular point, all the evidence on which that fact was found, and it there appears that there was no legal evidence to support it, this court must reverse the judgment if the fact so found is essential to the judgment. Judgment of Court of Claims reversed. *United States v. Clark.* Opinion by Miller J.

2. *When party competent witness at common law.*—At common law a party to a suit is a competent witness to prove the contents of a trunk or package, which by other testimony is shown to have been lost or destroyed under circumstances that render some one liable for the loss. *Ib.*

3. *Effect of § 1079, R. S., as to parties being witnesses.*—Section 1079, Rev. Stat., was intended to do no more than to restore in the Court of Claims the common law rule excluding parties as witnesses, which had been abolished by the act of July 1, 1864; and, hence, claimant in this case was competent to prove the contents of a package of government money taken from his official safe by robbers. *Ib.* Per Miller, J. Harlan, Clifford, Swayne and Strong, JJ., dissented.

4. *Competency of testimony given in another court.*—Claimant being competent, neither his testimony before the court-martial which convicted the robbers, nor his report of the loss to his superior officer, are competent as independent or original evidence, though it may be proper as corroborative of his own testimony. *Ib.*

5. *Statute of limitation of suits in Court of Claims.*—The statute of limitation of suits in the Court of Claims, section 1069, Rev. Stat., is not applicable to a suit brought under sections 1069-1062, because such a suit is not brought to establish a claim against the United States in the just sense of that word, but to establish a peculiar defense to a cause of action which the United States has against the petitioner. And so long as the United States neglects to bring suit in the proper court to establish her claim, so long must the defendant be allowed to set up any defense, not in itself a separate demand or cause of action. *Ib.* Per Miller, J. Harlan, Clifford, Swayne and Strong, JJ., dissented.

6. *When right of action accrues.*—The right to bring this suit in the Court of Claims did not accrue until the accounting officers had held claimant liable for the sum lost, by refusing to credit his account with the

amount, and their final action in this case was within the six years. Per Miller, J. Harlan, Clifford, Swayne and Strong, JJ., dissented.

COURT OF APPEALS ABSTRACT.

EVIDENCE.

1. *Entries in books: what entries inadmissible.*—In an action by the assignee in bankruptcy of the firm of S. & Co. against K., to foreclose a mortgage for a loan from S. & Co. to K., K. set up as a counter-claim a balance of \$4,000, alleged to be due as his share of the profits of S. & Co., by whom he was employed during the year 1863. The books of S. & Co. for 1863 were introduced by plaintiff to show by entries therein that the firm were indebted to him the sum claimed. *Held*, that the referee before whom the cause was tried was not in error in excluding entries in the books made in 1864 against K., it appearing that the entries were not made by K., and that he was not in the employ of the firm at that time. Judgment below affirmed. *Van Sachs, appellant, v. Krets.* Opinion by Andrews, J.

2. *Admissions made by bankrupt before bankruptcy admissible against assignee.*—Admissions made by a member of the firm of S. & Co. before it became bankrupt, *held* admissible in an action by the assignee in bankruptcy in behalf of defendant against the assignee. *Ib.*

[Decided February 19, 1878. Reported below, 10 Hun, 95.]

MANDAMUS.

When it does not lie.—The relator was the lowest bidder for a contract for grading a street in New York city, when the commissioners advertised for bids, his bid was accepted and the contract awarded to him. He furnished the security as required by the city charter, and in all respects conformed to the provisions of the law on the subject. It was claimed by him that he made out a clear legal right to the contract. Several questions were made to the right of relator to compel the execution of the contract which seriously affected its validity, and which were considered in the courts below. *Held*, that relator was not entitled to mandamus to enforce his contract because he had a remedy by an action at law against the city for damages if the city refused to perform a valid contract with him. *Held*, also, that under the circumstances the granting or refusing a mandamus was a matter of discretion with the courts below, and an appeal would not lie from these decisions. Appeal dismissed. *People ex rel. Lunney, appellant, v. Campbell.* Opinion by Miller, J.

[Decided February 12, 1878.]

PAYMENT.

Application of payments: election by debtor: what amounts to.—Defendant, as administrator of an estate in which plaintiff was entitled to a distributive share, had charged, in his verified account rendered to the surrogate, certain payments made by him upon drafts made by plaintiff as payments on such distributive share. The surrogate did not allow the payments, but his decision was reversed on appeal by the General Term, and an appeal was taken therefrom to the Court of Appeals. *Held*, that pending this appeal defendant could not set up such payments as a counter-claim on an action by plaintiff against him upon an

other claim. Judgment below affirmed. *Wright v. Wright, appellant*. Opinion by Miller, J. [Decided January 15, 1878.]

REPLEVIN.

Property taken under warrant for tax cannot be replevied.—Where the property of plaintiff was taken by the defendant by virtue of a warrant for the collection of a tax, it cannot be replevied (2 R. S. 522, § 4; Code, § 207, subd. 4), though the warrant may have issued erroneously or irregularly, if on its face it gave authority to the officer to collect the tax or assessment. Judgment below affirmed. *Troy & Lansingburgh R. R. Co., appellant, v. Kane*. Opinion per Curiam.

[Decided February 19, 1878. Reported below, 9 Hun, 506.]

SALE.

Delivery to carrier when sufficient: what constitutes acceptance.—Defendant, with others, who were directors of a fair association, assembled in defendant's banking-house in Jackson, Mississippi, verbally ordered of defendant's agent, who was there, certain goods of the value of over \$800, which were to the knowledge of the agent to be used as prizes for distribution by the fair association. Defendant directed the goods to be sent by the Adams express to Jackson. The goods were directed to defendant at Jackson and delivered to the Adams Express Company for transportation there. There was evidence that defendant directed the goods to be charged to him, which was contradicted, and it was shown that when the goods reached Jackson they were delivered to a director of the fair association, who was in the room with defendant when the goods were ordered, and assisted in selecting them, and defendant knew of this and made no objection thereto. Held, (1) that delivery to the express company constituted delivery to defendant, but not acceptance, but that (2) the evidence was sufficient to justify a jury in finding an acceptance by defendant. Judgment below affirmed. *Wilcox Silver Plate Co. v. Green, appellant*. Opinion by Rapallo, J.

[Decided January 15, 1878. Reported below, 9 Hun, 347.]

STATUTE OF LIMITATION.

Does not run against claim against bankrupts.—The assignee of a bankrupt stands in a position of trustee for his creditors, and the statute of limitation does not run against their claims against the estate of the bankrupt not barred at the time of the adjudication in bankruptcy. Judgment below affirmed. *Van Sachs, appellant, v. Krets*. Opinion by Andrews, J. [Decided February 19, 1878. Reported below, 10 Hun, 95.]

TRUST.

When assignee of mortgage held in trust takes subject to trust.—Land was devised to B. in confidence that the income should be expended for the support of H., a lunatic, during her life, and after her death the land was to belong to B. B. conveyed the land to J., taking back a bond and mortgage to secure the consideration, which were conditioned for the payment of the sum secured after the death of H., with annual interest during her life. The interest was paid for twenty years and applied to the support of H. Thereafter B. assigned the bond and mortgage to S. as collateral security for a debt. In an action against S. and others by H. to compel the application of the interest on the bond and mortgage to her support, held that S. had no greater rights than B., and the bond and mortgage

having been given for the benefit of H. as *cestui que trust*, she had a claim for protection, and S. could not interfere with her right. The interest belonged to her during her life, and after her death S. would be entitled to the principal. Judgment below affirmed. *Reid v. Sprague, appellant*. Opinion by Miller, J. [Decided February 12, 1878. Reported below, 9 Hun, 30.]

WILL.

Construction of: suspension of power of alienation.—By a provision in a will testator's estate was to be divided in three equal shares, one to be held in trust for each of his three children during life, and upon the decease of the child who should first die, the share was to go in fee to the lawful issue, or if none, then to be divided into two equal sub-shares, one of which should be held in trust for each of the surviving children during life, and at the death of the child who should next die, such sub-share should go in fee to his issue, and if none, to such persons as would be heirs at law if the surviving child were dead. A provision of the same character was made as to the child who should next die, and one of his shares was to go to the lawful issue of the child first dying, if any, and if none, to testator's heirs at law; the other share to go to the surviving child, and upon his death to vest absolutely as provided. Held, that the provisions were not in conflict with the statute forbidding the suspension of the power of alienation beyond two lives (1 R. S. 723, § 15; 773, § 1), and were valid. Judgment below affirmed. *Moore, appellant, v. Hegeman*. Opinion by Miller, J.

[Decided February 5, 1878.]

COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, March 23, 1878.

Judgment affirmed with costs—*Faber v. Hovey*; *Hastings v. Westchester Fire Insurance Company*; *National Bank of Chittenango v. Morgan*; *Weston v. New York Elevated Railroad Company*; *Hazeltine v. Weld*; *Hevner v. Bliss*; *Fairfax v. New York Central and Hudson River Railroad*; *May v. National Bank of Malone*.—Order affirmed with costs—*In re North Thirteenth street, of Brooklyn*; *People ex rel. Riley v. Watson*; *Hooley v. Gieve*.—Order granting new trial affirmed, and judgment absolute for defendants on stipulation with costs—*Royce v. Watrous*.—Appeal dismissed with costs—*Lawrence v. Farley*.—Judgment reversed and new trial granted, costs to abide event—*Ferris v. Van Vechten*.—Order reversed, and proceedings remitted for rehearing, with costs to appellant—*Ulster County Savings Institution v. Decker*.—Motion for reargument denied with \$10 costs.—*In re Ryers* to vacate assessment.—Motion denied without costs, unless appellant consent to a dismissal of the appeal—*Harris v. Burdett*.—Motion to dismiss appeal granted with costs of appeal up to time of motion and \$10 costs of motion—*Sleight v. City of Kingston*.—Order modified so as to direct a writ of mandamus to issue that the defendants reconsider the resolution passed by them, and amend the same so as not to allow to the county treasurer the sum of \$668.57, retained by him for fees on receiving and paying over the State tax for the year in question, without costs to either as against the other in this court.—*The People ex rel. Lawrence v. The Supervisors of Westchester county*.

NEW BOOKS AND NEW EDITIONS.

MISSOURI APPEAL REPORTS.

Cases argued and determined in the St. Louis Court of Appeals of the State of Missouri, from January 10, 1876, to April 10, 1876. Reported by A. Moore Berry, official Reporter. Vol. I. St. Louis: Soule, Thomas & Wentworth, 1877.

Cases argued and determined in the St. Louis Court of Appeals of the State of Missouri, from April 10, 1876, to July 2, 1876. Reported by A. Moore Berry, official Reporter. Vol. II. St. Louis: Soule, Thomas & Wentworth, 1878.

THE St. Louis Court of Appeals, though it has been in existence only a little over two years, has already taken a high position among the tribunals of the country, and its decisions are referred to with the respect which is seldom given to any court other than one of last resort. The public and profession had, however, until the appearance of these volumes, known those decisions only through the abstracts and occasional cases published in the *Central Law Journal*. That they are now presented to them in the usual form is a matter of congratulation, and especially so as the work of the reporter and the publisher is done in a particularly excellent manner. The cases of value in the two volumes before us are quite numerous, but we will notice only these: In volume I, *State v. Randolph*, p. 15. A State law prohibiting the keeping of specified game on one's premises during a certain portion of the year is valid, even when applied to game imported from another State. *State v. Boyle*, p. 18. No appeal or writ of error lies on behalf of the State when one charged with crime has been acquitted. *Guthrie v. Weaver*, p. 136. Replevin will not lie for a coffin and its contents when those contents are a corpse. *Armentrout v. S. L. K. C. & N. Ry. Co.*, p. 158. In case of injury to goods the act of God cannot be set up as a defense by the carrier, if guilty of previous misconduct or neglect by which the exposure resulting in the loss was occasioned. *Probasco v. Bouyon*, p. 241. Where a man named Oakes sold the exclusive right to manufacture and sell "Oakes' candies," he was restrained from selling candies made by him as "Oakes' candies." *Mead v. Mead*, p. 247. A statute requiring divorce cases to be tried by the court held not unconstitutional as impairing the right of trial by jury. *Baldwin v. Merrick*, p. 281. A furnace not fastened down, but set upon brick work which can be removed without disturbing the ceiling, walls or floor, held not a fixture within the meaning of the mechanics' lien law. In volume II, *Stilwell v. Commercial Ins. Co.*, p. 22. Freight is insurable and recoverable, while goods are so situated as to create a well-grounded expectation of freight. *Fine v. Hornsby*, p. 61. Shares of stock in a corporation are goods, wares and merchandise within the meaning of the statute of frauds so as to require a note or memorandum in writing to validate a sale. *Lovensstein v. Knopf*, p. 159. No instrument in writing, except a bill of exchange, not having the words "value received," is a negotiable instrument in Missouri. *Brunswig v. Taylor*, p. 351. A commission merchant occupies a fiduciary relation to his principal, so that a discharge in bankruptcy will not, under § 33 of the Bankrupt Act, release him. *Kirby v. Adams Express Co.*, p. 369. A provision in a receipt given for goods to be taken by a carrier, limiting liability to \$50, unless value of goods is declared, held not to limit in case of loss from carrier's negligence, and negligence

is presumed from a loss. *Brennan v. Tracy*, p. 540. A corporation may be the subject of a criminal libel.

JONES ON MORTGAGES.

A treatise on the law of Mortgages of Real Property. By Leonard A. Jones of the Boston Bar. In two volumes. Boston: Houghton, Osgood & Company, 1878.

This appears to be a carefully written treatise. It is, so far as we are able to judge, correct in its statements of principle, and it is certainly as full as could be desired both in text and citation. The author has given not only the common law with the modifications generally existing, but has stated in detail the law of each State upon the more important divisions of the subject in which there is a want of harmony. As to the citations of authority he thinks that upwards of fourteen thousand citations of about eight thousand different cases may be more than there is need of, especially in support of propositions upon which there is a general accord of opinion, but he concludes that it is better to have too many than too few cases, in which we fully agree with him. While in the presentation of an argument to the court one or two authorities in point may be enough to sustain a doctrine advanced, in a text-book upon a special subject, every thing of value in case law ought to be referred to, and in our country especially, where a book is designed to be used in every State, a citation of authorities from different States is desirable. A text book which is not up to the times on case law is of no value whatever to the practitioner, whatever it may be to one studying the elements.

The volumes before us are of nearly eight hundred pages each, and together contain forty chapters. Not only is the subject of mortgages, their nature, form, and other incidents discussed, but a number of chapters are devoted to the methods in which they may be foreclosed or otherwise enforced, a very important part of the law relating to mortgages, but one that is generally not touched upon in books upon the subject, it being considered to belong to the department of civil procedure. The book is excellently indexed, and has a carefully prepared table of cases cited, and we need hardly add, is printed and bound in the best possible manner. Both author and publisher seem to have done their best to produce an excellent work, and we know that the profession will heartily thank them for it.

MR. HALE ON THE NEW CODE.

The Hon. Matthew Hale, Chairman of the Committee on Law Reform of the N. Y. State Bar Association, has addressed the following letter to Mr. Throop:

ALBANY, March 23rd, 1878.

HON. MONTGOMERY H. THROOP:

DEAR SIR—The Committee on Law Reform of the State Bar Association consists of twenty-four lawyers, three from each judicial district. As chairman of that committee, I have taken pains to ascertain, so far as possible, the views of its members with reference to the "nine chapters" which passed the Legislature of 1877, but failed to receive the approval of the Governor. In pursuance of a resolution of the committee, passed at its first meeting, I assigned to different members specified portions of the nine chapters, requesting

them to report any suggestions of amendment, together with their views as to the whole, at a meeting appointed to be held in Albany.

* * About three-fourths of the committee responded, either in writing or orally. Of these all, with I think a single exception, favored the immediate adoption of the nine chapters. Those to whom the chapter on Surrogates' Courts was assigned were perhaps the most decided in favor of its adoption. The reasons given for this approval of the proposed law were, in substance, that the existing laws upon the subjects were very much scattered, in some instances inharmonious with each other, and with the practice in other respects, and so confused as often to render it difficult to ascertain exactly what was the law. * * * Such it was thought was the natural and inevitable result of the passage of various acts throughout a period of nearly fifty years without any revision. The proposed nine chapters were approved for the reason that they would substitute order certainly and harmony for confusion, doubt and inconsistency.

The objections made by the Governor are, some of them, very grave, and are entitled to, as they will doubtless receive, the most respectful consideration. I think he is clearly right as to the repeal of the existing limitation "extra allowances," and the power given to surrogates to divide dead men's estate among lawyers, to the detriment of heirs and next of kin. Some of his criticisms I think are not well-founded. As the result partly of such examination as I have given the subject, and partly of the views of my associates on the committee, who have more thoroughly examined portions of the revision, I am of the opinion that the nine chapters should become a law. I understand that the Judiciary Committees of both houses are ready to report at an early day such amendments to the whole twenty-two chapters as will obviate well-founded objections; general opinion expressed was that the nine chapters were much more *needed* than were the thirteen comprising the Code of Civil Procedure. Had the latter not been enacted there would probably have been as to them more difference of opinion in the committee. But there was almost entire unanimity in opposition to their repeal. The prevailing sentiment as to them was, "let us have peace."

At the same time it is right that I should say frankly that there are many provisions of the twenty-two chapters with which the committee were not satisfied. Many sections were objected to, among which were some of those referred to by the Governor in his veto message. The regret was also very generally expressed that in so many cases the Commissioners had changed the language where no change in substance was intended. But those who proposed amendments and pointed out objections were in most cases strongest in favor of the nine chapters as a whole.

If the nine chapters shall be enacted, and the necessary amendments to them and to the Code of Civil Procedure adopted at this session, I think we shall have a body of practice in all our courts, from highest to lowest, more consistent and harmonious and freer from uncertainty and difficulty, than has existed in this State for the past thirty years.

Yours very respectfully,

MATTHEW HALE.

BENCH AND BAR.

THE Hon. Thos. Johnson, ex-Chief Justice of the Supreme Court of Arkansas, died Saturday last.

William G. Choate, recently nominated by the President to the office of Judge of the United States District Court for the Southern District of New York, has been confirmed by the Senate.

Ex-United States Attorney-General Taft has been nominated to the bench of the Superior Court of Cincinnati.

NOTES.

A NEW exchange comes to us from Italy entitled the *Rivista Penale di Dottrina Legislazione E Giurisprudenza*. It is under the editorial management of Mr. Luigi Lucchini, a Roman advocate well known for his learning and ability. The current number contains articles upon recent legislation in Germany affecting the criminal law, contemporary jurisprudence, remarks on foreign codes and the condition of the Italian Penal Code. The editorial matter, embracing book reviews and a chronicle of current events, is carefully prepared and full of interest. — *The Southern Law Review* for February-March, 1878, contains three leading articles. The first on Homestead and Exemption Laws is by Seymour D. Thompson, Esq., late of the *Central Law Journal*. The subject of privileged debts is especially touched upon, and the case law relating thereto exhaustively considered. The second article, on the Taxation of Money, by Hon. David A. Wells, lucidly and strongly presents certain financial truths that our legislators are too apt to disregard in the enactment of laws relating to taxation. The last article on Trial by Jury is well written, and contains several interesting suggestions in relation to that time-honored institution. The book notices are well written and discriminating as usual. The syllabus of cases reported in the various law journals since the last issue of the *Review* forms, as usual, a very valuable feature, as does the list of valuable articles appearing in the law periodicals. Altogether the number is a very excellent one. — *The San Francisco Law Journal* has changed its name, and now appears under the title of *The Pacific Coast Law Journal*.

A curious question of negligence arose in the case of *Firth v. Bowling Iron Co.*, decided on the 2d inst. by the Common Pleas Division of the English High Court of Justice. The action was for the loss of a cow which had died from eating a piece of wire fencing. Plaintiff and defendants were adjoining occupiers of land, and the defendants had fenced off the land occupied by them with a fence composed of iron rope. From exposure to the weather the strands of wire rusted and separated into pieces, some of which fell to the ground and lay hidden in the grass of the plaintiff's adjoining pasture. In 1867, two heifers belonging to the plaintiff had died in consequence of taking up pieces of wire while grazing in the plaintiff's said pasture. The court held that the action was maintainable; for that the defendants, by maintaining this fence, the nature of which was known to them, were liable for the injury caused to the plaintiff, which was the natural result of the decay of the wire. Digitized by Google

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, APRIL 6, 1878.

CURRENT TOPICS.

THE question as to where a man's residence is, for the purposes of taxation, when he lives with his family part of each year in different places, or in other words, has a town and a country seat, at one of which he passes the summer, and at the other the winter, is a question of growing importance in these days of oppressive taxation. The case of *Thayer v. City of Boston*, just decided by the Supreme Judicial Court of Massachusetts, appearing in our present issue, contains an interesting discussion of the subject. An inhabitant of the city of Boston, who had a summer residence in the town of his nativity, finding his personal taxes growing more and more burdensome each year, for the purpose of relieving himself in some degree therefrom, concluded to become an inhabitant of the latter place, and did all he was able to accomplish that purpose without changing his previous habits of life. He spent about six months each year with his family in the country, voted, paid taxes and held public office there. The remainder of the year he dwelt at his old residence in the city, where were his chief social relations, and where he spent most of his money. The city of Boston imposed a personal tax upon him and collected it, and an action was brought by him to recover back the sum paid. The court decided that in such cases, whether a man is an inhabitant of one town or another is a question of fact to be determined by the jury, and sustained a verdict for plaintiff. The decision is an important one.

The Supreme Court of Pennsylvania, in the case of *Haskell v. Jones*, appearing in our present issue, does not seem to acquiesce in the view taken in Indiana, Michigan and elsewhere, as to the validity of State legislation in reference to negotiable instruments given for patent rights. The decisions of the various courts, heretofore passing upon these statutes, have been uniformly against their constitutionality. The court in Pennsylvania admits that a State law which should make a note given for a patent right void, if not in compliance with its requirements, would be invalid, but it does not think that one providing that a note given for a patent right shall have a statement that it was so given inserted on it,

and that in that case equities existing between the original parties shall accompany the note into the hands of any holder would be so. In the case decided, the note did not contain the words required by the statute, and the court held that it was in that case to be treated the same as other negotiable paper, but the constitutionality of the statute was argued on both sides and examined by the court. In the cases of *Woolen v. Banker*, 17 Alb. L. J. 72, and *Cranston v. Smith*, 18 id. 380, the question is very fully examined; in the first-mentioned case, by the United States Circuit Court for the Southern District of Ohio, and in the other by the Supreme Court of Michigan.

A bill introduced in the assembly, which prohibits justices of the peace from commencing any actions before themselves on claims left with them for collection, or about which they have given counsel, and making a violation of the act a misdemeanor, is aimed at a practice which prevails very extensively in some of the country districts of this State, and which has a very great influence in corrupting our inferior judiciary. Very many justices of the peace, in connection with their official business, carry on that of collecting small debts, and the temptation to use the process of their own courts for the purpose of inducing payment is too strong to be resisted. A defendant under such circumstances has no chance for justice except by an appeal to a jury, and even then he is liable to have a jury made up of the intimate associates of the justice, who will go even farther than the justice would dare to in favor of the party he is supposed to be interested in. We have often spoken of the corrupt character of these courts, but nothing has heretofore been attempted in the legislature to remedy the evil. We trust the bill mentioned will pass.

The bill of Mr. Graham, now pending in the assembly, which is designed to prevent non-resident insurance corporations from taking advantage of the Federal law, permitting them to transfer actions commenced in State courts against them to the Federal courts, ought to pass. The object of making these transfers is in no instance to further justice, for the insurance companies cannot complain that the State courts or the juries therein would deal with them in any different manner from what they would be dealt with in the Federal tribunals, but to render the proceedings tedious and expensive to the litigants. It is suggested that there are doubts as to the constitutionality of the act, but we do not believe it to be so. In the case of *Insurance Co. v. Morse*, 20 Wall. 446, a statute requiring an agreement to abstain from resorting to the courts of the United States, was said to be unconstitutional, and an agreement made in pursuance of the statute was held invalid; but in *Doyle v. Continental Insurance Co.*, 15

Alb. L. J. 267, also decided by the United States Supreme Court, it was held that a State has a right to entirely exclude an insurance company chartered by another State from its territory, or having given a license, to revoke it in its discretion for good cause or without cause. The proposed statute does not interfere with the right of non-resident corporations to transfer actions to the Federal courts, it only says, if they do so they cannot carry on the insurance business here any longer. See as supporting the validity of a similar statute, *State ex rel. Drake v. Doyle*, 40 Wis. 175; 22 Am. Rep. 602.

A bill for the relief of tax payers owning mortgaged real estate, introduced in the senate of this State, on Wednesday last, is an attempt to shift the burdens of taxation from real estate to personal property of a specified kind, and is both dishonest and impolitic. It provides that any person owning real estate, on which there is a lien by mortgage, shall have the amount of the mortgage deducted from the actual value of the real estate, and an assessment made only on the difference between the value of the estate and the amount of the mortgage; that a tax shall be assessed on the mortgage, to the owner thereof, but it may be paid by the owner of the real estate and deducted from the principal or interest of the mortgage. If the owner of the mortgage resides in this State, he may have the amount for which he is assessed thereon deducted from the assessment against him for personal property. It is, however, made lawful for the parties to a mortgage to stipulate that the mortgagor shall pay the entire tax on the real estate, in which case the act is not to apply. A mere statement of the features of the bill shows its thoroughly dishonest character. If it were made to apply only to mortgages hereafter to be executed, it would do no harm, perhaps, as parties could then contract in reference to it. The act violates these principles, which have, in every instance except in the taxation of bank shares, governed the imposition of personal taxes in this State, namely: that the individual should be taxed only where he resides, and that he should be allowed to offset his indebtedness against his personal property in estimating values for assessment. If the bill should become a law, it would ruinously impair the securities held by savings banks throughout the State, and perhaps destroy many of those institutions. Numerous other objections exist to the proposed law, but we have stated enough.

The case of *Guthrie v. Weaver*, 1 Mo. App. Rep. 186, was an action of replevin to obtain what was described to be a coffin of the value of \$90, with its contents. The contents were the dead body of plaintiff's wife, who was the daughter of defendant. The body had, with the consent of plaintiff, who had paid for the coffin containing it, been buried in

a cemetery lot belonging to defendant. Thereafter plaintiff demanded a delivery of the coffin and body to him that he might re-inter them, and this being refused, he brought this action. The court held, that there is no property in a corpse, that the relatives have only the right of interment; that this right, in the case at bar, having been exercised by a burial in the father's lot, with the consent of the husband, no right to the corpse remained except to protect it from insult. The doctrine that there is no absolute property in a dead body has been asserted in several cases. *Wynkoop v. Wynkoop*, 42 Penn. St. 293; *Pierce v. Proprietors of Swan Pt. Cemetery*, 10 R. I. 227; 14 Am. Rep. 667; *Kemp v. Wickes*, 3 Phillim. 264. By the old English law the charge of the body belonged exclusively to the ecclesiastical courts. The only common law remedy for a wrongful removal was by criminal process. In *Re v. Sharpe*, Dears. & B. 160, an indictment against a man for removing his mother's body from one graveyard for the purpose of burying it in another, was sustained. But under the old English law it was the practice to arrest and detain dead bodies for debt. In several States, Rhode Island, Massachusetts, etc., there are statutes forbidding this. For an interesting discussion of the subject, see *Peirce v. Proprietors, etc.*, *supra*, and notes, 14 Am. Rep. 676, 678.

NOTES OF CASES.

THE case of *Angus v. Dalton* (L. R., 3 Q. B. D. 85) recently decided by the Queen's Bench Division of the English High Court of Justice, establishes a rule of law upon the important subject of lateral support, which is not in harmony with what has generally been understood in England, namely: that twenty years open enjoyment of lateral support for a building is sufficient to raise a presumption of a grant of the right to such support. The action was brought by the owners of a factory against the defendants for excavating the soil of an adjoining house in such a manner as to leave the foundation of part of the factory without sufficient lateral support, and thereby causing it to fall. It appeared that the two buildings had apparently been erected at the same time, and were estimated to be upwards of 100 years old. Both had been occupied as dwelling-houses until about twenty-seven years before the accident, but the plaintiff's predecessor had then converted his house into a coach factory, removing the internal walls and erecting a stack of brickwork which both served as a chimney stack and supported the girders which had to be put up to sustain the floors. The defendants, in taking down the adjoining house, and in digging cellars which had not previously existed, left a support for the chimney stack which proved insufficient, and it fell, drawing after it the entire factory. It was held, by Cockburn, C. J., and Mellor, J., who constituted the ma-

jority of the court, that the defendants were entitled to judgment, because no grant of a right of lateral support for the factory, by the adjacent land, could be presumed from the enjoyment of such support by the plaintiff for twenty years, inasmuch as the owners of this land never had any power to oppose the conversion of the dwelling-house into a factory, and had no reasonable means of resisting or preventing the enjoyment by such factory of lateral support from the adjoining soil, and for the same reason such support was not an easement which had been enjoyed for twenty years within the Prescription Act (2 & 3 Wm. 4, c. 71, s. 2), as it could not be said to have been enjoyed by a person claiming right thereto and without interruption. Lush, J., however, dissented, holding the rule generally understood to prevail, was the correct one. The cases of *Dougal v. Wilson*, 2 Saunders, 504; *Darwin v. Upton*, id. 506; *Mayor of Kingston v. Horner*, 2 Cawp. 102; *Doe v. Reed*, 5 B. & A. 282; *Solomon v. Vinters Co.*, 4 H. & N. 585; *Bonomi v. Backhouse*, 9 H. L. C. 503; *Chasemore v. Richards*, 7 H. L. C. 370; *Webb v. Bird*, 10 C. B. (N. S.) 268; *Will v. Commissioners of New Forrest*, 18 C. B. 60, were cited. The doctrine laid down by the majority of the court is in accordance with that prevailing in this country. See *Mitchell v. The Mayor*, 40 Ga. 19; 15 Am. Rep. 669, where quite an extended discussion of the subject appears. Also, Wood on Nuisances, § 202, where the various authorities, both English and American, are collected and compared.

In the case of *Gott v. Pulsifer*, 122 Mass. 285, plaintiff brought action for an alleged false and malicious libel published concerning the image known as the "Cardiff Giant," in defendants' newspaper. The image belonged at the time to plaintiff, and he had made a contract with one Palmer to sell it to him for \$30,000. Defendants' newspaper in a humorous article charged that the "giant" was a humbug and that it had been sold in New Orleans for the sum of eight dollars. In consequence of the appearance of this article the sale to Palmer was not made. The jury found for defendants. The Supreme Court sustained certain exceptions taken by the plaintiff and gave a new trial, saying, however, that "the editor of a newspaper has the right, if not the duty, of publishing for the information of the public, fair and reasonable comments, however severe in terms, upon any thing which is made by its owner a subject of public exhibition as upon any other matter of public interest; and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice." See, as supporting this rule, *Dibden v. Swan*, 1 Esp. Cas. 28, where Lord Kenyon charged that the editor of a newspaper may fairly and candidly comment on any place or species

of public entertainment, and that if done fairly and without malice or view to injure the proprietor, however severe the censure, the justice of it screens the editor from legal animadversion. See, also, *Carr v. Hood*, 1 Campb. 355; *Henwood v. Harrison*, L. R., 7 C. P. 606; *Fry v. Bennett*, 28 N. Y. 324; *Gregory v. Duke of Brunswick*, 6 M. & G. 958.

In *Hester v. Commonwealth*, decided by the Supreme Court of Pennsylvania on the 7th of January last, it is held that the entry of a *nolle prosequi* is not a bar to a second indictment. The reason of this rule is stated in *McFadden v. Commonwealth*, 11 Harris, 12, to be that a prisoner charged with a crime is not in jeopardy until the jury is empaneled and sworn. At common law a *nolle prosequi* may be at any time retracted, and is not only no bar to a subsequent prosecution in another indictment, but it may be so far canceled as to permit a revival of proceedings on the original bill. Even a personal agreement by the attorney-general will not make the entry a bar. But if a jury has been actually empaneled, the entry, it is said, operates as an acquittal. *Reynolds v. State*, 3 Kelly, 53; *U. S. v. Shoemaker*, 2 McLean, 114; *Mount v. State*, 14 Ohio, 295. And when after a prisoner had pleaded to the indictment, and after the jury had been sworn and evidence offered, the public prosecutor, without the consent of the prisoner and without order of court, withdrew a juror merely to enter a *nolle prosequi*, it was held that the prisoner could not afterward be tried on the same indictment. *People v. Barrett*, 2 Caines, 304; *Commonwealth v. Tucker*, 20 Pick. 356. See also as supporting the principal case, *State v. McNeil*, 8 Hawks, 188; *Commonwealth v. Wheeler*, 2 Mass. 172; *Commonwealth v. Lindsay*, 2 Virg. Cas. 345.

In the case of *Abbott v. Abbott*, to appear in the 67th Me., it is held that a wife cannot, after being divorced from her husband, maintain an action against him for an assault committed upon her during coverture, nor against persons who confederated with and assisted him in committing the assault. The assault in question was forcibly carrying the wife to an insane asylum. The same question came before an English court in *Phillips v. Burnet*, L. R., 1 Q. B. D. 436, and the decision was in accordance with that in the principal case, the court saying that divorce does not make a marriage void *ab initio*, but merely terminates the relation of husband and wife, and as the husband and wife are one person, up to that time, neither can maintain an action against the other. The reason that the wife cannot maintain the action afterward is that as there was no civil remedy at the time the act was committed there was no civil right. See *State v. Oliver*, 70 N. C. 60; *Norcross v. Stuart*, 50 Me. 87; *Hasbrouck v. Weaver*, 10 Johns. 247; *Shaddock v. Clifton*, 22 Wis. 114.

SOME RECENT DECISIONS—TWENTY-SECOND AMERICAN REPORTS.

THIS volume condenses twenty-three volumes of reports of the States of Illinois, Kansas, Maine, Maryland, Michigan, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, South Carolina and Wisconsin.

In *Third National Bank of Baltimore v. Boyd*, 44 Md. 47, it is held, where a national bank has received bonds as a collateral security for an indebtedness already existing and for future obligations, and after the discharge of the indebtedness, the bonds were stolen from the bank, that the bank was not a gratuitous bailee, that it had power to take the bonds as security for existing or future indebtedness, and was bound to use ordinary diligence and care in the custody of the bonds. The doctrine of *Wiley v. First National Bank of Brattleborough*, 47 Vt. 546, and *First National Bank of Lyons v. Ocean National Bank*, 60 N. Y. 278, on which we have heretofore commented, is approved and distinguished.

Hardesty v. Richardson, 44 Md. 617, decides that where a father makes to his son a parol gift of land, and the son enters into possession and makes improvements in reliance upon the gift, the gift is irrevocable in equity and a conveyance will be decreed. This is harmonious with *Freeman v. Freeman*, 48 N. Y. 84, which is cited with approval.

A rather curious principle is announced in *Happel v. Brethauer*, 70 Ill. 166, namely: that the court will not act upon the admission of parties that a statute has not been passed in the manner required by the Constitution, but that the fact must be shown by the printed journals on the certificate of the Secretary of State. Otherwise, say the court, "the entire statute might be abrogated by agreement."

A remarkable case of conflict of authority is shown in *Dewey v. Warriner*, 71 Ill. 198, which holds that the indorser of negotiable paper is not a competent witness to impeach its consideration. This doctrine, the reporter's note informs us, is in harmony with the decisions in the United States Supreme Court, Massachusetts, Maine, Pennsylvania, Ohio, Iowa, Mississippi and Tennessee, but hostile to those of England, New York, New Jersey, Maryland, Virginia, Connecticut, New Hampshire, Michigan, Kentucky, North Carolina, South Carolina, Georgia, Alabama, Texas and Missouri. We confess we cannot see why the indorser should not be competent to prove the fact as well as any other witness. There is a manifest distinction between this line of proof and proof of the admission of the indorser to the same effect, which was held incompetent in our leading case of *Paige v. Cagwin*, 7 Hill, 861.

Smith v. Knight, 71 Ill. 148, is an interesting case. A agreed to advance money from time to time to B, up to a certain amount, to enable B to carry on

business, and B agreed to pay interest on the average balance advanced, and also to divide the profits, after deducting a fixed sum for expenses, but A was not to bear any losses. Held, that A and B were not partners as to third persons. This is in direct conflict with *Leggett v. Hyde*, 58 N. Y. 272; 17 Am. Rep. 244; where it is held that the test is the receipt of the gains of the adventure as profits. But turning over a few leaves of our volume, and stepping across the State of Indiana into Ohio, we find, in *Harvey v. Childs*, 28 Ohio, 319, that "participation in the profits of a business, though cogent evidence of a partnership, is not necessarily decisive of the question. The evidence must show that the persons taking the profits shared them as principals in a joint business in which each has an express or implied authority to bind the other." In the latter case *Leggett v. Hyde* is referred to and distinguished on the ground of the difference between a continuing trade, from which the authority of the lender may be implied, as in the New York case, and a single transaction, where no credit is contemplated, as in the Ohio case.

In *First National Bank v. Ricker*, 71 Ill. 439, the facts were as follows: the defendant received a check in good faith and for value, but becoming suspicious of its genuineness presented it to the plaintiff, on whom it was drawn, and demanded payment without disclosing his suspicions. The plaintiff's teller expressed doubt as to the signature, but said he would pay it if defendant would indorse it, which he did. Held, that the defendant, on discovering that the check was a forgery, might recover from the defendant the money paid on it. The principle seems to be that the presumption that the drawee knows the signature of the drawer is conclusive only in cases of innocent holders.

Shannon v. Hall, 72 Ill. 354, holds that where a conveyance is once duly recorded, it is thenceforth notice to all the world, even though the record is totally destroyed. In this case the public records had been destroyed by fire; a statute was passed providing for their restoration, but a mortgagee took no steps to restore his record. It was held that a subsequent bona fide purchaser of the land took title subject to the mortgage.

In *Union National Bank v. Oceana County Bank*, 80 Ill. 212, it is held that an action may be maintained against a bank refusing to pay a check drawn upon it, where it is in sufficient funds of the drawer. This is in conflict with the rule everywhere else except in Kentucky, but the court make no reference to the singular fact. We would like to have the learned court explain (what it does not attempt to explain) how an unaccepted draft can operate as an assignment of the drawer's funds in the drawee's hands.

Sheehy v. Cokley, 48 Iowa, 183, was an action of slander for calling a woman what Desdemona expressed by "that name." Held, that proof of sexual intercourse with her affianced husband before

marriage was not a justification, and that evidence of her good general reputation for chastity was admissible.

In *Blanchard v. Lambert*, 48 Iowa, 228, a husband and wife separated, and afterward the husband cohabited with another woman whom he claimed and who was reputed to be his wife; nine years after the wife, with knowledge of the fact, married again, and lived with the second husband until his death; in a proceeding for dower in the second husband's estate, *held*, that it would be presumed that the first marriage had been legally dissolved before the second marriage, or if the second marriage was originally void, that a subsequent marriage had taken place after the death of the first husband.

In *McChuer v. Girard Fire and Marine Insurance Company*, 48 Iowa, 349, a fire policy was issued on a carriage described as "contained in a frame barn." The carriage was destroyed by fire while under repair at a carriage shop. *Held*, that the loss was covered by the policy. A valuable note accompanies this case.

A valuable case for abortionists is *State v. Winthrop*, 48 Iowa, holding that an infant, even after birth, is not the subject of murder until an independent circulation has been established. So, it seems, infanticide is safe enough if committed before the severance of the umbilical cord.

Another case showing remarkable conflict of authority is *Pritchett v. Mitchell*, 17 Kans. 355, holding that a second mortgagee cannot plead usury in a mortgage either to defeat or postpone its lien. This view is sustained by the decisions of Alabama, Connecticut, Illinois, Iowa, Kentucky, Michigan, Missouri and Vermont. On the other side are Indiana, Pennsylvania, Ohio, New York, Maryland and New Jersey. An elaborate note accompanies this case.

Hayner v. Cowden, 27 Ohio, 292, is not so much remarkable for what it decides as for the argument of the defendant's counsel. The decision was that words charging a clergyman with drunkenness, when spoken concerning him in his calling, are actionable in themselves. This was *held*, in spite of the following argument: "Ministers ought not to be regarded in the eye of the law as purer or holier than any other men, nor entitled to protection in any greater degree. The law is no respecter of persons; it no longer makes any distinction between classes or conditions of men; its guiding star now is 'equality before the law for all.'"

We must suspend our examination of this interesting volume.

The lawyers of Lyons, France, became dissatisfied with M. Lagrevol, an appellate judge, and unanimously resolved not to plead before him unless he should publicly apologize for his conduct toward them. What the result of this action will be is not yet known.

TAXATION OF PERSONS RESIDING IN TWO PLACES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.
MARCH, 1878.

THAYER V. CITY OF BOSTON.

Plaintiff had for many years been an inhabitant of Boston, had lived there in his own dwelling-house with his family, and paid taxes, and had an office for business. On account of the increase of taxation in 1870, he removed to the town of Lancaster, where he already had a summer residence, and thereafter remained there some months each year with his family, claiming to reside there, paying taxes, voting and holding office there. He, however, spent several months each year in Boston, which continued to be the principal place of his social and domestic life, and the place where the most of his family expenditures were made. In an action to recover back a tax for personal property, assessed upon and collected from him by the city of Boston, in 1876, *held*, that the question whether he was an inhabitant at that time of Boston or not, for the purposes of taxation, was for the jury.

While the choice of the tax payer as between two places of residence is an element to be considered in determining his domicile, a choice in favor of one place will not control a preponderance of evidence in favor of another. In all disputed cases it is the duty of the court to submit each case to the jury, with instructions adapted to its peculiar aspects.

THIS action was brought in the Supreme Judicial Court for Worcester county to recover back a tax assessed by the city of Boston upon the plaintiff, and paid by him under protest. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions to certain rulings of the presiding judge. The case was reported to the full court.

G. F. Hoar, H. C. Hutchins and A. S. Wheeler, for plaintiff.

D. Foster and W. S. B. Hopkins, for defendant.

COLT, J. The plaintiff's right to recover back the tax paid by him to the city of Boston depends on whether he was, within the meaning of the statute, an inhabitant of that city on the 1st day of May, 1876, and subject to taxation there. Gen. Stat., ch. 11, § 12. The case requires the application of those rules which determine where a citizen is legally taxable, who has more than one place of residence in this State, situated in different municipalities, in each of which he lives with his family for a part of each year.

In 1869 the plaintiff was an inhabitant of Boston, where since early life he had lived with his family and paid taxes. He there had a dwelling-house and an office for business, where his account-books and valuable papers were kept. He complained of the increase of his taxes in the previous year, and informed the assessor if they were again increased he would pay no more taxes in Boston. In the assessment of the following year his taxes were increased, and he accordingly gave notice to the assessors of Boston and to the assessors of Lancaster that he had removed his residence to the latter place, where he should be thereafter taxed. The plaintiff was born in Lancaster, and at the time of giving the notice owned the place formerly belonging to his father, where he was born. Upon this place, in 1860, he had erected a new dwelling-house, and afterward lived there a portion of each year with his family, going from his house in Boston early in June and returning in October or November following. After giving the notice he continued to live there with his family as before, for a part of each year, voting and being taxed only in that town, taking part in town meetings, and occasionally

serving on town committees. The plaintiff on cross-examination testified that Boston was, and had been, since he was married the principal place of his family and domestic life, and that the greater part of family expenditures had been there made.

Only so much of the evidence at the trial as was thought necessary to present the question of law raised by the defendant's requests for instructions, and by the exceptions taken to the exclusion of evidence, is reported. The judge declined to give the instructions requested, except so far as they were embraced in the instructions given; and by the terms of the report judgment is to be entered on the verdict for the plaintiff, unless there was error in the refusal to instruct the jury as requested, or the evidence offered was improperly excluded. The discussion is limited to these points.

The jury, under the instructions which were given, must have found that the plaintiff, after 1869 and before the 1st of May, 1876, when this tax was assessed, with an honest intention to change his domicile or permanent residence from Boston to Lancaster, to make the latter the place of his permanent and real home, as distinguished from a mere place of temporary summer resort, did acts which amounted to such change, and made himself an inhabitant of Lancaster. The weight of the evidence on which this finding was made is not for our consideration. This is not a motion to set aside a verdict, as against the weight of evidence, and it is enough upon this report that we cannot, as a matter of law, declare that the evidence would not, under the instructions given, justify the finding. The question remains whether the instructions requested ought to have been given, in whole or in part, or ought to have been given in the language requested.

The statute declares that all personal property shall be taxed to the owner in the city or town where he is an inhabitant on the 1st day of May. By the decisions of this court it is held that in cases of this description the inhabitancy which fixes the place of taxation must be practically equivalent to that legal residence which establishes the domicile of the tax payer, although the words do not always have precisely the same meaning. *Briggs v. Rochester*, 16 Gray, 337. The Constitution of this Commonwealth declares that to remove all doubts concerning the meaning of the word "inhabitant," "every person shall be considered an inhabitant, for the purpose of electing and being elected into any office or place within this State, in that town, district or plantation where he dwelleth or hath his home." § 2, art. 2.

It is always a question of fact where the place of a man's domicile is. As to most persons it is determined at once by the decisive facts which show permanent and unchanging residence in only one place. As to such persons, the question of domicile, the question where they are to be taxed, or where they have a right to vote, presents no difficulty. There can be no right of election to the tax payer between two places when one is already fixed by the actual facts which go to establish domicile. It is only when the facts which establish permanent residence and domicile are ambiguous and uncertain, in the absence of any settled abode, and when the real intention of the party cannot be ascertained, that the question becomes difficult. It may then require an examination into the motives of the man, his habits and character, his domestic, social,

political and business relations for a series of years; and the answer will depend in the end upon the weight of evidence in favor of one or two or more places. It is evident that with the increasing number of those who live each year in different places, the increased facilities for travel, and the great temptation to escape taxation by a change of domicile, cases of the latter description are becoming more common.

It is said to be difficult, if not impossible, to give an exact and comprehensive definition of domicile. No test which can safely be applied to all cases has yet been established.

In *Lyman v. Fiske*, 17 Pick. 234, it was said that, "in general terms one may be designated as an inhabitant of that place which constitutes the principal seat of his residence, of his business, pursuits, connections, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place with the intent to regard it and make it his home. The act and intent must concur, and the intent may be inferred from declarations and conduct. But the election to be taxed in one town rather than another is only one circumstance bearing upon the question of actual habitancy, and to be taken in connection with other circumstances to determine the principal fact."

In *Sears v. Boston*, 1 Metc. 250, it was declared that actual residence, that is, personal presence in a place, is one circumstance to determine domicile or the fact of being an inhabitant, but is far from conclusive. A seaman on a long voyage and a soldier in actual service may respectively be inhabitants of a place, though not personally present there for years. It depends upon many other considerations besides actual presence.

In *Briggs v. Rochester*, 16 Gray, 341, that the words "where he shall be an inhabitant on the first of May," means where he shall have his home on that day." In *Otis v. Boston*, 12 Cush. 49, that "a man is properly said to be an inhabitant where he dwelleth and hath his home." In *Abington v. North Bridgewater*, 23 Pick. 170, that "it depends not on proving particular facts, but whether all the facts and circumstances taken together tending to show that a man has his domicile or home in one place overbalance all the like proofs tending to establish it in another."

If we adopt the definition taken from the Constitution, which seems intended to put the matter beyond doubt, it will be found to be only an identical proposition, equivalent to declaring that a man shall be an inhabitant where he inhabits, or be considered as dwelling or having his home where he dwells or has his home. It must often depend upon the circumstances of each case, the combinations of which are infinite. If it be said to be fixed by the place of his dwelling-house, he may have dwelling-houses in different places; if it be where his family reside, his family with himself may occupy them indiscriminately, and reside as much in one as another; if it be where he lodges or sleeps *per noctem*, he may lodge as much in one as the other. *Thorndike v. Boston*, 1 Metc. 245; *Harvard College v. Gore*, 5 Pick. 231; *Blanchard v. Stearns*, 5 Metc. 238; Opinion of the Justices, id. 587; *Williams v. Roxbury*, 12 Gray, 21.

It is evident that the choice of the tax payer, as between two places of residence, is an element to be considered in determining which is the real domicile; but a choice in favor of one place will not be per-

mitted to control a preponderance of evidence in favor of another. The place of domicile, upon which so many important municipal obligations and privileges depend, is not left by the law to the choice of the citizen, except only as such choice may give character to existing relations and accompanying acts of residence which are not in conflict with it. As between different places, it may depend on a mass of evidence which will generally include as one of its items the declared intentions and choice of the party himself. The weight to be given to that intention, however honest, will depend largely upon the condition of all the evidence.

If the evidence be equivocal and uncertain, then the choice may be sufficient to turn the scale; if the weight of it be one way, then an opposite intention or wish will be of little or no avail. *Holmes v. Greene*, 7 Gray, 299.

The true rule was plainly recognized in *Cheney v. Walkham*, 8 Cush. 327. The judge was there asked by the plaintiff, who sought to recover back a tax paid the defendant, to rule that if the true dividing line between two towns passed through an integral portion of the dwelling-house occupied by him and his family, then he had a right to elect in which town he would be assessed on his personal property and become a citizen. This was refused, and it was ruled that if the house was so divided by the line as to leave that portion of it in which the occupant mainly and substantially performed those acts and offices which characterized his home (such as sleeping, eating, sitting and receiving visitors) in one town, then the occupant would be a citizen of that town, and that no right of election would exist; and that if the house was so divided by the line as to render it impossible to determine in which town the occupant mainly and substantially performed the acts and offices before referred to, then the occupant would have a right of election, and his election would be binding on both towns. The rule thus laid down was declared by the full court to be sufficiently favorable to the plaintiff on the question of his right to elect.

In the law of domicile it is settled that a person can have but one domicile at the same time, for the same purpose; that domicile once acquired remains until a new one is acquired; and that a new one is acquired only by a clear and honest purpose to change, which is carried into actual execution. Applying these maxims to the facts, in all disputed cases it is the duty of the court to submit each case to the jury with instructions adapted to its peculiar aspects.

Upon a careful examination we are satisfied that the instructions here requested, so far as they were not substantially given by the judge in his charge, were properly refused. The jury were told that the plaintiff must prove all the facts necessary to make out his case, including the fact that he was not an inhabitant of Boston on the 1st of May, 1876.

They could not have been properly instructed that he was *prima facie* such inhabitant "if he and his family were on that day living in a house of his own, in the same way in which he had lived in Boston during those years in which he admits he had been a taxable inhabitant of that city," for such instruction was calculated to mislead the jury by excluding from their consideration the evidence of inhabitancy acquired in Lancaster. It would be stating a conclusion from one

item of evidence bearing on the question which is not in itself conclusive. The third request was, therefore, properly refused.

The fourth and seventh requests were embraced in the instructions "that the mere intention of purpose formed or expressed to change his home is not enough; he must do something which actually works a change of home. The act of change and the intention must concur." The first part of the fifth request was given, and the judge was not required to give the definition of home contained in the last part. The principal place of abode of a man and his family, when it is only a temporary abode, is not his home in the sense here required. The sixth was properly refused, because the single fact of residence on the first of May, in the popular meaning of that word, is not conclusive on the question of inhabitancy or domicile. The eighth request was for an instruction that the facts therein recited were conclusive on the question of domicile, and left out of view all the evidence in the case which might possibly control those facts. It was properly refused.

The instructions which were given to the jury recognize in their whole tenor the rules of law applicable to the facts in this case. And the report does not reserve to the defendant the right to except to the phraseology of each sentence in the instructions given to the jury, but only the question whether there was error in the rulings on evidence which was excepted to, or in the refusals to instruct the jury as requested by the defendant.

The exceptions taken to the exclusion of evidence require brief consideration. On cross-examination the plaintiff was asked: "What amount of personal property he had on the 1st of May, 1868, not exempt from taxation?" This question was answered.

He was then asked "what amount of personal property he had," and upon his declining, the court refused to order him to answer.

The next question objected to was, as to how much tax the witness paid at the West on certain railroad stock there. The exceptions to the refusal of the court to permit these questions cannot be sustained. The issue was whether the plaintiff on the 1st of May, 1876, was an inhabitant of Boston. The motive which induced him to change to Lancaster was not material to that issue. A man may change his residence for the purpose of reducing taxation only, although he will be subject to a penalty if he escapes taxation by designedly changing or concealing his residence for that purpose. Stat. 1864, ch. 172. The wish to change for that purpose does not tend to show any want of a real intention to change, but rather the contrary. As bearing on the honesty of his purpose to change his residence, the plaintiff was required to state what amount of taxable personal property, he had on the 1st of May, 1868, but the inquiry, what was the whole amount of his personal property was quite different, and had more remote bearing on the case. The extent to which a witness may be cross-examined upon facts which appear to be material only as showing his bias or testing his accuracy or credibility, is largely a matter within the discretion of the court, to the exercise of which no exception lies. *Commonwealth v. Kelley*, 113 Mass. 453; *Commonwealth v. Leyden*, id. 452; *Müller v. Smith*, 112 id. 470.

Exceptions overruled.

MUNICIPAL BONDS AND THEIR INCIDENTS.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

CROMWELL, Plaintiff in Error, v. COUNTY OF SAC.

1. Where to a municipal bond which has several years to run, an overdue and unpaid coupon for interest is attached, that fact does not render the bond and the subsequently maturing coupons dishonored paper, so as to subject them, in the hands of a purchaser for value, to defenses good against the original holder.
2. A *bona fide* purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin; the only exceptions being where the paper is absolutely void for want of power in the maker to issue it, or where the circulation is prohibited by law for the illegality of the consideration. Municipal bonds payable to bearer are negotiable instruments and subject to the same rules as other negotiable paper.
3. A purchaser of a municipal bond from a *bona fide* holder, who had obtained it for value before maturity, takes it equally freed as in the hands of such holder, though he may have had notice of infirmities in its origin.
4. A purchaser of a negotiable security before maturity, unless personally chargeable with fraud in the purchase, can recover the full amount of the security against the maker, though he may have paid less than its par value, whatever may have been its original infirmity.
5. When the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will govern.
6. Municipal bonds in Iowa, drawing ten per cent interest before maturity, draw the same interest, under the law of the State, after maturity, and coupons attached to such bonds draw six per cent after maturity. Judgments in that State entered upon such bonds and coupons draw interest for the amount due on the bonds at the rate of ten per cent a year, and upon the amount due upon the coupons at the rate of six per cent a year.

In error to the Circuit Court of the United States for the District of Iowa.

The facts appear in the opinion.

Mr. Justice FIELD delivered the opinion of the court.

This case was before us at the last term, and the judgment of the court below was then reversed and the cause remanded for a new trial. 94 U. S. Rep. 351. Upon the new trial a special verdict was found by the jury, and the questions presented for our determination now relate to the judgment which those findings authorize.

The action was brought upon four bonds of the county of Sac, in the State of Iowa, each for \$1,000, and four coupons for interest attached to them, each for \$100. The bonds were issued on the 1st of October, 1860, and were made payable to bearer on the 1st of May, in the years 1868, 1869, 1870, and 1871, respectively, at the Metropolitan Bank, in the city of New York, with annual interest at the rate of ten per cent a year. The coupons in suit matured after the first of May, 1868. They were, at the option of the holder, payable at the same bank in New York, or were receivable at the office of the treasurer of Sac county for county taxes.

As a defense to this action the county relied upon the estoppel of a judgment rendered in its favor in a prior action brought by one Samuel C. Smith upon certain earlier maturing coupons upon the same bonds, accompanied with proof that the present plaintiff, Cromwell, was at the time the owner of the coupons in controversy in that action, and that the action was prosecuted for his benefit. It appeared from the findings in that action that the county of Sac had authorized, by a vote of its people, the issue of bonds to the amount of \$10,000 for the erection of a court-house; that the bonds were issued by the county

judge, and delivered to one Meserey, with whom he had made a contract for the erection of the court-house; that immediately thereafter the contractor gave one of the bonds as a gratuity to the county judge; and that a court-house was never constructed by the contractor or any other person pursuant to the contract. It also appeared that the plaintiff had become the holder before maturity of the coupons in controversy, but it did not appear that he had ever given any value for them. Upon these findings the court below held that the bonds were void as against the county, and accordingly gave judgment in its favor upon the coupons. Any infirmity of the bonds from illegality or fraud in their issue necessarily affected the coupons attached to them. When that case was brought here on writ of error this court held that the facts disclosed by the findings were sufficient evidence of fraud and illegality in the inception of the bonds to call upon the holder to show, not only that he had received the coupons before maturity, but that he had given value for them, and not having done so, the judgment was affirmed.

When the present case was first tried, the court below held that the judgment in the Smith case was conclusive against the plaintiff, and refused to permit him to prove that he had received the bonds and coupons in this suit before maturity for value, and gave judgment for the county. But when the case was brought here at the last term we held that the court below erred in refusing to admit this proof; and that the matters adjudged in the Smith case were only that the bonds were void as against the county in the hands of parties who had not thus acquired them before maturity and for value. The judgment was accordingly reversed.

Upon the second trial the plaintiff proved that he had received two of the bonds in suit — those payable in 1870 and 1871 — with coupons attached, before their maturity, and given value for them, without notice of any defense to them on the part of the county. Under our ruling there can be no doubt of his right to recover upon them. The only questions for our determination as respects them relate to the interest which they shall draw after maturity, and the interest which the judgment shall bear. These questions we shall hereafter consider.

As to the other two bonds in suit — those payable in 1868 and 1869 — and coupons annexed, it appears that the plaintiff purchased them from one Clark on the 1st of April, 1873, after their maturity, for the consideration of a precedent debt due to him from Clark, amounting to \$1,500; that they had previously been held by one Robinson, who had pledged them to a bank in Brooklyn as collateral security for a loan of money; that Clark purchased them of Robinson on the 20th of May, 1863, by paying this loan to the bank, then amounting to \$1,192, and applying the excess of the amount of the bonds over the amount thus paid, in satisfaction of a precedent debt due to him by Robinson. To each of these bonds there were attached at the time of Clark's purchase the coupon due on the first of the month and all subsequent unmaturing coupons. Robinson stated to Clark that the coupons previously matured had been paid, and that those due on the first of the month would be paid in a few days. Clark had no notice at the time of any defense to the bonds, except such as may be imputed to him from the fact that one of the coupons attached to each of the bonds was then past due and unpaid. And the principal

question for our determination is whether, this fact existing, the plaintiff had, as to these bonds, the right of a holder for value before dishonor, without notice of any defenses by the county; or, as stated by counsel, whether this fact rendered the bonds themselves, and all subsequently maturing coupons dishonored paper, and subjected them in the hands of Clark, and the plaintiff succeeding to his rights, to all defenses good against the original holder. The judges of the Circuit Court were divided in opinion upon this question, and as in such cases the opinion of the presiding judge prevails, the decision of the court was against the plaintiff, and he was held to have taken the bonds and subsequent coupons as dishonored paper, subject to all the infirmities which could be urged against them in the hands of the original holder. In this decision we think the court erred. The special verdict does not show that the coupons overdue had been presented to the Metropolitan Bank for payment, and their payment refused. Assuming that such was the fact the case is not changed. The non-payment of an installment of interest when due could not affect the negotiability of the bonds, or of the subsequent coupons. Until their maturity, a purchaser for value, without notice of their invalidity as between antecedent parties, would take them discharged from all infirmities. The non-payment of the installment of interest represented by the coupons due at the commencement of the month, in which the purchase was made by Clark, was a slight circumstance, and taken in connection with the fact that previous coupons had been paid, was entirely insufficient to excite suspicion even of any illegality or irregularity in the issue of the bonds. Obligations of municipalities in the form of those in suit here are placed by numerous decisions of this court on the footing of negotiable paper. They are transferable by delivery, and when issued by competent authority pass into the hands of a *bona fide* purchaser for value before maturity, freed from any infirmity in their origin. Whatever fraud the officers authorized to issue them may have committed in disposing of them, or however entire may have been the failure of the consideration promised by parties receiving them, these circumstances will not affect the title of subsequent *bona fide* purchasers for value before maturity, or affect the liability of the municipalities. As with other negotiable paper mere suspicion that there may be a defect of title in its holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part. Such is the decision of this court, and substantially its language in the case of *Murray v. Lander*, reported in the 2d of Wallace, where the leading authorities on the subject are considered.

The interest stipulated was a mere incident of the debt. The holder of the bond had his option to insist upon its payment when due or to allow it to run until the maturity of the bond, that is, until the principal was payable. Many causes may have existed for a failure to meet the interest as it matured, entirely independent of the question of the validity of the bonds in their inception. The payment of previous installments of interest would seem to suggest that only causes of a temporary nature had prevented their continued payment. If no installment had been paid,

and several were past due, there might have been greater reason for hesitation on the part of the purchaser to take the paper, and suspicions might have been excited that something was wrong in issuing it. All that we now decide is, that the simple fact that an installment of interest is overdue and unpaid, disconnected from other facts, is not sufficient to affect the position of one taking the bonds and subsequent coupons before their maturity for value as a *bona fide* purchaser. *The National Bank of North America v. Kirby*, 108 Mass. 497. To hold otherwise would throw discredit upon a large class of securities, issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually. Temporary financial pressure, the falling off of expected revenues or income, and many other causes having no connection with the original validity of such instruments, have heretofore, in many instances, prevented a punctual payment of every installment of interest on them as it matured, and similar causes may be expected to prevent a punctual payment of interest in many instances hereafter. To hold that a failure to meet the interest as it matures renders them, though they may have years to run, and all subsequent coupons dishonored paper, subject to all defenses good against the original holders, would greatly impair the currency and credit of such securities and correspondingly diminish their value. We are of opinion, therefore, that Clark took the two bonds in suit and the subsequently maturing coupons as a *bona fide* purchaser, and as such was entitled to recover upon them, whatever may have been their original infirmity. The plaintiff, Cromwell, succeeded by his purchase from Clark to all Clark's rights, and can enforce them to the same extent. Nor does it matter whether, in the previous action against the county by Smith, who represented him, he was informed of the invalidity of the bonds as against the county, and knew, when he purchased, the circumstances attending their issue, or whether he was made acquainted with them in any other way. The rule has been too long settled to be questioned now, that whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. His own title and right would be impaired if any restrictions were placed upon his power of disposition. This doctrine, as well as the one which protects the purchaser without notice, says Story, "is indispensable to the security and circulation of negotiable instruments, and it is founded on the most comprehensive and liberal principles of public policy." Story on Promissory Notes, § 191. The only exceptions to this doctrine are those where the paper is absolutely void, as when issued by parties having no authority to contract, or its circulation is forbidden by law from the illegality of its consideration, as when made upon a gambling or usurious transaction.

The plaintiff, therefore, holds the bonds and the subsequent coupons as his vendor held them, freed from all infirmities attending their original issue. Nor is he limited in his recovery upon them, or upon the other two bonds, as contended by counsel for the county, to the amount he paid his vendor. Clark had given full value for those he purchased and could have recovered their amount from the county, and his right passed to his vendee. But independently of the fact of such

full payment we are of opinion that a purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, though he may have paid less than its par value, whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law, but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities, and those of private corporations, are constantly fluctuating in price in the market, one day being above par and the next below it, and often passing within short periods from one-half of their nominal to their full value. Indeed all sales of such securities are made with reference to prices current in the market and not with reference to their par value. It would introduce, therefore, inconceivable confusion if *bona fide* purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them. This rule in no respect impinges upon the doctrine that one who makes only a loan upon such paper or takes it as collateral security for a precedent debt may be limited in his recovery to the amount advanced or secured. *Stoddard v. Kimball*, 6 Cush. 471; *Allaire v. Hartshorne*, 1 Zab. 665; *Williams v. Smith*, 2 Hill, 301; *Chicopee Bank v. Chapin*, 8 Meto. 40; *Lay v. Wiseman*, 36 Iowa, 305.

The only questions remaining, which we deem of sufficient importance to require consideration, relate to the interest which the bonds and coupons in suit shall draw after their maturity, and the interest which the judgment shall bear. The statute of Iowa on this subject provides that the rate of interest shall be six per cent a year on money due by express contract, unless a different rate be stipulated, and on judgments and decrees for the payment of money in such cases; but that parties may agree in writing for any rate of interest not exceeding ten per cent a year, and that any judgment or decree thereon shall draw the rate of interest expressed in the contract.

The bonds by their terms, as already stated, bear interest at the rate of ten per cent until maturity. The plaintiff claims that they should draw the same rate of interest after maturity, and that under the statute of Iowa the judgment should also bear ten per cent interest. The court below allowed only seven per cent on the bonds after maturity, that being the rate in New York where the bonds were payable, and only six per cent on the judgment. In this ruling we think the court erred. By the settled law of Iowa, as established by repeated decisions of her highest court, contracts drawing a specified rate of interest before maturity draw the same rate of interest afterward. *Hand v. Armstrong*, 18 Iowa, 324; and *Lucas v. Ptokel*, 20 id. 490. A like decision has been made under similar statutes in several of the States (*Brannan v. Hursell*, 112 Mass. 63; *Marietta Iron Works v. Lottimer*, 25 Ohio St. 621; *Monnet v. Sturges*, id. 384; *Kilgore v. Powers*, 5 Blackf. 22; *Phinney v. Baldwin*, 16 Ill. 106; *Etnyre v. McDaniel*, 28 id. 201; *Spencer v. Masfield*, 16 Wis. 185; *Pruyn v. Milwaukee*, 18 id. 387; *Kohler v. Smith*, 2 Cal. 597; *McLane v. Abrams*, 2 Nev. 199; *Hopkins v. Crittenden*, 10 Tex. 189); and such appears to be the English rule. *Keene v. Keene*, 3 C. B. (N. S.) 144; *Morgan v. Jones*, (Exch.) 20 Eng. Law and Eq. 454; *Pearce v. Hennessey*, 10 R. I. 223; *Lash v. Lam-*

bert, 15 Minn. 418; *Searle v. Adams*, 3 Kan. 515; *Kitchen v. Branch Bank*, 14 Ala. 233. There are conflicting decisions in some of the States, though the preponderance of opinion is in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in the judgment. The statutory rate of six per cent in Iowa only applies in the absence of a different stipulated rate. As the judgment in case of a stipulated interest in the contract must bear the same rate, it could not have been intended that a different rate should be allowed between the maturity of the contract and the entry of the judgment.

The case of *Brewster v. Wakefield*, 22 How. 118, in this court, is cited against this view. That case came from a territorial court, and arose under a statute which allowed parties to agree upon any rate of interest, however exorbitant, and only prescribed seven per cent in the absence of such agreement. This court, bound by no adjudication of the territorial court, and looking with disfavor upon the devouring character of the interest stipulated in that case, gave a strict construction to the contract of the parties. "The law of Minnesota," (then a territory), said the court, "has fixed seven per cent per annum as a reasonable and fair compensation for the use of money; and when a party desires to extort, from the necessities of a borrower, more than three times as much as the legislature deems reasonable and just, he must take care that the contract is so written in plain and unambiguous terms, for with such a claim he must stand on his bond." The statute of Iowa only allows the parties by their agreement to stipulate for interest up to ten per cent a year, a rate which has not been deemed extravagant or unreasonable in any of the States lying west of the Mississippi. Be that as it may, the question is one of local law under a statute of a State, and the construction given by its tribunals should conclude us.

The position of counsel, that because the rate of interest in New York, where the bonds were payable, is only seven per cent, the bonds can only draw that rate after maturity, is not tenable. When the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will govern. *Miller v. Tiffany*, 1 Wall. 236; *Depeau v. Humphreys*, 20 Mart. (La.) 1; *Chapman v. Robertson*, 6 Paige, 637, 634; *Peck v. Mayo*, 14 Vt. 33; *Butters v. Old*, 11 Ia. 1. The bonds were made with reference to the law of Iowa, as to interest, and not to that of New York, where interest above seven per cent is deemed usurious and avoids the whole contract. The obligor is a municipal corporation of Iowa, the bonds were deliverable in that State, and proceedings to enforce their payment could only be had in courts sitting there.

With reference to interest on the coupons after their maturity, that can be allowed only at the rate of six per cent under the law of Iowa. See as to coupons drawing interest, *Aurora City v. West*, 7 Wall. 105.

It follows, from the views expressed, that the plaintiff was entitled to judgment for the amount of the four bonds and the coupons in suit, with interest on the bonds after maturity until judgment at the rate of ten per cent a year, and with interest on the coupons after their maturity until judgment at the rate of six per cent a year; and that the judgment should draw interest at the rate of ten per cent a year upon the amount found due on the bonds, and at the rate of six per cent

a year upon the amount found due on the coupons, including the costs of the action.

The judgment of the Circuit Court must, therefore, be reversed, and the cause remanded with directions to enter a judgment for the plaintiff, in conformity with this opinion; and it is so ordered.

CONSTITUTIONALITY OF STATE LEGISLATION IN RELATION TO PATENT RIGHT NOTES.

SUPREME COURT OF PENNSYLVANIA, FEBRUARY 25, 1878.

HASKELL v. JONES.

A statute of Pennsylvania, which required that every note given for the right to make or sell a patented invention should contain the words "given for a patent right," and made such note subject in the hands of any holder to the same defenses as if in the hands of the original holder, and provided a penalty for a violation of its requirements, held not in conflict with the provisions of the U. S. Constitution (art. 1, § 8) as to patent rights. But a note given for a patent right and not marked in accordance with the statute would be freed from the equities between the original parties in the hands of a bona fide holder for value and without notice.

ACTION in assumpsit on a promissory note drawn by defendant Jones to the order of one Baldwin, and by him indorsed to plaintiffs Haskell and others, who took it for value before maturity in good faith and without a knowledge of the consideration for which it was given. The defense was that the note was given for a patent right, and was in violation of the provisions of an act of Assembly of Pennsylvania, approved April 12, 1872, which reads as follows:

"Whenever any promissory note or other negotiable instrument shall be given, the consideration for which shall consist in whole or in part of the right to make, use, or vend any patent invention, or inventions claimed to be patented, the words 'given for a patent right' shall be prominently and legibly written or printed on the face of such note or instrument, above the signature thereto, and such note or instrument in the hands of any purchaser or holder shall be subject to the same defenses as if in the hands of the original owner or holder.

"If any person shall take, sell or transfer any promissory note or other negotiable instrument, not having the words 'given for a patent right' written or printed legibly and prominently on the face of such note or instrument above the signature thereto, knowing the consideration of such note or instrument to consist, in whole or in part, of the right to make, use, or vend any patent invention, or inventions claimed to be patented, every such person or persons shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding five hundred dollars, or imprisoned in the county jail not exceeding sixty days, or both, in the discretion of the court."

The court below gave judgment for the defendant, and the plaintiffs took a writ of error.

Lewis Wain Smith, for plaintiffs in error, cited as to the constitutionality of the statute, *Brown v. Maryland*, 12 Wheat. 419; *Willson v. Blackbird Creek Co.*, 2 Pet. 245; *Gibbons v. Ogden*, 9 Wheat. 1; *New York v. Milne*, 11 Pet. 102; *Passenger cases*, 7 How. 283; *Cooley v. Board of Wardens*, 12 How. 311; *Gilman v. Philadelphia*, 3 Wall. 718; *State Taxes cases*, 15 id.

232, 284, 800; *Woolen v. Banker*, 17 Alb. L. J. 72, 236; *Ex parte Robinson* (Ill.), 2 Bissell, 311; *Helm v. First National Bank*, 43 Ind. 167; *Hollida v. Hunt*, 70 Ill. 109; *Cranston v. Smith* (Mich.), 16 Alb. L. J. 330; *Crittenden v. White* (Minn.), 9 Chic. L. N. 112; *Patterson v. Commonwealth*, 11 Bush (Ky.), 311.

Edwin S. Dixon, for defendant in error.

SHARSWOOD, J. If the act entitled "An act to regulate the execution and transfer of notes given for patent rights," passed April 12, 1872 (Pamph. L. 60), makes absolutely void all such notes in which the words "given for a patent right" are not prominently and legibly written or printed on the face of such note above the signature thereto, there would be great reason for the contention that the act is unconstitutional and void. No State can so interfere with the right of a patentee, secured to him by the act of Congress, to sell and assign his patent.

But such is not the operation of the act according to its letter and spirit. By the express provision of the statute the only effect of the insertion of such words is that "such note or instrument in the hands of the purchaser or holder shall be subject to the same defenses as if in the hands of the original owner or holder." By necessary implication notes without such words inserted in them remain on the same footing as before the act. The sole object of the legislature was to secure, so far as could be done consistently with the rights of innocent third persons, that notice of the consideration should be given to all who should take the paper. Nothing is better settled than that between the original parties to a note given for a patent right, it is a good defense to show that the alleged patent is void—in other words, that it is no patent right at all, and that the consideration has therefore entirely failed. *Bellas v. Hayes*, 5 S. & R. 437; *Getger v. Cook*, 3 W. & S. 286; *Holliday v. Rheem*, 6 Harris, 465. All who take with notice of the consideration, take necessarily subject to the same defense. There is nothing in all this which interferes with any just right of the holder of a valid patent under the acts of Congress, nor that the maker of the note shall be permitted to show against a holder with such notice that it was obtained by fraudulent misrepresentation. This very plainly distinguishes our act from the statutes of other States, which have been held unconstitutional.

To secure the insertion of these words the second section of the act makes it a misdemeanor punishable by fine or imprisonment, or both, for any person "knowing the consideration of a note" to be the sale of a patent right, to take, sell, or transfer it without the words "given for a patent right" inserted, as provided by the act. It is too plain for argument, that this section in no way affects the right or title of the holder of such a note, who takes it not knowing that the consideration was the sale of a patent. He commits no illegal or indelible offense. The negotiability of a note in which the required words are not inserted, is in no way affected by the act. The innocent holder, who takes it before maturity for value without knowledge or notice of the consideration, takes it, as heretofore, clear of all equities between the original parties.

We think, therefore, that the court below were clearly wrong in entering judgment *non obstante veredicto* on the reserved point in favor of the defendant.

Judgment reversed, and now judgment for the plaintiff upon the verdict.

THE STATE AS A PREFERRED CREDITOR.

NEW JERSEY COURT OF CHANCERY.

BOARD OF CHOSEN FREEHOLDERS OF MIDDLESEX V. STATE BANK AT NEW BRUNSWICK.

1. New Jersey does not possess the crown's common law prerogative to have its debts paid in preference to the debts of other creditors.
2. On the appointment of a receiver of an insolvent corporation its title to its property is directed by force of law.

ON the 3rd of April, 1877, this court took possession of the State bank at New Brunswick, as an insolvent corporation, and appointed a receiver to convert its assets into money, and distribute the same among its creditors according to law. In January, 1877, the State treasurer, pursuant to the requirements of the eleventh section of the act respecting the office of treasurer (Rev. 1215) deposited nearly \$34,000 of the moneys of the State in this bank, which stood to his credit, as treasurer, when the bank suspended business. On the 7th of July, 1877, the treasurer filed a petition in this court, alleging that the State was a preferred creditor of the bank, and praying that the receiver be directed to pay the State's debt first in preference to the other creditors.

Mr. Attorney-General Stockton, for the State.

Mr. A. V. Schenck, for Receiver.

THE VICE-CHANCELLOR: The claim of the State rests upon a prerogative right of the crown of Great Britain, the contention being that the State succeeded to all royal rights in virtue of its sovereignty, when the crown was displaced here as the sovereign power. The right of the crown in this particular is clear. Anciently, the king might, by his writ of protection, prevent any subject from suing his debtor until his debt was paid. By statute 25 Edward III, chap. 19, its despotic rigor was so far mitigated as to allow the subject to obtain a judgment against the king's debtor, and upon paying the king's debt to have execution for both debts. But the prerogative has at all times been most loyally upheld by the English courts. It stands on a common law maxim: *Quando p[ar]tis domini Regis et subditi concurrent, p[ar]tis Regis p[re]ferri debet*. Debts due the crown by record or upon speciality are entitled to preference over debts of the same class due to subjects, but simple contract debts due to the crown are not entitled over debts of record due to subjects. Com. Dig., tit. aden C, 2; Bac. Abr., tit. Exr. L. 2; 2 Williams on Exrs. 991; but where both are simple contract debts, that due to the crown must be preferred. Bac. Abr., tit. Exrs. L. 2; 2 Williams on Exrs. 993. The king is supposed to be so constantly engrossed with public business as to be unable to give proper attention to matters relating to his revenue, and therefore no time occurs to him and he is incapable of laches. Gilbert's Hist. Exchq. 90. The common method of enforcing this right is by writ of extant, by which the debtor's body may be taken and also his goods and lands. 2 Tidd's Pr. 1,044. Upon a debt of record or upon a speciality, it may issue without any previous suit or proceeding, except an affidavit that the debtor is insolvent and the debt is in danger of being lost. Id. 1,046. If the debt is upon simple contract it may be raised to a debt of record by simply issuing a commission to ascertain the amount due, which is uniformly executed without notice to the debtor, and on the return of the commis-

sion and an affidavit of insolvency and danger, an extent issues as of course. Id. 1,047. It may be resorted to during the progress of a suit, brought in the ordinary form, and when all liability is denied. *Rez v. Pearson*, 3 Price, 288; *Giles v. Grover*, 9 Bing. 171. By virtue of it the sheriff may break into the debtor's house, if admission be refused, either to arrest him or to seize his goods; a debtor taken under it cannot be bailed, nor will his discharge under bankrupt or insolvent laws release him. 2 Tidd's Pr. 1,049. In 1832 it was held by the House of Lords, in conformity to the opinion of a majority of the law judges, that the crown's right continues as long as its debtor retains title, whether he retains possession of the property or the law has taken custody of it; it will overreach a prior execution and levy, but cannot reach property either partially or wholly aliened by the debtor. *Giles v. Grover*, 1 Cl. & Fin. 72; S. C., 9 Bing. 128. It was also held in this case, that the crown's right must prevail against a judgment-creditor whose judgment execution and levy were antecedent to an extent in favor of the crown, because the seizure under the prior writ did not change the title, but merely put the property in *custodia legis* for the benefit of those to whom the law would ultimately adjudge it, but it was unanimously resolved that if the debtor's title was divested before the *teste* of the extent, the crown's right against the property was gone. Tindal, C. J., in his opinion, referred to a case decided in the Court of Exchequer in 1686—*Attorney-General v. Capel*, 2 Shaw, 481, in which it was held that if an extent comes after the issuing of a commission in bankruptcy but before an assignment by the commissioners, it will take the property, but if it does not come until after assignment, the debtor's title being divested, it cannot reach the property. If by the adoption of the common law New Jersey became invested with this right, it holds it now in all its original force, and may wield it to-day in all its iron rigor. It has not been changed or mitigated by legislation, indeed it is unknown in the legislation of the State, and if it exists at all it is held as perfect and complete as it existed in the hands of George III. Statutes regulating private rights or ameliorating private remedies, do not extend to the king. 1 Black. Com. 261; nor to the State. *O'Hanlon v. Vankleck*, Spen. 40; S. C. *in error*, 1 Zab. 589. When a statute is general, and thereby any prerogative right, title or interest is divested, or taken from the king, in such case the king shall not be bound, unless the statute is made to extend to him by express words. Bac. Abr., tit. Prerogative (E. 5.) If the right exists here, it is untouched by either constitutional or statutory regulations. But my research has failed to discover a single instance in which it has been recognized by the courts of this State, and only one where it was asserted as a State right. In *Ely v. Jones*, Cox, 132, decided in 1792, it was claimed by counsel that the official bond given by a sheriff to the king was in the nature of recognizance, and bound the obligor's land from the time a breach of the condition occurred, and that a subsequent conveyance, either by the obligor or his heir, passed the land subject to the lien, but the court did not deem it necessary to pass upon the question, being able to decide the case upon another ground. It certainly has never received judicial approval, and so far as my knowledge extends, no law officer of the State has ever attempted to enforce it. For over one hundred years as an actual, practical prerogative of government it has neither been exerted nor recog-

nized, and this circumstance, as a matter of contemporaneous and long continued practice, by all departments of the government, would seem to negative the existence of the right with great emphasis. A prerogative which has remained so long practically useless can hardly be said to exist. By an act passed June 13, 1799 (Pat. 435), it was enacted that when the estate of any decedent was insufficient to pay all his debts, the physician's bill during the last sickness, funeral expenses and judgments entered of record during the life-time of the decedent should be first paid, and that the balance of the estate should be distributed among his creditors in proportion to the sums due to them respectively. This act in substance has continued in force up to this time. Revision of 1821, p. 766; Elmor's Dig. 169; Revision of 1846, p. 346; Nixon's Dig. (4th ed.) 419. In the first edition of *Ewing N. J. Justice*, published in 1805, it is said (p. 69): "All the ancient law learning respecting the priority of debts is entirely done away by the act of June 13, 1799," and Mr. Griffith subsequently declared it to be his opinion that our laws give no preference to debts of any kind due to the State; they stand only on the same footing as other debts according to their degree. 4 Grif. Law Reg. 1281, note 2. And an author quite as eminent as a jurist as any name that ever adorned the American bench, has stated the right of preference to a State, in this country, does not rest upon the common law, but exists only where given by statute. 1 Kent's Com. 248, note c. The Federal government unquestionably possessed as high a prerogative right, as a creditor, as any sovereignty could under a government republican in form, yet it never attempted to exercise the crown's common law prerogative in this respect, but as early as 1797 established a right of preference by statute. U. S. Rev. Stat. 691. And it has been held that this statute must be strictly construed, it being in derogation of the common right of creditors of the same class, to be paid equally. 1 Kent's Com. 247. It has been thrice adjudged in South Carolina that this prerogative was so purely an attribute of a despotic government, and so strongly in antagonism to the cardinal objects of a government established by the people for their common protection and security, that it could not, either as a matter of law or reason, be held to belong to the latter, as of its inherent functions in the absence of an express legislative declaration to that effect. *Commissioners of Public Accounts v. Greenwood*, 1 Dessaus. 450. Arguments of counsel will be found in the appendix, p. 599. *State v. Harris*, 2 Bailey, 598; *Keckley v. Keckley*, 2 Hill's Ch. 266. Debts which arise *ex contractu* and are therefore due to the State in her corporate capacity, or debts which arise *ex delicto*, and which are the punishment of the law for misdemeanor are not entitled to preference over debts due to the citizen. *State Bank v. Gibbs*, 3 McCord (Law) 377. Neither the research of counsel, nor my own has brought to my attention but a single case, decided by an American court, in which this right, as an attribute of government, has received judicial sanction. *Maryland*, 6 Gill & Johns. 205. This case does distinctly declare, that by the adoption of the common law, the State of Maryland became invested with the prerogative in question, but not of its harsh and oppressive incidents. It was held the State simply acquired the pre-eminent right without the writ of protection or extent, and could only enforce the right by such remedies as the citizen

was at liberty to employ. By what means these incidents were lost is not stated. I think it would be quite difficult to show how they were lost, unless altered by legislation. I think if the right is admitted at all, it must be allowed to stand in all its original vigor. But what is more pertinent to the question in hand, it was also held in this case that any act which divests the title of the debtor and puts his property in the hands of either for the benefit of his creditors out of the right of the State. In all its essential features that case was identical with this. The treasurer of the Western Shore of Maryland had on deposit in the Bank of Maryland when it became insolvent over \$50,000, the bank assigned its property to trustees for the equal benefit of its creditors, and thereupon the State filed a bill in equity, alleging that the trustees, in the proper execution of their trust, were bound to pay the State first in preference to the other creditors. Judgment of dismissal was pronounced on the ground that the moment the debtor's title was divested by assignment the right of the State expired.

In my opinion, a judgment which adjudges this prerogative to the State, will give it, what, in the unanimous judgment of a long line of distinguished law officers it never had, if their persistent refusal to assert it can be regarded as any evidence of their judgment and what has but feeble support in the judicial opinion of the country. My judgment is, the State does not possess the prerogative claimed. But if my examination of the question had led me to a different conclusion, still, I think the claim could not be sustained. The authorities of both countries unanimously agreed that the right dies the moment the debtor's title is divested. No claim was made by the State in this case until after a receiver had been appointed. That appointment invested him with full power to sell, assign, and convey all the property of the corporation. Rev. 189, § 72. No act by the corporation is necessary to complete either the title of the receiver or that of his purchaser. Unlike proceedings under bankrupt laws no assignment by the debtor or commissioners is required. Title is divested by force of law, and such divestiture is perfect and absolute.

The order asked must be denied and the petition dismissed.

POSSESSION ESSENTIAL TO MAINTENANCE OF ACTION FOR BREACH OF WARRANTY.

SUPREME COURT OF MICHIGAN, JANUARY TERM, 1873.

MATTESON V. VAUGHN.

The grantee in a warranty deed who has never been in possession actually or constructively, cannot maintain an action on the covenant on the ground that he has been evicted.*

ACTION upon covenants of warranty in deed from defendant to plaintiff. The facts appear in the opinion.

H. Geer, for plaintiff.

A. Blair & M. V. Montgomery, for defendant.

CAMPBELL, C. J. In this case suit was brought on the covenants of a warranty deed, made by Vaughn to plaintiff June 13, 1853, of certain lands in Lapeer county,

* See *contra*, overruling *Kortz v. Carpenter*, 5 Johns. 120, *Shattuck v. Lamb*, 65 N. Y. 499; S. O., 22 Am. Rep. 656.

upon which, as it afterward turned out, Vaughn had certain illegal tax titles and nothing more. He had never been in possession, and Matteson never went into possession. The legal title had passed from the United States, in 1838, to Rodney D. Hill; from Hill to Bostwick and Sterling in 1851; from Sterling and Bostwick's administrator to Adam Van Allen in 1855; from Van Allen to Stephen Clark in April, 1858, and from Clark to Hamilton Littlefield in November, 1865. The court found that the Bostwick title was not legally conveyed, so that Bostwick's heirs and Littlefield held each an undivided half.

Sometime in 1868 or 1869, as Matteson testified, he was preparing to enter on the land and lumber on it (the land having always been vacant), but was informed by Littlefield that he was owner and would prosecute him if he did. A similar warning was given by Littlefield's agent—all the conversations taking place at the city of Lapeer, at a distance from the land.

The court below held the action on the covenants of seizin, and against incumbrances barred by the statute of limitations, but allowed a recovery for Littlefield's eviction, as it was held to be, of one undivided half, and allowed damages to the extent of half the consideration and interest from the date of the supposed eviction. Matteson brings error, claiming that none of the causes of action are barred, and that the damages should have included all the consideration, with interest from the date of the deed.

Some questions are raised by defendant in error concerning the sufficiency of the pleadings, but he has not brought error, and the view we take of the case renders this matter unimportant.

As the covenants of seizin and against incumbrance were at once broken, the statute of limitation at once began to run against them, as against all other personal actions, and they were barred many years since. No reason has been suggested upon which they can be taken out of the statute, and we do not perceive how they can be without entirely disregarding its terms.

So far as the covenant of warranty is concerned the situation is peculiar. Vaughn never had either title or possession. His void deeds could not draw possession after them by construction. The constructive possession, if anywhere, was in the grantees of the United States from the beginning. And, inasmuch as Matteson was never in possession actually or constructively, it is difficult to see what difference there is between his original and his present position. He is no more excluded now than he has always been. We do not comprehend how he can be said to have been evicted.

An eviction, according to all the best authorities, means some change in the possession of the party by the disturbance of an actual or constructive possession, which has been displaced by a paramount title to which the party has been compelled by law or by satisfactory proof of genuineness to submit. Some of the authorities hold that there can be no eviction of one who is not in actual possession. Others more liberally extend the rule to a constructive possession. But it would be going to an absurd length to hold that a person can be said to have been disturbed or evicted, when he has never had either kind of possession. As very well remarked by the Supreme Court of New York in *St. John v. Palmer*, 5 Hill, 599: "The mere fact of a superior title in a third person can never amount to a breach of the covenant of quiet enjoyment. The possession of the covenantor must be disturbed—he

must be evicted—by the person having the better title."

In that case the plaintiffs were held to be in by constructive possession, and therefore capable of being ousted under a mortgage derived from the same source of title. But the necessity of some real or constructive possession was plainly asserted and recognized. The authorities are fully considered in *Rawle on Covenants*, chapter 7. The doctrine of the case in 5 Hill is quite as liberal as justice or good sense will warrant.

The substantial remedy in such cases as this is on the covenants of seizin and those against incumbrance. If a party does not choose to investigate his title or enforce his possession within the period of limitation, he must take the consequence of his own neglect.

If land is vacant it is a very easy matter to assume possession, and possession may ripen into a good title, while if disturbed there is no doubt of the remedy for eviction. If land is occupied adversely, the policy of the law requires the purchaser to inquire into the possessor's title. And in all cases prudence and the usual course of business will dictate the propriety of some examination into the title. If a purchaser examines into neither title nor possession, and does not see fit to protect himself by proper covenants, it is his own fault.

As in our opinion the plaintiff in error has a larger judgment than he could lawfully obtain under the facts set out in the record, he has no cause of complaint, and we need not examine into the specific errors not above alluded to.

The judgment should be affirmed, with costs.

RECENT ENGLISH DECISIONS.

DOMICILE.

Evidence of choice: intention not executed.—In determining the question of a man's domicile it is material to consider where his wife and family have their permanent residence. An intention expressed but not executed cannot countervail existing facts. A testator, a native of Scotland, acquired a domicile in New South Wales, where he was possessed of a station called W., at which he, for some time, resided. The portion of New South Wales in which W. was situated was afterward separated from the rest and made into an independent colony, under the name of Queensland. Shortly before the separation the testator had ceased to reside permanently at W., and handed over the management of the station to his partner; but he was still part owner of the station, and frequently visited it, and had expressed an intention to reside there at a future time, and to be buried there. He was a member of the Legislative Assembly of Queensland, and took an active part in the political business of the colony, but had no permanent residence there. His wife and family lived at a house which he had built in New South Wales. He died suddenly while on a visit to the station at W., and was buried there. *Held* (affirming the judgment of the court below), that the testator was domiciled in New South Wales, not in Queensland. Privy Council, January 23, 1878. *Platt v. Attorney-General of New South Wales*, 38 L. T. Rep. (N. S.) 74.

EVIDENCE.

Inspection of documents: privilege: correspondence of solicitors: prior action against plaintiff, leading to

action over against defendant.—Where an action by A. against B. gives rise to an action over by B. against C., the correspondence between the solicitors of A. and B. is privileged from inspection by C. Q. B. Div., February 14, 1878. *Dulloch v. Corrie*, 38 L. T. Rep. (N. S.) 102.

PARTNERSHIP.

What necessary to constitute: participation in profits.—By an agreement entered into in 1871 between M. and the trading firm of S. Brothers, M. agreed to pay S. Brothers the sum of 2000*l.*, which was to be invested by them in the purchase of a steamer, to be used for purposes of trade. For this sum M. was to receive interest at the rate of 5 per cent per annum, and to have one-eighth interest in the steamer; i. e., to have one-eighth of the annual results after there had been deducted therefrom the above-mentioned 5 per cent, all expenses of equipment, and a further sum of 10 per cent on account of the annual depreciation in value of the steamer. M. also agreed to pay S. Brothers, within a year from the date of the agreement, a further sum of 4000*l.*; and, on payment of the last-mentioned sum, M. was to become interested in all the business of the firm of S. Brothers to the extent of three-sixteenths of the whole, and was to cease to have the said one-eighth interest in the steamer. M. duly paid to S. Brothers the 2000*l.*, and also paid them, at different times, various sums, not, however, amounting altogether to 4000*l.* Held, that the above-mentioned agreement did not constitute M. a partner with the firm of S. Brothers in respect of the special venture, i. e., the one steamer. Ch. D., January 22, 1878. *Meyer v. Schacher*, 38 L. T. Rep. (N. S.) 97.

SURETYSHIP.

Surety: alteration in risk: alteration in principal's contract: landlord and tenant: bad notice to quit: fresh terms: new tenancy.—The defendants were sureties on a bond for the re-delivery of a stock of 700 sheep, let by the plaintiff, with a farm and lands called R., from year to year, to one G. B., such bond to be void if the said G. B. should, at the determination of the said tenancy, deliver up to the plaintiff, along with the said farm and premises, the like number, species and quality of good and sound sheep as were delivered to the said G. B. The plaintiff gave G. B. notice to quit on a day named, which would have been bad as a notice for that day; but before that day the parties met and agreed that from the day named in the notice to quit the rent should be reduced by 10*l.*, and a field of seven acres given up by the tenant. The jury found that this new agreement with the tenant had not made any substantial or material difference in the relation between the parties as regards the tenant's capacity to do the things mentioned in the condition of the bond, and for the breach of which the action was brought. Held, that whether there is such a substantial or material alteration in the risk as to discharge the surety is a question for the jury, but that there had been such an alteration in the contract between the plaintiff and G. B. as to constitute a different contract for a breach of which the defendants were not liable; and, further, that the tenancy which was contemplated by the bond ceased by the operation of the notice to quit, followed by the fresh agreement, and that the defendants consequently were not liable in respect of a deficiency of sheep arising at the expiration of the new tenancy. C. P. Div., Dec. 21, 1877, *Holme v. Brunskill*, 38 L. T. Rep. (N. S.) 103.

RECENT BANKRUPTCY DECISIONS.

COMPOSITION.

What debts included in: injunction.—Provable debts created by fraud are included in and bound by a composition in bankruptcy. An injunction to restrain the prosecution of an action against the bankrupt in a State court, during the pendency of a composition, is proper where installments of the composition have been tendered to the creditors, and the bankrupt is not permitted to plead the composition as a bar to the action. U. S. Dist. Ct., New Jersey. *In re Shafer & Wesselhoeft*, 17 Nat. Bankr. Reg. 116.

HOMESTEAD.

Tenant in common.—The interest of a tenant in common, not exceeding five thousand dollars in value, in the dwelling-house and land actually occupied by him as a homestead, is, by the Nevada Constitution and Laws, exempt from forced sale. U. S. Dist. Ct., Nevada. *In re Swearingen & Lamar*, 17 Nat. Bankr. Reg. 138.

JURISDICTION.

1. *Of State courts in actions against bankrupt: assignee.*—If the assignee does not choose to become a party, voluntarily, to a suit pending in the name of the bankrupt, the court in which such suit is pending has no power or authority to make him a party or to compel him to submit to its jurisdiction and control. Sup. Ct., Louisiana. *Serra é Hijo v. Hoffman & Co.*, 17 Nat. Bankr. Reg. 124.

2. *When assignee may not demand stay of proceedings.*—Where the assignee intervenes at a proper time to defend a suit pending against the bankrupt, he has no right to demand a stay of proceedings; nor can he plead the final discharge in bar; the Bankrupt Act gives these privileges to the bankrupt alone. Ib.

3. *Where jurisdiction of State courts not affected.*—The jurisdiction of State courts over pending actions is not affected by the adjudication or discharge of a defendant, unless such adjudication or discharge is pleaded. Ib.

4. *Appellate tribunals.*—An appellate tribunal will take cognizance only of matters appearing upon the record of the court below. A discharge obtained pending the appeal cannot be pleaded in the appellate court. Section 21 of the Bankrupt Act (§ 5106, U. S. R. S.) does not apply to appellate tribunals. Ib.

5. *Residence: partnership.*—Residence or carrying on of business in the district for six months is a jurisdictional fact, and the petition must contain an allegation showing it. But, upon an application for a discharge, the creditors may show that the alleged ground of jurisdiction did not exist. In a proceeding against a copartnership the court must acquire jurisdiction over all the members of the firm in order to have jurisdiction over any of them. Where the petition against a copartnership alleged as the ground of jurisdiction that all the members of the firm had resided in the district for the necessary period, the fact that one of such members has not so resided defeats the jurisdiction of the court as respects the entire case. U. S. Dist. Ct., S. D. New York. *In re Beale*, 17 Nat. Bankr. Reg. 107.

SET-OFF.

Storage receipt issued by bankrupt: tort.—The bankrupt was extensively engaged in manufacturing flour and storing grain in an elevator attached to its mill.

Defendant, prior to the bankruptcy, and in ignorance of the insolvency of the corporation, purchased a storage receipt which had been issued by it, and subsequently demanded a delivery of the grain, which was refused. In an action brought by the assignee to recover money of the bankrupt which the defendant had in his possession at the time of adjudication, *held*, that the value of the grain so converted might be set off. Where the set-off is founded on a duty which the plaintiff owes the defendant, the wrongful act can be waived and a set-off is proper; but where the cause of action is a tort, then the wrongful act cannot be waived. U. S. Dist. Ct., Minnesota. *McCabe v. Winship*, 17 Nat. Bankr. Reg. 113.

SURETYSHIP.

What constitutes.—Prior to the commencement of the proceedings, the bankrupt sold his interest in a firm of which he was a member to E., his partner, at the same time agreeing to pay all the firm debts, and to indemnify E. against any liability thereon. *Held*, that as between themselves the bankrupt became the principal debtor, and E. surety for him as to all the debts of the firm, and that E. could not make proof for the respective differences between the total amount of the firm debts and the dividends which the estate will pay thereon as a contingent debt under section 5068, when he has not paid any part of such differences. U. S. Dist. Ct., S. D. New York. *In re Phelps*, 17 Nat. Bankr. Reg. 144.

TRADESMAN.

Who is: saloon keeper.—A saloon keeper who purchases liquors and segars in quantities, and some on credit, and sells them at retail for cash and on credit, is a merchant or tradesman within the meaning of the seventh subdivision of section 5110. U. S. Dist. Ct., S. D. New York. *In re Sherwood*, 17 Nat. Bankr. Reg. 112.

COURT OF APPEALS ABSTRACT.

ATTACHMENT.

1. *Provisions of old Code, section 227, apply to New York Common Pleas.*—The provision of section 227 of the old Code, which authorizes the issuing of an attachment, that "for the purposes of this section an action shall be deemed commenced when the summons is issued, provided, however, that personal service of such summons shall be made, or publication thereof commenced within thirty days," applies generally to courts having authority to issue attachments, including the New York Common Pleas. Motion for reargument denied. *Allen v. Meyer*. Opinion per *Curtiam*.

2. *Order to take deposition of unwilling witness, under section 401 of old Code.*—An order for taking the deposition of a witness who refuses to make an affidavit, under section 401 of the old Code, is authorized in case of an application for an attachment. Such application is a motion within the section. *Ib*.

3. *Appealable order: order granting attachment.*—An order granting an attachment is not appealable to this court, unless it presents a question of law or absolute legal right. But if the order is granted in a case not authorized, or if there is an entire absence of facts proved justifying it, the case would present a question of law and be appealable. *Ib*.

[Decided January 15, 1873.]

CORPORATION.

Neglect to elect officers: rights of stockholders: statutory construction: mandamus.—The provision of 2 R. R. 604, § 8, declaring that if the election for directors of any bank or other incorporated company of this State shall not be duly held on the day designated, "it shall be the duty of the president, etc., to notify and cause an election for directors to be held within sixty days immediately thereafter," applies to manufacturing corporations formed under the act of 1848, and the provisions of sections 3 and 4 of the last-mentioned act in reference to the election of officers do not control and are not in conflict with the statute first named. Accordingly where the managing officers of a manufacturing corporation, in case of the failure to hold an annual election as provided by the statute, refused to give the notice and hold the election provided for by 2 R. S. 604, § 8, *held*, that a stockholder was entitled to a peremptory mandamus to compel them to do so. Order below affirmed. *People ex rel. Miller v. Cumming*. Opinion by Miller, J. [Decided February 5, 1873.]

EVIDENCE.

1. *Privileged question: inquiry as to arrest of witness.*—The defendant while upon the stand as a witness in his own behalf, in a criminal trial, was asked this question: "How many times have you been arrested?" *Held*, that defendant was privileged from answering the question, and that an objection on this ground would be well taken by his counsel and an exception to the ruling of the court, requiring him to answer, was available to him as a ground of error. Judgment of General Term reversing judgment of court below affirmed. *People, plaintiff in error, v. Brown*. Opinion by Church, C. J. [Decided February 19, 1873. Reported below, 8 Hun, 562.]

2. *Admissions by agent: when not allowable against principal.*—In an action against a street railroad company for damages, for negligently running over a child, *held*, that statements of defendant's conductor in charge of the car causing the accident, made long after the accident took place, were inadmissible either to establish the driver's negligence or to contradict the testimony of the conductor, who was sworn as a witness for defendant upon immaterial answers concerning matter not given on direct but drawn out on cross-examination. Judgment below reversed and new trial granted. *Furnt v. Second Avenue R. R. Co*; Opinion by Rapallo, J.

3. *Practice at trial: objections and waiver.*—After repeated objections on the part of defendant had been made to the questions put to a witness for the plaintiff and overruled, he answered that the conductor told him he thought the driver did not look or the child would not have been run over. Plaintiff's counsel then proposed to have the answer stricken out, it appearing from the answer that it was manifestly matter of opinion. Defendant's counsel declined to accept this proposition and elected to retain his exception. The court made no ruling and gave no instruction on the subject. *Held*, that the action of defendant's counsel was proper and his exception was available to entitle defendant to a new trial. *Ib*.

[Decided February 19, 1873.]

FIRE INSURANCE.

Conditions in policy: acts of agent: authority of agent. — A fire insurance policy contained these conditions: "If the premises hereby insured shall become vacated by the removal of the owner or occupant, and so remain for more than fifteen days without notice to the company and consent indorsed hereon, then the policy shall be void." "And it is further expressly covenanted by the parties hereto that no officer, agent or representative of this company shall be held to have waived any of the terms and conditions of the policy unless such waiver shall be indorsed hereon in writing." "This policy is made and accepted upon the above express condition." The house which was insured was vacated by its tenant, and the owner upon the same or the next day asked the agent of the company, and the one from whom he had procured the policy, if he would give consent, and asked him to indorse it upon the policy. The agent gave oral consent, and said it need not be indorsed on the policy, as he would make a memorandum of it in the register he kept of insurances. He made the memorandum promised but did not indorse consent upon the policy. The company received no notice of these things. *Held*, that the act of the agent did not constitute a waiver of the condition so as to bind the company, and the company was not liable upon the policy for a loss occurring more than fifteen days after the house had become vacant. Order below granting a new trial reversed. *Walsh v. Hartford Fire Ins. Co.* Opinion by Andrews, J. Allen, Rapallo and Earl, JJ., concurred. Church, C. J., and Folger and Miller, JJ., dissented. [Decided March 19, 1878. Reported below, 9 Hun, 421.]

RECORDING ACTS.

What necessary to entitle purchaser to benefit of: good faith. — A purchaser to have the benefit of the recording acts must be a purchaser in good faith, that is, without notice actual or constructive of any outstanding or other title, but also for a valuable consideration. Judgment below affirmed. *Wells v. Ross.* Opinion by Allen, J.

WAIVER.

Action by State to recover moneys paid on contract illegally entered into: ratification of contract after knowledge of fraud. — In an action by the State to recover damages for the loss suffered by the State by reason of fraudulent canal contracts entered into between defendants and the State, it was alleged that the State was induced to enter into the contracts by a fraudulent combination between defendants and others and certain acts amounting to false representations, for the purpose of preventing competition. As a defense it was set up that after the knowledge of these fraudulent acts had come to the State authorities and the legislature the legislature directed the completion of the contracts or some of them, and payment to be made in case the contracts were completed, and for the payment for work actually done in case the contracts were annulled. *Held*, that the State, in accepting the work and making payment, manifested an intention to waive its rights to recover damages for the fraudulent combination through which the contracts were entered into, and that it could not maintain the action. Judgment below affirmed. *People v. Lord.* Opinion by Rapallo, J. [Decided January 15, 1878.]

WILL.

Construction of: perpetuities. — The testator directed his executors, at the expiration of four years after his decease, to sell his real estate and pay over the proceeds to the Bishop of Raphoe upon the trusts mentioned, and until the sale he directed them to rent the real estate, and after paying taxes, etc., to deposit the balance of the rents in a savings bank, and pay the money thus deposited, with the residue of his personal estate and the proceeds of the sale of his real estate, to the Bishop of Raphoe upon the trusts mentioned. *Held*, (1) that the direction to rent the real estate and deposit the rents during four years was a suspension of the power of alienation not limited by life and was void; (2) that the direction as to the disposition of the personal estate, and of the proceeds of the real estate at the end of four years to the Bishop of Raphoe, would not be invalid if he was to receive them absolutely for his own use, but (3) as he was to receive them merely as trustee for certain trusts, and consequently could not unite with the heirs or others in the disposition of this fund, the power of alienation would be suspended during the four years, and the provision was void as being against the statute relating to perpetuities. Judgment below affirmed. *Garvey v. McDevitt.* Opinion by Earl, J.

[Decided February 19, 1878. Reported below, 11 Hun, 457.]

ASSIGNMENTS UNDER STATE LAW.

IN Williams v. Pitts, decided by Mr. Justice Angle of the Supreme Court of this State at the Ontario equity term, held on the third Monday of March, the question was as to the validity of a general assignment with preferences. The court held in substance as follows:

If *Bostwick v. Burnett*, 11 Hun, 301, be sound this motion should be granted, for it holds that an assignment giving preferences is not only void as against proceedings under the bankrupt act, but it also holds that it is void in the State courts as to persons claiming under State adjudications or under the process of State courts. The opinion in the above case, written by Justice Barnard, and concurred in by Justice Gilbert, refers to none of the adverse decisions and it is opposed to the following:

Dodge v. Sheldon, 6 Hill, 9; *Seaman v. Stoughton*, 3 Barb Ch. 344; *Schryock v. Bashore*, 13 Nat. Bankr. Reg. 481, 495; *Altkins v. Speer*, 8 Metc. 490; *Maltbie v. Hotchkiss*, 38 Conn. 80; S. C., 15 Nat. Bankr. Reg. 485; S. C., 9 Am. Rep. 364; *Bromley v. Goodrich*, 40 Wis. 131; S. C., 22 Am. Rep. 685; *In the matter of Beisenenthal*, 15 Nat. Bankr. Reg. 228.

If *Bostwick v. Burnett* were the only case in this State on the point, I should obediently follow it, notwithstanding the array of other authorities opposed, but *Dodge v. Sheldon* and *Seaman v. Stoughton* are each of equal dignity and authority with it in our own State, although not so recent, and appear to me so plainly sound in principle that I deem myself at liberty to follow these, and the numerous corresponding decisions also cited and order judgment for the defendant in this case, and by so doing hold that, although an assignment giving preferences is void under the bankrupt act under the conditions therein provided, it is void only as to persons and proceedings under that act, and except as to such persons and proceedings it is as valid as ever.

NOTES OF RECENT DECISIONS.

PARTIES: IN ACTIONS RELATING TO CORPORATIONS: STOCKHOLDERS.—Where any fraud has been perpetrated by the directors of a corporation, by which the property or interest of the stockholders is affected, the stockholders can come in as parties, and ask that their property shall be relieved from the effect of such fraud, but the question is raised whether they can so come in in a suit where there will be nothing left for the stockholders. U. S. Cir. Ct., Indiana, March 18, 1878. *Bayliss v. Lafayette, Muncie, etc., R. R. Co.* (Ch. Leg. News.)

BANKRUPTCY: OF CORPORATION: BANK: DUTIES OF DIRECTORS.—1. The bankruptcy of a corporation does not put an end to the corporate existence, nor vacate the office of its directors. 2. After a chartered bank has been adjudicated a bankrupt, a member of its last active board of directors (the board in existence when the failure occurred and the act of bankruptcy was committed) cannot buy up claims against it at a discount, and entitle himself to credit therefor at full face value in settlement with creditors, on his personal liability as a stockholder. At least, this cannot be done so as to defeat the suit of a creditor who commenced his action before the bought up claims were actually applied in extinguishment of the stockholder's personal liability, and whilst the stockholder held them, as transferee, open against the bank, he not having surrendered or canceled them until after the action was brought. Sup. Ct., Georgia, Feb. 19, 1878. *Holland v. Heyman.*

BOND: OF UNITED STATES REVENUE COLLECTOR: SURETIES NOT LIABLE TO PRIVATE INDIVIDUALS FOR TORT OF COLLECTOR.—A United States revenue collector and his securities are not liable in a suit upon the bond of the collector for a tort or injury committed by one of the deputies of the collector upon the property of the plaintiff. Such bond is for the indemnity of the United States alone, not for private individuals injured by the wrongs and torts of the collector and deputies. The collector might be proceeded against under section 3160 of the Revised Statutes (U. S.) Sup. Ct., Georgia, Feb. 19, 1878. *Clarke v. United States.*

CORPORATION: LIABILITY OF STOCKHOLDERS: CONSTRUCTION OF NEW YORK STATUTE.—Defendant was stockholder in a company organized under a general act authorizing the formation of corporations for manufacturing purposes, etc., passed by the Legislature of New York, which provides, section 10, that all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively upon all debts and contracts of the company until the whole amount of capital stock fixed by the company shall have been paid in, and a certificate thereof made and recorded as required in section 11, which provides that the president and a majority of the trustees shall, within thirty days after the payment of the last installment of the capital stock, make a certificate of the amount of the capital stock fixed and paid in, to be sworn to by such officers and recorded in the county wherein the business of the company is carried on. Section 24 provides that no stockholder shall be personally liable for any debt so contracted which is not to be paid within one year from the time of contracting

nor unless suit is commenced against the company within one year after the debt becomes due, and no suit shall be brought against any stockholder until an execution against the company is returned unsatisfied in whole or in part: *Held*, that the liability of the stockholder grows out of his contract in becoming a stockholder, a liability in the first instance, and is not a penalty or in the nature of a penalty or forfeiture for the non-performance of duties or acts of the officers. The provisions of the statute referred to are mere limitations of liability, and not conditions upon which liability is imposed. The courts of this State may enforce such contracts. Sup. Ct., Florida, January term, 1878. *Flash v. Conn.*

HOMESTEAD: WHAT DOES NOT CONSTITUTE FAMILY SO AS TO ENTITLE TO.—Where a single man, a cripple, lived on his plantation, having with him no relatives or connections, with whom certain servants resided with their children and grandchildren in the same house, managed his domestic affairs and ministered to his infirmities, having his confidence and friendship as faithful servants, he had no such family as entitled him to a homestead. Sup. Ct., Texas, Jan. 15, 1878. *Howard v. Marshall* (Texas L. J.)

NEGLIGENCE: PASSENGER LANDING FROM STEAM-BOAT.—Appellee was a passenger on one of the boats belonging to appellant, and was injured while on the staging, going ashore, being struck by the handles of a coal box in the hands of the workmen of the boat. This was at Quincy, and it was maintained that appellee ought to have remained in the cabin for the two hours the boat was to remain at the wharf. *Held*, that such an objection is untenable. That appellee, in thus landing, could not be held to extraordinary care and prudence, as there was no appearance of danger. There was no similarity in this to the case of a passenger attempting to leave a train before reaching the platform. Carriers of passengers for hire are bound to the utmost care and diligence in providing for their safety, by the use of efficient and suitable modes of carriage, and in managing, directing and using these means thus provided. The degrees of care, vigilance, and skill, are the highest; and the responsibility is for the least neglect known to the law short of insurance. Sup. Ct., Illinois, Feb. 9, 1878. *Keokuk N. L. Packet Co. v. True.*

COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, April 2, 1878:

Judgment affirmed, with costs—*Kincald v. Archibald*; *Muller v. McKesson*; *Jones v. Smith*; *Calvo v. Davies*; *Rexter v. Starin*; *Duffield v. Horton*.—Order affirmed, with costs—In the matter of the petition of Chapman to vacate an assessment.—Appeal dismissed without costs to either party in this court—*Hunter v. Hatfield*.—Motion denied—*Wetmore v. Smith*.—Motion for reargument denied with \$10 costs—*Littaner v. Goldman*; *New v. Nicoll*; *Bruce v. Carter*.—Order reversed and judgment on report of referee affirmed, with costs—*Crawford v. O'Connor*.—Judgment of General Term reversed and judgment on verdict affirmed, with costs. Also, appeal from order of General Term dismissed, without costs to either party—*Olcott v. MacLeau*.

CORRESPONDENCE.

THE COURT OF ARBITRATION.

To the Editor of the Albany Law Journal:

SIR — On Tuesday, April 2, 1878, the chairman of the committee on ways and means reported to the assembly the supply bill for the ensuing fiscal year beginning October 1, 1878. That bill contains an appropriation of twenty-six thousand dollars for the salaries of the arbitrator and clerk of the Court of Arbitration of the Chamber of Commerce of the State of New York for the two years from October 1, 1877, to October 1, 1879, at the rate of ten thousand dollars a year for the arbitrator and three thousand dollars per year for his clerk.

So far as it is an appropriation for the year ending October 1, 1878, this bill reverses the action of the legislature of 1877, for that body not only struck this appropriation out of the supply bill of that year, but in the assembly, I believe, passed an act abolishing the court as a useless luxury which was not of the slightest benefit to any one except the two fortunate officials who did nothing whatever but draw their very bountiful salaries, and laugh at the ease with which the members of the Chamber of Commerce had been beguiled into procuring them such well-paid sinecures.

The Court of Arbitration was created by act of legislature passed June 5, 1875, chapter 496, Laws of 1875. Among other things that act provided section 6, "that the salary of the arbitrator shall be at the rate of ten thousand dollars per annum, commencing with the 1st day of January, 1875, and shall be raised and paid out of the State treasury, on the warrant of the comptroller, in the same manner as salaries of judges of the Supreme Court. The salary of the arbitration clerk shall be three thousand dollars per annum, commencing at the same period, and shall be raised and paid in the same manner."

Section 29 prescribes that, "in every case tried by said Court of Arbitration, the sum of twenty dollars is to be paid to the arbitration clerk, by each of the respective parties thereto;" and the same section also provides for certain smaller sums to be paid to the clerk for such services as he would naturally be called upon to render in the course of the action, and then provides, that "the arbitration clerk shall make a sworn return on the first day of each month of all the fees received by him pursuant to this section, during the preceding year, and file the same with the treasurer of the State of New York, and, at the same time, he shall pay over all moneys received by him for such fees during such month to the said treasurer, to be applied toward paying the salary of said arbitrator and the arbitration clerk."

The act from which I make the above citations was amendatory of chapter 278 of the Laws of 1874, which provided that the salaries of the arbitrator and clerk should be fixed and paid by the Chamber of Commerce.

It will be seen that the act of 1875 provides, that the salaries of the arbitrator and his clerk shall be paid for nearly six months before the time of the organization of the court, and I assume that the salaries from January 1, 1875, to October 1, 1876, have been so paid. The appropriation to pay those salaries for the fiscal year ending October 1, 1876, is to be found at pages 24 and 25, Laws of 1876.

It will be seen, therefore, that these gentlemen have received from the treasury of the State the following

sums as and for their salaries from January 1, 1876, to October 1, 1877:

The Arbitrator.....	\$17,500
The Clerk.....	5,250
Total.....	\$22,750

The bill now before the assembly proposes to pay the same gentlemen out of the State treasury as and for their salaries from October 1, 1877, to October 1, 1879, as follows:

The Arbitrator.....	\$20,000
The Clerk.....	6,000
Total.....	\$26,000

In view of this enormous outlay of public money, it is reasonable to ask what has been done to earn it, and the question is easily answered from the public records. The clerk of the court has performed his duty under section 29, so far as to render to and file with the State treasurer up to October 1, 1876, seven sworn statements, which he probably believed to be true at the time he made them. But according to his statements, so made and filed, the receipts and payments by him under section 29, were as follows:

June to September 30, 1875.....	\$124 00
September 30, 1875, to January 1, 1876.....	189 35
January 1, 1876, to February 1, 1876.....	140 50
February 1, 1876, to March 1, 1876.....	80 00
March 1, 1876, to June 1, 1876.....	181 00
June 1, 1876, to July 1, 1876.....	120 00
July 1, 1876, to October 1, 1876.....	180 50

Total (nineteen months).....\$995 35

During this period as I have shown the salaries paid to the arbitrator and clerk amounted to \$22,750.

The amount so returned and paid over to the State treasurer would amount to about the equivalent of twenty-five cases, heard and determined by or submitted to the Court of Arbitration during the nineteen months intermediate June 5, 1875, and October 1, 1876, and the docket of that court shows that many and more. But as careful examination as I have been able to make will show that even out of these twenty-five cases only about six were ever submitted to that court; and that the remainder were cases (one of which was a case of my own) which were tried before the arbitrator as a referee, appointed by one of the superior courts of record, in all of which he received the enormous referees' fees for which he is somewhat noted. It is thus made clearly to appear that, in at least nineteen of these cases, the arbitrator has caused or permitted said cases to be entered upon the docket of his Court of Arbitration as if the same had been regularly commenced and tried in that court; and to keep up the illusion, the forty dollars which the statute requires shall be charged by the court in each case has been paid into the treasury of the court by some one, out of the sums so received by the arbitrator as referee, and the balance has been retained by him in addition to the \$17,500, received by him from the State.

As nearly as I can get at it, the fees received by him as such referee in these nineteen cases or thereabouts will amount to six thousand dollars.

Since October 1, 1876, the Court of Arbitration has done, substantially, no business; and yet it is now proposed to reward the arbitrator with \$20,000 — for doing nothing.

T. M. TYNG.

DREXEL BUILDING, NEW YORK, April 3, 1878.

NEW BOOKS AND NEW EDITIONS.

WASHBURN'S MANUAL OF CRIMINAL LAW.

A Manual of Criminal Law, including the mode of procedure by which it is enforced. Especially designed for the use of students. By Emory Washburn, LL.D., author of "A treatise upon the American Law of Real Property," etc. Edited with notes by Marshall D. Ewell, professor in Union College of law, Chicago, and author of "A Treatise on the Law of Fixtures," etc. Chicago: Callaghan & Company, 1878.

ANY thing from the pen of the late Professor Washburn designed for the use of law students, must be welcomed by that great body of young men who are standing at the threshold of the profession and preparing themselves to enter it and share its honors. The little book before us was written by its lamented author but a short time before his death, and was when he left it substantially complete. The editor has made a few additions to the text and the notes which are indicated; but those in the text especially are so few that the book must be examined very thoroughly to discover them. The volume is, we need not say, an excellent text-book for the student, and any young man who will devote a few weeks to its careful perusal will be thoroughly grounded in the principles of criminal law, and the practicing lawyer will not find time spent in reading the book uselessly spent. The object of the book is to teach only general principles, and the mode in which it is sought to accomplish this purpose is to describe in the first place the principal crimes known to the law, as well as the principle upon which their character for criminality rests, and then to take up and describe step by step the processes by which prosecutions for offenses are begun and carried on to final judgment. As the readiest means of accomplishing this end it attempts to illustrate the various matters treated by tracing a criminal prosecution from its incipient stage—a complaint before a magistrate—to its final judgment and sentence. The work of the editor, Mr. Ewell, seems to have been carefully and conscientiously done, and the volume is published in a substantial and attractive form.

BISHOP ON CONTRACTS.

The Doctrines of the Law of Contracts in their principal outlines, stated, illustrated and condensed. By Joel Prentiss Bishop. St. Louis: Soule, Thomas & Wentworth, 1878.

This volume contains a statement of the law of contracts in brief sections, and is of course well written and accurate. The object of the author has been, as he says, "to present the body of the law of contracts without its bloat in form to be examined and re-examined by old and young, the learned and the unlearned, the student, the practicing lawyer, the judge, the man of business, as any skeleton is, by all classes of inquirers." The volume seems to be well adapted for the purpose of the author. As a book wherein the student may learn the principles of this important branch of the law, we have seen nothing better; as a handy book of reference to the practitioner, that he may take with him where it would be burdensome to carry the larger treatises, it will prove a great benefit, and as an easily understood and accurate epitome of the laws of business, it must recommend itself to the merchant and tradesman. The text throughout is illustrated with numerous references to authority, a thing fully as essential in a work of this kind as in a larger work. The index to the volume is very full and is well arranged. In all respects the book is worthy the reputation of its author.

NOTES.

THE publishers of the LAW JOURNAL have received the following letter from one of our subscribers in New Zealand, which, although not intended for publication, may not be uninteresting:—"Broadway, Reefton, N. Z., January 26, 1878. Messrs. Weed, Parsons & Co., Albany, New York—Gentlemen: Please find herewith post-office order, upon London, in your favor for £1 (\$5.00 in your currency) for this year's subscription to the ALBANY LAW JOURNAL. I am sorry that our post-office could not give me an order payable in New York. If it submits you to extra cost in the way of exchange pray advise me. I am much pleased with the JOURNAL, and, although our systems differ, I have found in your articles the true ring of juridical philosophy. I have read, and I hope I have profited by the reading of Kent's Commentaries and Story's classical works, and I am glad indeed to note that the loyal respect observed by those great men for our dear old common law is maintained by your jurists.

"Your reports I have lent to some of our judges in this country, and they are by them much appreciated.

"Yours faithfully,

"WILLIAM PITT."

In the case of *Fiske v. Tolman*, decided last week in the Supreme Judicial Court of Massachusetts, the plaintiff made a conveyance to the defendant of an estate on Westminster street, in Boston. The premises were subject to a mortgage, and the deed contained a clause in these words: "Subject, however, to a mortgage held by the Lowell Five Cents Savings Bank of \$7,000, which is part of the above-named consideration." The principal question in the case was whether these words imported a promise to pay the mortgage. At the trial before Mr. Justice Soule, without a jury, the court declined to rule upon the evidence presented,—that the defendant was liable for the amount of the mortgage note and interest, and ordered judgment for the defendant. The plaintiff alleged exceptions which have now been overruled by the full court, for the reason that "the language of the deed taken by the grantee does not import a promise to pay the mortgage debt."

No better exemplification of the length to which the doctrine of "common employment" has been permitted to go could be found than the case of *Swinson v. North-Eastern Railway Company*, which was decided by the English Court of Appeal in the latter part of February. The plaintiff was the widow of a signalman porter in the service of the Great Northern Company, who was killed in the Leeds station by the negligence of an engine driver of the North-Eastern Company. The Leeds station is occupied by both companies under an agreement, and the expenses of that station are jointly defrayed by both companies. Amongst these expenses came the wages of the deceased signalman, and upon this ground it was argued that the Great Northern signalman was a *collaborateur* with the North-Eastern engine driver, whose negligence caused his death. The court below yielded to this argument, but it is not surprising to find that the Court of Appeal has unanimously reversed the decision of the court below, and given judgment for the plaintiff. If the decision for the company had been allowed to stand, the *collaborateurs* which the law would have created might have been counted by thousands, for there are few large railway stations which are not occupied and paid for by more companies than one.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, APRIL 13, 1878.

CURRENT TOPICS.

THE Supreme Court of the United States, in the case of *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, just decided, pass upon a very important constitutional question, namely: whether the power conferred upon Congress to regulate commerce between the different States entitles that body to exercise, if it desires to do so, exclusive control over telegraphic communication. The court reaches the conclusion that the telegraph is an instrument of commerce, and that as such it comes within the controlling power of Congress as against hostile State legislation. In this case the legislature of Florida gave to a local company the exclusive right to maintain telegraphs in a portion of the State. A company chartered by another State, but which had complied with the requirements of an act of Congress passed July 24, 1866, in relation to telegraph lines, undertook to operate its lines within the territory given to the local company. The latter company brought action to restrain the other from carrying on business. The Supreme Court held that the statute of Florida was inoperative against the defendant, and that the action was not maintainable. The court distinguishes the case from that of *Paul v. Virginia*, 8 Wall. 168, the corporation in that case not being engaged in interstate commerce.

The Supreme Court of Appeals of the State of Virginia, in a case decided on the 4th inst., has put an end to the schemes for repudiating the public debt, which have found favor among the legislators and people of Virginia. In 1871, the State being indebted for a sum greater than it was convenient to pay, a legislative act was passed providing for the issue of new bonds, which were to be exchanged for those then in existence at the rate of two dollars of the new for three of the old. To the new bonds were attached interest coupons, which were made by law receivable for all taxes, debts or demands due the State. Under this act, \$20,000,000 of bonds were issued. The following year the Legislature repealed the act and prohibited the receipt of coupons for taxes, debts or demands due the State. One Clark, who was confined in jail for the non-payment of fines due to the State, tendered coupons at their face value in payment, which were refused.

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A writ of *habeas corpus* was then moved for, Clark claiming that the tender of coupons was a sufficient tender of the fine, and that, therefore, he was illegally confined. The court sustained this claim, saying that the act of 1870 constituted a contract between the State and the bondholder which no subsequent action of the State could impair. The coupon under that contract represented so much gold as far as the State was concerned, and must be received for its face value for all taxes, debts and demands due the State; that fines were demands due the State; that all moneys coming to the State, for taxes, debts, dues or demands, must be payable in coupons. It was claimed on the part of the State authorities, that fines which are, by the Constitution of the State, devoted to the support of public schools, were not to be included in the provisions of the act, but the court held otherwise, saying that the provisions of the Constitution dedicating certain revenues to the public schools, mean that an amount equal to the amount of such revenues shall be raised and applied to the schools, and that it is the duty of the Legislature to raise revenue sufficient both to pay the interest on the debt and to support the schools, and that it could not be presumed that that body would fail to do its duty. We are glad that the highest court of Virginia has emphatically pronounced against a repudiation of the public debt.

A case of some importance upon the law relating to corporations was decided in the United States District Court for the Northern District of Illinois, on the 8th inst. One Esterly made a claim against the bankrupt estate of one Meeker, which was disputed, and the question was, whether an agreement to pay a bonus to an individual member of a corporation, for a transfer of the charter of the corporation, where the money to be received was not to be paid over for the benefit of the corporation, is valid. The court held that such an agreement is contrary to public policy, and cannot be enforced. The point is a new one, and has not, we think, been passed upon before.

Inter arma silent leges has ceased to be a vital, truthful maxim. Amid wars and rumors of wars the publicists of Great Britain and Europe—the moulders of the opinions and policies that are to be—are steadily agitating and studying the problems of International law that are to ultimate in the “thousand years of peace.” Among these none stands higher, has done more or has brought to the discussion a clearer judgment or more practical common sense than Professor Lorimer, Professor of Public Law in the University of Edinburgh, from whom we have a brief but suggestive letter this week. Professor Lorimer stands high in the estimation of his collaborators in this country, and they will be pleased to hear from him again.

A rather unusual scene took place in a Philadelphia Criminal Court on the 6th inst.: An individual who bears the astonishing name, Blasius Pistorius, and who is by profession a priest, has been twice tried and convicted of murder in the first degree. The first conviction his counsel were able to set aside, but as the facts were such that there was no hope of a verdict of acquittal, they advised him to plead guilty to manslaughter, it being understood that this plea would be accepted. He refused to do this, and was convicted. A motion was thereafter made by his counsel for a new trial, at the argument of which he was present. After one of the counsel had spoken in favor of the motion, the prisoner arose and delivered a long speech, in which he reviewed the evidence, and made severe charges against all the members of the legal profession who had had any thing to do with the case, charging his own counsel with having been in collusion with the district attorney, and stating that he had been convicted in order to please Prince Bismarck. The speech of the prisoner was read from a manuscript, and although quite lengthy, was listened to to the end by the court.

The Supplement accompanying this number contains, among others, statutes requiring justices of the peace to give bonds; providing for the consolidation of fire insurance companies; relating to building and loan associations; amending section 23 of chapter 628 of the Laws of 1857, relating to the recovery of penalties for the unlawful sale of intoxicating liquors; amending the law regarding co-operative and industrial unions. Our plan of making the Supplement this year a distinct and complete embodiment of the public and general statutes of the State, with full index, list of titles, etc., meets with very general approval among the profession.

On Wednesday the Senate, by a vote of 17 to 11, passed a concurrent resolution providing for the appointment of a joint revision and code committee of three members from each house. This committee is to sit during the interval between this and the next session of the legislature, and is to examine, revise and report upon the Code of Civil Procedure, and all bills or reports submitted at this session by the Revision Commissioners. The "Code of Procedure of 1849" was also submitted to the committee. The object of this committee, as we understand it, is to make a careful review and revision of the work of the present commission so far as reported; to retain the good, to reject the bad, to restore so much of the old Code of Procedure as shall seem preferable to the new, and to report to the next session such a Code or Codes as in its judgment should become the law of this State. We regret that the Code of Civil Procedure reported complete in 1849, or in other words,

the perfected work of the former commission was not also submitted to this committee. It is beyond question a work of great merit and surely contains many features worth the attention of the legislature. The expenses of the committee are not to exceed \$15,000.

Dr. Spear's article on British Extradition Precedents—the first half of which we give this week—examines, with great acumen, the leading cases cited by Mr. Secretary Fish in his correspondence with Lord Derby, to support his position in the Winslow case, and shows conclusively that they are in nowise authority for the position then taken by our government. Dr. Spear's articles on Extradition are attracting the attention of lawyers and publicists in both this country and Europe, and are receiving deserved commendation.

NOTES OF CASES.

IN the case of *Killman v. State*, 2 Texas Ct. App. 222, where the defendant was charged with "unlawfully keeping a disorderly house for the purposes of public prostitution," etc., it was held that a canvas tent, if kept for the purposes mentioned, would come within the meaning of "house" as used in the statute creating the offense. In an offense of this kind the controlling idea is that the structure is a place kept for the purposes of public prostitution, and the material of which the edifice is built is of secondary importance. It has been held that proof of the use of a single room in a tenement will support an indictment for keeping a house for such purposes. *Commonwealth v. Hill*, 14 Gray, 26; *State v. Garrity*, 46 N. H. 61. But in respect to the offense of burglary the rule is different. That offense cannot be committed in a tent or booth in a market or fair, even though the owner lodge in it, because it is not a permanent but a temporary edifice. 1 Hawk. P. C., ch. 38, § 85; 1 Hale's P. C. 557. See, also, *People v. Birby*, 67 Barb. 221, where an indecent exhibition of women in a room which was not open to the public generally, but only to such as were permitted to enter and paid therefor, was held to be in a "public place" within the statute against indecent exposure. In all offenses of this kind the construction is such as to give the words of the statute the broadest meaning, though when the offense is against property a different construction very properly prevails. See *Callahan v. State*, 41 Tex. 43; *Clifton v. State*, 53 Ga. 241.

In *Proctor v. Bigelow*, decided by the Supreme Court of Michigan at the January, 1878, term, which was an action brought by a widow for dower in lands of her husband, the lands were aliened in 1838, the husband died in 1851, and the action was brought in 1876. There were two questions presented: First, whether plaintiff's marriage was

proved by legal evidence, the only proof being general conduct and reputation, and, *second*, whether the action of dower is governed by the statutes of limitation. The court held affirmatively as to both questions. Proof of marriage in this way is admissible where the right to property depends upon it. *Alfray v. Alfray*, 2 Philim. Ec. 548; *Gaines v. Relf*, 12 How. 472, but on the trial of indictments for polygamy, and in actions for criminal conversation, direct evidence is required, it being necessary in such cases to prove a marriage valid in all respects. *Morris v. Miller*, 4 Burr. 2059; *Leader v. Barry*, 1 Esp. 353; *Commonwealth v. Norcross*, 9 Mass. 492; *Commonwealth v. Littlejohn*, 15 id. 163; *People v. Humphrey*, 7 Johns. 314. But a deliberate declaration of a prisoner on trial for bigamy or for adultery, that he was married to the alleged wife, has been held sufficient evidence of marriage. *Regina v. Upton*, 1 C. & K. 165; especially if the marriage took place in a foreign country. *Reg. v. Simmonato*, id. 164; *Cayford's case*, 7 Greenl. 57. But see *Birt v. Barlow*, Doug. 174; *State v. Roswell*, 6 Conn. 446. As to whether the action for dower is within the statute, the rule varies in different States. It is not within the English statute of Henry or of James. Angel on Lim., § 367; Park on Dower, 311. Neither is it within the statute in New Hampshire (*Barnard v. Edwards*, 4 N. H. 107), in Georgia, in North Carolina (*Spencer v. Weston*, 1 D. & B. 218), in Tennessee (*Guthrie v. Owen*, 10 Yerg. 389), nor in Maryland (*Wells v. Beal*, 2 G. & J. 468). In New Jersey, dower is barred after twenty years, and in Ohio, after twenty-one years. In the State of Michigan the decision in *May v. Rumney*, 1 Mich. 1, has been supposed to determine that the statute did not apply, but the case at bar indicates a different rule as now prevailing, and the reasons given for this conclusion will commend themselves to every one. "Every principle of justice and policy," says the court, "is against favoring ancient and dormant claims. These dower claims are often, if not generally, unknown until presented, and it is difficult in many cases to find out whether they exist or not." The courts in former times, for reasons satisfactory to themselves, excluded dower claims from the general rule, but the Michigan court does not think that the language of the present statute in force in that State should be disregarded in order to except this action from its operation.

The case of *Queen v. Read*, L. R., 3 Q. B. D. 181, involved a curious question under the statute relating to embezzlement. The English statute provides that "whosoever, being a clerk or servant, shall fraudulently embezzle any chattel money or valuable security, which shall be delivered to or received, or taken into possession by him, for or in the name or on account of his master or employer," shall be guilty of embezzlement. A gamekeeper not authorized

to take or kill rabbits for his own use, took and killed some wild rabbits, upon his master's land, and converted them dishonestly to his own use by selling them. The taking, killing, removing and selling were parts of one continuous action. The court held that a conviction of the gamekeeper for embezzling the rabbits could not be upheld. In *Reg. v. Townley*, L. R., 1 C. C. R. 315, it is held that wild rabbits cannot be the subject of larceny and consequently cannot be of embezzlement. The general rule is that no larceny at common law can be committed of animals in which there is no property, either absolute or qualified, as of beasts that are *feræ naturæ* and unreclaimed, such as deer, hares and conies, in a forest chase or warren, fish in an open river or pond, or wild fowls at liberty. Even a wild animal caught in a trap has been held not a subject of larceny. *Norton v. Ladd*, 5 N. H. 203; see also *Warren v. State*, 1 Green (Iowa), 106; *Hanman v. Mockett*, 2 B. & C. 934; *Ree v. Powell*, 14 Eng. L. & Eq. 575; *Wallis v. Mase*, 3 Binn. 546; *Cock v. Weatherby*, 1 S. & M. 383; *Gillet v. Mason*, 7 Johns. 1.

The case of *Brennan v. Guardians of the Poor of Limerick* (13 Ir. L. T. Rep. 33), decided on the 22d of February last by the Queen's Bench Division of the Irish High Court of Justice, involves an interesting question as to the liability of public officers for negligence. Plaintiff's son was, while sick with fever, received as a charity patient in a hospital attached to the Limerick work-house of which defendants, who constitute a public corporation, had charge. By reason of a failure to furnish sufficient attendants to watch over him, he was able in the delirium which accompanied the fever, to leave his bed and wander about. In his wanderings he fell some distance into a yard, and was so injured that he died. The court held that an action would not lie against defendants, saying, that while they might as a corporation be liable to indictment for a neglect of duty, they would not be liable to a civil action for a negligent omission in carrying out their administrative duties. The case is distinguished from *Livingstone v. Guardians of Lurgan Union*, 2 Ir. R. L. 202, where it was held, that a wrong committed by the guardians in making a sewer from the work-house premises into plaintiff's stream, and polluting it would render them liable in their corporate capacity. The general rule, however, seems to be that whenever an individual has suffered injury from the negligence of an administrative officer, who therein acts contrary to his official duty, an action lies on behalf of the party injured. *Novell v. Wright*, 3 Allen, 166; *Briggs v. Wardwell*, 10 Mass. 356; *Robinson v. Chamberlain*, 34 N. Y. 389; *Keenard v. Willmore*, 2 Heisk. 619. And the fact that the defendant contracted faithfully to perform his duties, not to the plaintiff but to the government, is no defense, for the action is founded not on contract but on breach of duty. *Hoyer v. Barkhoof*, 44 N. Y. 118; *Adsit v. Brady*, 4 Hill, 680; *Marshall v. York*, 11 C. B. 655; *Burnett v. Lynch*, 5 B. & C. 589. Judicial officers are, however, not liable upon grounds of public policy for negligence in the performance of their judicial duties. Bacon's Max. 17; *Floyd v. Barker*, 12 Rep. 23; *Pappa v. Rose*, L. R., 7 C. P. 32; *Cunningham v. Bucklin*, 8 Cow. 176.

BRITISH EXTRADITION PRECEDENTS.

BY SAMUEL T. SPEAR, D. D.

THE diplomatic correspondence between Great Britain and the United States, with reference to the case of Winslow, related to the question whether the treaty of 1842 between the two governments provides, either expressly or by implication, that a party extradited under it on the charge and proof of a specific crime, shall not, until he has had a reasonable opportunity to return to the jurisdiction from which he was thus removed, be tried for any offense committed prior to his extradition within the jurisdiction of the receiving government, other than the one for which he was demanded and surrendered, and further, whether the delivering government has the right, under the treaty, to insist that the receiving government shall thus limit its action in respect to the trial. Secretary Fish answered both of these questions in the negative, and Lord Derby answered both in the affirmative; and neither convinced the other.

The argument of Secretary Fish, while omitting any analysis of the provisions of the treaty itself, consisted mainly in the citation of precedents, supporting, as he alleged, his view. Some of these precedents are British: and, hence, they were presented as *argumenta ad hominem* for the consideration of the British Government. We propose in this article to state the leading cases thus referred to, and ascertain their pertinency and significance with reference to the matter in dispute.

1. The first case is that of Heilbronn, who, in 1854, was extradited from the United States to Great Britain, and in regard to whom Secretary Fish says: "The facts, as stated by the Solicitor-General of Great Britain, who had charge of the proceedings, and who was examined before the late British commission on the extradition question, were that the prisoner, being extradited for forgery, was acquitted, and was thereupon tried and convicted for larceny, an offense for which he could not have been surrendered, not being enumerated in the list of crimes mentioned in the treaty." *Foreign Relations of the United States*, 1876, pp. 213, 214. Mr. Mullens is the man to whom the Secretary alludes as the "Solicitor-General of Great Britain," but who held no such office at the time, and acted simply as the solicitor in a private prosecution, with which, as we shall see, the British Government had nothing to do.

The answer of Lord Derby in respect to this case is as follows: "Her Majesty's Government much regret that a charge was made against the prisoner not justified by the extradition warrant under which he was received; but though the charge was preferred according to the ordinary forms of criminal procedure in Her Majesty's name, it is the well-known course of law in this country that every pri-

vate individual has the power of presenting an indictment, while, as a matter of fact, the presenting or finding of that indictment is entirely unknown to any person representing the executive government. Her Majesty's Government must repeat that this departure from the extradition warrant in the case of Heilbronn was not the act of Her Majesty's Government, nor was it called to their attention or known to them; and Her Majesty's Government are not aware of any other instance which has occurred in this country, during the long period that has elapsed since 1842, where a person surrendered under the treaty of 1842 has been put upon his trial for an offense other than that in respect to which his extradition was demanded." *Id.*, p. 259.

The Lord Chancellor of England, alluding to this case in his speech in the House of Lords, said: "When he [Heilbronn] was tried here this actually occurred: the judge at once said that the facts showed that the offense committed was embezzlement and not robbery, and the man was tried and sentenced for the former offense, for which he ought not to have been surrendered under the terms of the treaty. That would not have been very creditable to the Government if they had ever heard of it; but the Government never heard of it. It was never brought to their notice at the time of the prosecution, or until it was mentioned by the committee of the other house in 1868." *Id.*, p. 292. His Lordship, if correctly reported, was mistaken as to the crime on which Heilbronn was extradited. It was not robbery, but forgery.

Mr. William B. Lawrence, in an article published in the *ALBANY LAW JOURNAL*, vol. 14, p. 91, refers to a letter written January 4th, 1875, by Sir Thomas Henry, the English magistrate to whom extradition matters were confided, in which the writer says: "It will be seen that it was a private prosecution, which was conducted by Mr. Mullens, as solicitor for the private prosecutor, and that the English Government had nothing whatever to do with the trial, and probably knew nothing about it. The trial took place in 1854, more than twenty years ago, and at that period the law of extradition was very little known, either in England or the United States, and it did not occur to any one to raise an objection to the prisoner being tried for a second offense."

These statements effectually dispose of the case of Heilbronn. The British Government had no knowledge of the proceeding at the time, and was made aware of it only by the report of a committee of the House of Commons in 1868. The prosecution was a private one, and what was done was the act of the judge who tried the case, and not of Her Majesty's Government. The Government of the United States was not apprised of the facts. The question, whether a person extradited on a specific

charge can be tried for any other offense than the one for which he was surrendered, was not raised before the court, and no decision was made in regard to it. Sir Thomas Henry says that it did not occur to any one to raise such a question. Lord Derby admits that the proceeding was "not justified by the extradition warrant," and expresses the regret of Her Majesty's Government that there was such a departure from this warrant. Neither government was appealed to at the time; and, hence, neither, by acquiescence and approbation, or by protest, placed any construction upon the treaty of 1842. The case, in the light of these facts, plainly has no significance as a precedent.

2. A second case is that of Von Aernam, who, in 1854, was surrendered by the United States to the authorities of Upper Canada, upon the charge of forgery. Mr. Clarke, in his treatise on Extradition, sec. ed., p. 101, mentions this case, and refers to 4 Upper Can. Rep. C. P., 228. It appears that, after Von Aernam's committal in Canada, an application was made for his release on bail, on the ground that the evidence of the *corpus delicti* was not sufficient, and that at the most the offense was simply that of obtaining money under false pretenses, which was not within the treaty. In answer to this application, and denying it, Chief Justice Macaulay said: "The committing magistrate has transmitted copies of the depositions, etc., before him, but they are not all that may be reasonably supposed to exist. It is not necessary to express an opinion on the point, but I am much disposed to regard the instrument as a forged bill; and even if the prisoner's offense amounted to false pretenses only, I should hesitate to bail him under the circumstances under which he has been taken, surrendered, and received into custody. Being in custody, he is liable to be prosecuted for any offense which the facts may support."

The question before the court, and the only one upon which it passed judgment, was, not for what offense the prisoner should be tried, but whether he should be admitted to bail. The court was inclined to the opinion that the offense was that of forgery, which was the crime specified in the extradition proceedings; but, if it were simply that of false pretenses, the decision was not to grant the application for bail. The remark incidentally fell from the lips of Chief Justice Macaulay, that, "being in custody," the prisoner "is liable to be prosecuted for any offense which the facts may support;" and this remark is the only part of the utterance which Secretary Fish quotes.

This case, in being neither pertinent nor authoritative, lacks the cardinal qualities of a good precedent. It is not pertinent, because the question considered and decided by the court is entirely different from the one under discussion between Lord Derby

and Secretary Fish. Chief Justice Macaulay, in the words quoted, simply stated a general rule of criminal law which no one disputes; but in stating that rule he expressed no opinion as to the proper construction of the treaty of 1842 between Great Britain and the United States, and especially as to the rights upon which each might insist, under the provisions of the treaty, in respect to the trial of extradited persons. No such question was before him or decided by him; and what he said in denying an application for bail is not to be forced out of the relations in which the utterance was made.

Nor is the precedent any better as an authority. If the words used really mean all that they were quoted to prove, they would not furnish a precedent binding upon the British Government, unless it could be shown that the Government, having knowledge of them, had adopted them as an expression of its views. To make a single sentence, casually falling from the lips of a provincial judge, when denying an application for bail, an authority as against Her Majesty's Government as to the proper construction of an international compact, is immensely to overrate its importance, especially so when that compact was not the subject-matter of the utterance, and not necessarily involved in its meaning. We may hence dismiss this precedent as being neither pertinent nor authoritative, and, of course, of no value in settling the point that was under discussion.

3. The third case is that of John Paxton, who, in 1866, was extradited from the United States to Lower Canada, on the charge of forgery. The charge brought against him in Canada was that of uttering a forged promissory note, knowing it to be forged. His plea was that he could not be tried except for the specific crime set forth in the extradition proceedings. The facts of the plea were denied in the replication; and a jury, having been empanelled to try the issue of fact, found "that the prisoner was extradited for forgery, whereas he is actually indicted for uttering forged paper." On a motion to set aside this verdict and grant a new trial, made by the prosecutor before the Queen's Bench, it was decided by two judges against one that the question submitted to the jury was not a proper one for a jury to determine, that a new trial of that issue should not be granted, and that the prisoner should plead and answer forthwith to the indictment found against him. Though he protested against being tried for uttering forged paper, when he had been extradited on the charge of forgery, he was, nevertheless, tried and found guilty on the former charge; and, the sentence being postponed, the verdict was subsequently confirmed by the Court of Appeal, consisting of the same judges, with the addition of Chief Justice Duval. See 10 Lower Can. Jurist, 11, 212, 852, and Clarke on Extradition, sec. ed., pp. 98-100.

The court, in this case, proceeded upon the assumption that the defendant had no standing at its bar, except to plead to the indictment found against him. It, hence, tried him for the offense charged in the indictment, without any reference to the terms of the treaty under which he had been extradited, or to the proceedings under that treaty, or to the question whether the offense thus charged was or was not the one for which he had been surrendered by the United States. This was, in practice, the adoption of the French doctrine, which assigns the construction and application of extradition treaties to the political department of government, and leaves the judiciary nothing to do but simply try offenders for the crimes charged against them, without inquiring into the form of their arrest, or the mode in which they were brought within its jurisdiction.

The proceeding in this case manifestly has no application whatever, considered as a precedent, to the point in dispute between the two governments in respect to Winslow. Lord Derby and Secretary Fish were not discussing the question whether a person, extradited under the treaty of 1842, and afterward standing before a court of justice and there charged with crime, could himself set up, as a plea of defense, that the crime for which he was about to be tried, is not the one for which he was surrendered, and on this ground claim, as a legal right, that the court has no jurisdiction to try him for that crime. They were not disputing about any question of right or jurisdiction as between the prisoner and the court before which he was arraigned. Their question related to the proper construction of the treaty itself, with reference to the inquiry whether it, expressly or by implication, stipulates that the party surrendered shall be tried only for the offense for which the surrender was made, and hence whether the delivering government, and not the prisoner, has the right to insist that the jurisdiction acquired by the surrender shall be limited to this purpose. Their question was one of diplomacy as between the two governments, and not one of law as between the prisoner and the court. Upon this point the court in the case of Paxton expressed no opinion, and passed no judgment; and, hence, its action has no pertinency whatever to the matter which was the subject in controversy. Let it be granted, for the sake of the argument, that the prisoner cannot make the treaty the basis of a legal right in respect to the crime for which he may be tried; and it does not follow that the surrendering government cannot claim in respect to him the rights which flow from the treaty. The two questions are entirely distinct.

It is quite true that if it were an established and well-known rule, in the courts of different countries, when dealing with extradited persons, to pay no at-

tention to the fact of their extradition and try them for any crime legally charged against them, and if governments should make extradition treaties, and deliver up fugitive criminals to each other, with a full knowledge of this fact, and with no provisions in those treaties, express or implied, qualifying or limiting the application of the rule, then, indeed, the facts would show a tacit acquiescence in the rule on the part of these governments, and thus it might become a rule of international law. This is conceivable, but it is not real. No such fact of long and general acquiescence exists or has ever existed. The few cases in which the question, whether an extradited person can be tried for any offense other than the one for which he was surrendered, has been considered by courts, falls very far short of establishing any such rule; and, in these cases even, the decisions have not been uniform one way or the other. No one will pretend that such a rule exists as a general usage of nations.

4. The fourth case is that of Rosenbaum, occurring in Canada in 1874, in respect to which Secretary Fish says that "the discharge of the prisoner was claimed because there was no prohibition under the laws of the United States against the trial of criminals for offenses other than those for which they were extradited, as required by the [English] act of 1870." *Foreign Relations of the United States, 1876*, p. 235. Secretary Fish quotes two remarks made by Mr. Justice Ramsay, of the Supreme Court of Canada.

The first remark is the following: "If it were recognized as a principle of international law that a prisoner extradited could only be tried for the crime for which the extradition took place, it would not have been necessary for the Imperial Parliament to make these provisions." The provisions referred to are those of the English act of 1870. There are three answers to this remark. The first is, that the primary and main question between Lord Derby and Secretary Fish was not whether such immunity is secured to an extradited prisoner by "international law," independently of treaties, but whether it was involved in the treaty of 1842 between Great Britain and the United States. The second is, that the text writers on international law who have referred to the subject at all, recognize and with great uniformity affirm the "principle" which Mr. Justice Ramsay states as an hypothesis, simply for an argumentative purpose. The third is, that the object of the provisions referred to in the English act, as Lord Derby asserts, and as the reason of the thing clearly implies, was not to gain ends that lie beyond the scope of British extradition treaties, including that with the United States, but to secure their proper execution according to the construction placed upon them by the "Imperial Parliament." It is not to be assumed that Parliament, when passing a law for

the execution of these treaties, consciously and deliberately designed to insert in the law a "principle" entirely unknown to them, and in excess of their provisions, and that, too, without the consent of the other parties to these treaties. The assumption contradicts all the probabilities and proprieties of the case, and withal is not sustained by a particle of evidence. The proper view of the English Extradition Act is that Parliament judged it to be suitable legislation to carry into effect the provisions and purposes of existing extradition treaties.

The other remark of Mr. Justice Ramsay is as follows: "I am not, however, aware that it has been laid down in England, that a man, once within the jurisdiction of English courts, could set up the form of his arrest, or the mode by which he came into custody, as a reason for his discharge when accused of crime." This remark plainly has no pertinency to the question under discussion between Lord Derby and Secretary Fish. That question, as previously observed, related, not to what the prisoner might plead in his defense as a ground of "discharge," but to what the delivering government might under the treaty claim in his behalf.

Nor has the remark any significance, as a rule of law, when sought to be applied in this country to the trial of extradited persons. The Constitution makes the treaties of the United States a part of "the supreme law of the land;" and, as such, they are a rule for courts. British treaties, however, have no such character in England or Canada, except as they are invested with it by law. Now, it might be true, in Great Britain and Canada, that the form of one's arrest and the mode by which he came into custody would be circumstances of no legal consequence in reference to the crime for which it would be allowable to try him; yet it does not follow that the same would be equally true in the United States. If the extradition treaties of the United States, either expressly or by implication, do secure to an extradited person immunity against trial for any offense other than the one for which he was surrendered, and if a given person, having been surrendered to the United States on a specific charge of crime, is sought to be put on trial for some other offense, then the form of his arrest and the mode by which he came into custody are, as matters of law, vital circumstances in the case. The treaty, under which he was surrendered, is, upon the supposition stated, a law in respect to the crime for which he may be tried. He has a legal right to claim a "discharge," as against detention or trial for any other crime, committed prior to his extradition, than the one for which the surrender was made. Whether an extradited party has the same legal right in England or Canada does not affect the question, one way or the other, in the United States.

There are, hence, two serious difficulties with the second remark of Mr. Justice Ramsay. One is its irrelevancy to the point under discussion between the two governments; and the other is its insignificance, considered as furnishing a rule by which to determine what an American court may or may not do in dealing with an extradited person.

(To be concluded.)

LIABILITY OF HUSBAND TO DIVORCED WIFE FOR TORT COMMITTED DURING COVERTURE.

SUPREME JUDICIAL COURT OF MAINE, MAY 5, 1877.

ABBOTT V. ABBOTT.*

A wife, after being divorced from her husband, cannot maintain an action against him for an assault committed upon her during coverture; nor against persons who confederated with and assisted him in committing the assault.

ON report. The action was brought against defendant for wrongfully confining plaintiff in an insane asylum. The opinion states sufficient facts.

H. D. Hadlock, for plaintiff.

A. Wiswell & A. P. Wiswell, for defendants.

PETERS, J. The defendants forcibly carried the plaintiff to an insane asylum. The case assumes the act to have been wrongful and wanton. The plaintiff and one of the defendants, at the time, were husband and wife; since then she was divorced. Can an action of tort, for such an injury, instituted after divorce, be sustained by her against her former husband? We have no doubt that it cannot be maintained.

Precisely the same question was lately before the English court, and the decision and the reasons on which the decision is grounded meet with our unqualified approval. *Phillips v. Barnett*, 1 Q. B. D. 438. It is there held that a wife, after being divorced from her husband, cannot sue him for an assault committed upon her during coverture. In the course of the discussion in that case, Lush, J., says: "Now I cannot for a moment think that a divorce makes a marriage void *ab initio*; it merely terminates the relation of husband and wife from the time of the divorce, and their future rights with regard to property are adjusted according to the decision of the court in each case;" Field, J., says: "I now think it clear that the real substantial ground why the wife cannot sue her husband is not merely a difficulty in the procedure, but the general principle of the common law that husband and wife are one person;" and Blackburn, J., states the objection to be "not the technical one of parties, but because, being one person, one cannot sue the other."

The theory upon which the present action is sought to be maintained is, that coverture merely suspends and does not destroy the remedy of the wife against her husband. But the error in the proposition is the supposition that a cause of action or a right of action ever exists in such a case. There is not only no civil remedy but there is no civil right, during coverture, to be redressed at any time. There is, therefore, nothing to be suspended. Divorce cannot make that a cause of action which was not a cause of action before

* To appear in 67th Me. Rep.

divorce. The legal character of an act of violence by husband upon wife and of the consequences that flow from it, is fixed by the condition of the parties at the time the act is done. If there be no cause of action at the time, there never can be any.

The doctrine advocated by the plaintiff finds no support from any of the principles of the common law. According to the oldest authorities, the being of the wife became, by marriage, merged in the being of the husband. Her disabilities were about complete. By the earliest edicts of courts, he had a right to strike her, as a punishment for her misconduct, and her only remedy was, that "she hath retaliation to beat him again if she dare." And Chancellor Kent lays down the doctrine, not contradicted or challenged in any of the editions of his commentaries, that, "as the husband is the guardian of the wife, and bound to protect and maintain her, the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints upon her liberty, if her conduct be such as to require it, unless he renounces that control by articles of separation, or it be taken from him by a qualified divorce." 2 Kent's Com. 180. But there has been for many years a gradual evolution of the law going on, for the amelioration of the married woman's condition, until it is now, undoubtedly, the law of England and of all the American States that the husband has no right to strike his wife, to punish her, under any circumstances or provocation whatever. See, upon this subject, the cases collected in a learned and instructive note to the case of *Commonwealth v. Barry*, in 2 Green's Cr. L. Reports, 286. Still, the state of the old common law serves to show the basis upon which the marriage relation subsisted; and we do not perceive that there has been, either by legislative enactment or by the growth of the law in adapting itself to the present condition of society, any change in that relation which can afford the plaintiff a remedy. So to speak, marriage acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other. As said by Settle, J., in *State v. Oliver*, 70 N. C. 60, "It is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."

We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically, the married woman has remedy enough. The criminal courts are open to her. She has the privilege of the writ of *habeas corpus*, if unlawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce. If a divorce is decreed to her, she has dower in all his estate, and all her needs and all her causes of complaint, including any cruelties suffered, can be considered by the court, and compensation in the nature of alimony allowed for them. In this way all matters would be settled in one suit as a finality.

It would be a poor policy for the law to grant the remedy asked for in this case. If such a cause of action exists, others do. If the wife can sue the husband, he can sue her. If an assault was actionable, then would slander and libel and other torts be. Instead of settling, a divorce would very much unsettle all matters between married parties. The private matters of the whole period of married existence might be exposed by suits. The statute of limitations could not cut off actions, because during coverture the statute would not run. With divorces as common as they are now-a-days, there would be new harvests of

litigation. If such a precedent was permitted, we do not see why any wife surviving her husband could not maintain a suit against his executors or administrators for defamation, or cruelty, or assaults, or deprivations that she may have wrongfully suffered at the hands of the husband; and this would add a new method by which estates could be plundered. We believe the rule, which forbids all such opportunities for law suits and speculations, to be wise and salutary and to stand on the solid foundations of the law.

The plaintiff invokes the case of *Blake v. Blake*, 64 Maine, 177, as supporting her right to sue. That was a suit in assumpsit. In matters of contract there may be a cause of action during coverture, not enforceable by the ordinary methods until afterward. The common law has been so far abrogated by the force of various legislative acts as to allow contracts to be made by husband and wife with each other. And, to a certain extent, contracts between man and wife always were upheld in courts of chancery. That case, therefore, differs from this.

Then, if the husband is not liable, the question arises whether the co-defendants are liable in this action. We think it follows from the previous reasoning that they are not. The true test as to their liability is, whether an action could have been maintained against them at the time of the act complained of. It is clear that no action was then maintainable. If the co-defendants had been then sued, the action must have been in the name of the husband and wife, and the husband would have sued to recover damages for an injury actually committed by himself. Husband and wife must declare that the injury was *ad damnum ipsorum*. She cannot, at common law, sue in her own name alone, nor in his without his consent. She cannot appoint an attorney, ordinarily, but he must do it for her. His conduct and admissions can affect the suit. He can release the cause of action and she cannot. She could do no act to redress an injury to her without his concurrence. Nor has the common law been changed in any of these respects until 1876; which was after this action was commenced. Laws of 1876, ch. 112. The damages recoverable in an action would have belonged to him and not to her. And, at the same time, if she had committed a tort, he would have been civilly liable for it. It is very certain, therefore, that no action could ever have been sustained against them in his name. They merely aided and assisted him. But if there was no injury to him there was none to her. They were one. Without doubt, after the death of the husband, a wife may maintain an action in her own name for a wrong committed upon her while her husband was alive, if no action was instituted nor the cause of action released during his life-time; and undoubtedly the same right follows after a divorce a *vinculo matrimonii*. But she can only recover for such a wrong as she and her husband could have recovered for in their joint names while the marriage relation subsisted. She succeeds after death or divorce to just such rights as existed before that time. The language of the law is that the right survives to her. But there must be some right in existence to survive. Here there was none. A thing cannot continue after an event which does not exist before. It would not be the survival of a claim, but would be one newly created. *Norcross v. Stuart*, 50 Maine, 87; *Marshall v. Oakes*, 51 id. 308; *Ballard v. Russell*, 33 id. 196; *Laughlin v. Eaton*, 54 id. 156; *West v. Jordan*, 62 id. 484; *Hasbrouck v. Weaver*, 10 Johns.

247; *Snyder v. Sponable*, 1 Hill (N. Y.), 567; Bacon's Abr., Baron and Feme, K.; *Shaddock v. Clifton*, 22 Wis. 114.

Plaintiff nonsuit.

Appleton, C. J., Walton, Dickerson and Virgin, JJ., concurred.

Barrows, J., concurred in the result.

LIABILITY OF SHIP-OWNERS—WHEN PERSONAL SERVICE NOT ESSENTIAL TO JURISDICTION.

UNITED STATES CIRCUIT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK, 1876.

LEVINSON v. THE OCEANIC STEAM NAVIGATION CO. The U. S. Statute of 1851 (9 Stat. at Large, 635), limiting the liability of ship-owners to their interest in the vessel, and her freight, is applicable to foreign vessels. It is a regulation of commerce, and not a municipal regulation.

Congress has power to authorize the Supreme Court to fix by rule the manner of serving process. A rule providing for service of process upon an attorney is valid, and jurisdiction of his client can be thus acquired.

THE facts are fully stated in the opinion of the court.

E. F. Shepard and E. Coffin, Jr., for plaintiff.

Everett P. Wheeler and Charles E. Souther, for defendant.

SHIPMAN, J. The case now before the court stands in this position: The plaintiff, a resident of the State of New York, and of the Southern District of New York, brought his action in this court against a common carrier by sea (having its domicile in a foreign country), to recover damages for personal injuries to him while a passenger and for the loss of his baggage. The plaintiff has made out his *prima facie* case. The defendants pleaded in bar a decree of the District Court of the Southern District of New York, and have offered in evidence the libel, the appraisement by the commissioners, the motion after the appraisement, the payment into court of the amount of the appraisement, and the final decree. The defendants then rested their case.

The plaintiff thereupon moved for a direction to the jury to find for the plaintiff, on the ground that the defense is insufficient in law. The question is, whether the decree of the District Court is a bar to the action of the plaintiff. That decree was based upon the statute passed by Congress in 1851, the first and third sections of which are as follows:

§ 1. No owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners; provided that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners.

§ 3. The liability of the owner or owners of any ship or vessel for any embezzlement, loss or destruction by the master, officers, mariners, passengers or any other person or persons, of any property, goods or merchandise shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any

act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively in such ship or vessel and her freight then pending. 92 U. S. Stat. 635.

The motion of plaintiffs for a direction to the jury notwithstanding the decree of the District Court is founded substantially upon two points.

First. That the District Court never had jurisdiction of the subject-matter of the libel; and

Second. It had no jurisdiction of the person who is now plaintiff in this suit, and who was named as one of the defendants in that libel.

All the objections resolve themselves into these two questions, whether the District Court had jurisdiction of the subject-matter or jurisdiction of the person. This statute of 1851 has been discussed at length by the counsel. It seems to me to have been a limitation of the common-law liability of common carriers by sea. It is well understood that at common law there was no limitation upon the liabilities of such common carriers, but that the amount which they were liable to pay was limited only by the judgments which might be rendered against them. Congress, in 1851, saw fit by statute to limit that liability, and the statute seems to have been a modification or alteration of the common law in regard to the extent of liability of ship-owners for the negligence of their officers and crew. Congress also saw fit to adopt the same limitation which had previously existed in the several maritime countries of Europe.

The statute which was passed was the adoption by legislative authority of a new principle of law so far as this country is concerned, but one which has been the rule in the Admiralty Courts of foreign countries.

The question, then, is whether this limitation of the liability of common carriers by sea applies only to American vessels, and was merely a municipal regulation, or whether it was the adoption of a general principle.

Now, neither from the language of the statute of 1851, nor upon principle, can I see that this limitation of liability was local, or that the legislation was municipal.

There was nothing local or municipal in its character. The statute was not in terms confined to American vessels. It had a wider scope and was a modification by legislative enactment of the common-law, in regard to a subject over which Congress had jurisdiction.

If a modification of the common-law liabilities of carriers by land was provided by the statute of the State, which had jurisdiction over such corporations, it would have been binding upon all courts of the State; it would have been the *lex fori*, the modification would have been a general one, and when an action was brought before a court of the State, the court would have been prohibited from exceeding the liabilities which the legislature of the State had limited.

So, this statute being a modification of the common law of a general and universal character, it is binding upon all courts in this country, and they are limited or restrained from proceeding to give judgment beyond the limit of liability, which the legislature had prescribed in 1851. In other words, the adoption of a principle of admiralty law cannot be considered as merely local or municipal legislation.

Second. Whether the District Court had jurisdiction of the person, is next to be considered. At common

law personal service, or its equivalent, is in all cases to be made upon the defendant, so that he may have an opportunity to appear and make defense. The common law prescribes that " * * * personal service is in all cases necessary to enable the court to acquire jurisdiction, unless some other mode of service is authorized by the laws of the State."

This action in admiralty was both a proceeding *in rem*, and a proceeding *in personam*. In so far as it is a proceeding *in personam*, the principles of common law in regard to actions *in personam* are applicable; that is, that personal service of process or that service which is authorized by statute as an equivalent, is to be made upon the party who is to be affected by the judgment that may be rendered in the suit.

In this admiralty proceeding the Supreme Court has announced the rules which are applicable to the service, and the rule of the Supreme Court corresponds to and has the same effect as the rules prescribed by the statutes as to common law service.

The Statute of 1851 (section 4) provides that the owner "may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto." It announced no rule by which service shall be made.

The Supreme Court has jurisdiction of the rules which govern the proceeding.

The general rule of the Supreme Court, adopted in 1871 (13 Wallace, p. xlii) provides that * * :

"Public notice of such monition shall be given as in other cases, and such further notice served through the post-office or otherwise, as the court in its discretion may direct."

They point out one method of service: through the post-office. That is not, strictly speaking, personal service; it is merely constructive. One mode of constructive service then is designated, and they declare that the District Court, in its discretion, may direct how such other and further notice may be given as it chooses.

The rule does not say "such further notice shall be served through the post-office, and otherwise;" but it is optional with the District Court whether notice shall be served on the known claimants through the post-office or otherwise in the exercise of its judgment.

The Supreme Court provides an equivalent for personal service, and has in effect declared that constructive service shall be sufficient.

In other words, they direct that the District Court may elect, in its discretion, whether one or another mode of constructive service may be adopted, and have not limited them to personal service.

The District Court, in its discretion, selected one mode of constructive notice, and that was by service upon the attorneys for the claimants, and it was not necessary that service upon them should be made otherwise than by delivering a copy of the monition to their attorneys.

It is not material, in my judgment, whether the attorneys admitted or did not admit service, for the important question is whether the service which the court directed to be made on the defendant was sufficient service or not.

If the rule had provided that "such other notice shall be served through the post-office, or actually served upon the defendants," and the monition has not been served, either by mail or personally, the District Court would have had no jurisdiction.

But the rule having left the method of service to the discretion of the court, which had the jurisdiction of the libel, and the court, having exercised its discretion, and determined what in its judgment should be a valid constructive service to bring the defendant into court, and service having been made accordingly, no valid objection can be taken to the jurisdiction of the court over the action *in personam*.

The motion to direct a verdict, for the plaintiff is denied.

The court, at the conclusion of the evidence, directed a verdict for the defendant.

Judgment was entered on the verdict. No writ of error has been brought to review this judgment.

NOTE.

By the common consent of nations going back to a period before the Christian era, maritime usages and customs have been recognized as constituting a law merchant differing in many respects from the local laws of each particular country, and applicable to all maritime causes.

Chancellor Kent says in his Commentaries, vol. 3, p. 1: "The marine law of the United States is the same as the marine law of Europe. It is not the law of a particular country, but the general law of nations." Blackstone, vol. 1, p. 273.

"No municipal laws can be sufficient to order and adjust the new, extensive, and complicated affairs of traffic and merchandise. In this case they have a proper authority for this purpose. For, as there are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called the law merchant, or *lex mercatoria*, which all nations agree in, and take notice of."

So in vol. 4, p. 67: "In all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature, the law merchant, which is a branch of the law of nations, is regulated and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, to hostages and ransom bills, there is no other rule of decision, but this great universal law, collected from history and usage, and such writers of all nations and languages, as are generally approved and allowed of."

So Malynes, "*Lex Mercatoria*," pp. 87, 88: "All controversies of seafaring actions and maritime causes ought to be decided according to the sea laws, which took their beginning from custom and observations, and from them is the interpretation of the said law to be taken."

Among the authorities in reference to the law merchant, there are none entitled to more weight than the *Consolato del Mare*, and the ordinance of Louis XIV. Chancellor Kent says, quoting from Casaregis, vol. 3, p. 11, n.: "The Consolato had in maritime matters by universal custom, the force of law among all provinces and nations."

Boucher, in the preface to his *Consulat de la mer*, p. III: "The Consolato had the same authority among maritime nations that the pandects had among all nations in general."

In reference to the ordinance of Louis XIV, Chancellor Kent says, vol. 3, pp. 16, 17: "The whole law of navigation, shipping, insurance and bottomry was systematically collected and arranged. * * * Every commercial nation has rendered homage to the wisdom and integrity of the French ordinance of the marine, and they have regarded it as a digest of the maritime laws of civilized Europe."

As long ago as 1759, Lord Mansfield, in *Luke v. Lyde*, 2 Burrows, 882, cites it as an authority and says: "It was collected and compiled under the authority of M. Colbert."

Emerigon says in his preface to his *Traité sur l'assurance*, p. II: "The ancient maritime laws are the sources which were open to the compilers of the ordinance (*les rédacteurs de l'ordonnance*), and from which those must draw who would go to the fountain head." He then gives a sketch of the different compilations before the ordinance, and adds p. XV.

"The ordinance of 1681 is a compilation of all these ancient laws."

Azunl on Maritime Law, vol. 1, p. 393 (Am. Ed. of 1806), says: "The ordinance has become in some sort the common law of all the neighboring nations." See, also, Bedarride, du Commerce Maritime, tome 1, § 10, 18, pp. 14, 21.

It is to be especially noticed that the authorities just cited uniformly speak of the ordinance, not merely as a statute or a decree of Louis XIV, which on its face it purports to be, but as a code or digest of the existing maritime law.

What then are the provisions of the ordinance on this subject?

Book 4, title 4, article 4, provides that the liability of the ship-owner for the negligence of the master is discharged by the abandonment of the ship and freight. Valin Comm. sur. l'Ord., vol. 1, p. 490; Bedarride, du Commerce Maritime, vol. 1, §§ 273, 276, 279, 287. In section 279, he says: In no case can the ship-owner be made liable by any consequence of the voyage beyond his interest in the ship itself.

In section 287, he says: The right to abandon the ship and freight exists where the negligence or willful tort or *quasi tort (quasi delict)* is imputable to the crew or to the captain himself.

The Consolato contains a provision to the same effect, as to the liability of the owner, although it did not undertake to provide a remedy by which this limitation of liability could be enforced. Chap. 33.

The courts of Holland recognize the same right on the part of the owner (Grotius on Peace and War, book 2, chap. 11, § 13), and the same law is recognized throughout the continent of Europe.

There does, at first blush, seem to be serious difficulty in maintaining that the statutes of a country should operate upon foreigners and regulate their liability for a loss occurring on the high seas. But when this statute is considered as the promulgation and adoption of a rule existing among most other commercial nations, the difficulty vanishes.

The confusion which seems to arise as to the effect and scope of the United States statute is owing to several causes.

The sea laws were originally promulgated by some maritime power and under its authority. This is notably true of the ordinance of Louis XIV, yet, as has been shown, they have always been treated, not as local or municipal statutes, but as a public and official recognition of the general maritime law; not as adopting new rules, but as giving definiteness and precision to a rule already existing.

The remedy in question in this particular case is one which could not be obtained through the machinery of a court of common law. In other words, it does not constitute an absolute defense.

Before it could be made available, some steps must be taken by the owner in an appropriate tribunal, by which his interest in the vessel and freight should be abandoned, and all persons having claims by reason of the disaster, be summoned before the court, and bound by the decree.

Until this is done the liability remains absolute, and could not be contested in any court. This was held in the case of the *Norwich Co. v. Wright*, 13 Wallace, 104. The District Court for the Eastern District of New York had previously held (1 Benedict, 89) that the admiralty jurisdiction was not sufficiently broad to include a proceeding of this character, which it treated as one *in personam*.

This was decided on the authority of the English decisions, which do show that in the absence of a special statute, the English admiralty could not furnish the relief now sought, and that until the English statute on the subject was passed, there was no court in England capable of affording this relief. But when the United States Supreme Court held that the proceeding was *in rem* for the ascertainment of the claims to a fund within the jurisdiction of the court, and its distribution among the persons entitled thereto, the difficulty vanished. It is to be observed that jurisdiction over this description of causes was at first conferred in England upon a court of chancery. Merchant Shipping Act of 1854, 17 and 18 Vict., chap. 104, § 514.

The language of that section is significant; it provides: "It shall be lawful in England or Ireland for the High Court of Chancery * * * to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability."

Section 13, chap. 10, 24 and 25 Victoria, confers a similar power upon the admiralty: "When any ship or vessel or the proceeds thereof are under arrest of that court." The language of the Merchant Shipping Amendment Act of 1862, 25 and 26 Vict., chapter 63, section 54, is also significant: "The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur, without their actual fault or privity (here follows an enumeration of the cases) be answerable in damages for loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise or other things to an aggregate amount exceeding £15 for each ton of their ship's tonnage."

This language, it is believed, shows by necessary implication: First, that in the absence of the statute no English court had the power to give the relief sought, and second that the question before the English legislature was not whether a liability existing by the law merchant should be extended, but whether the unlimited liability existing at common law should be limited. Nothing better illustrates the divergence between the jurisprudence of the two countries than a comparison between the decisions upon the English statute and those under that of this country. The English cases hold that the value of the vessel for which her owners are liable is her value before the accident. *Gale v. Laurie*, 15 Mees. & Wels. 390; *Norwich Co. v. Wright*, 13 Wallace, 104, holds just the reverse.

The early English cases corroborate the view of the English statute previously stated.

In the *Carl Johan* reported in note to 3 Haggard Adm. 186, it was held by Lord Stowell, that a court of admiralty enforced the general maritime law; that the English statute was a purely municipal regulation, and it is assumed that by the general law merchant no such right to limit the owner's liability existed. See also the *Dundee*, 3 Haggard Adm. 113. These decisions are based upon an assumption which has been shown to be erroneous, and which undoubtedly grew out of that want of acquaintance with continental law, which has so often been noticed in English jurists of the last century, and which Lord Mansfield (who it will be remembered was educated in Scotland) was the first to dispel. The more recent English cases simply follow these decisions of Lord Stowell. The jurisprudence of the two countries in relation to the subject in hand is essentially different.

EVERETT P. WHEELER.

PROOF OF MARRIAGE—STATUTES OF LIMITATION AS TO DOWER.

SUPREME COURT OF MICHIGAN, JANUARY, 1878.

SAMUEL PROCTOR V. NANCY BIGELOW.

WILLIAM H. SCOTT V. NANCY BIGELOW.

Where property rights only are involved, general reputation is sufficient proof of marriage. In Michigan the statute of limitations runs against a claim for dower.

ACTION for dower. The opinion states the case.

Prentiss & Fox, for plaintiffs in error.

Pendleton & Radford, for defendant in error.

CAMPBELL, C. J. Nancy Bigelow sued for dower in lands aliened by her husband in 1838. He died in 1851. These suits were brought in 1876.

The two principal questions presented are, 1. Whether her marriage was proven by legal evidence; and, 2. Whether dower is governed by the statutes of limitation.

The marriage was proved by her son's testimony, showing that she and his father lived together and brought up a large family, treated each other on all

occasions as husband and wife, were so reputed in the family and by others, addressed each other as such, and jointly signed papers in that relation.

We know of no authority which requires any better proof of marriage, unless in criminal prosecution and cases of seduction. There is no rule of law making marriage records the best evidence in any case, and even where they exist, some parol evidence is usually necessary to identify the parties, in case of any controversy. In most cases where the right of property is to be made out by proof of a marriage, the witnesses who were present are not living or attainable. One or both of the married persons must die before any inheritance or dower can exist. It would be impossible in a majority of such cases to prove a marriage by any better testimony than conduct and reputation. The general presumption in favor of legality has led to more liberal rules instead of stricter ones in modern times, as more just and reasonable. 1 Starkie's Ev. 45; *Hutchins v. Kimmell*, 31 Mich. 126; 2 Greenl. Ev., § 462; 3 Edwards' Edition of Phillips' Ev. 599 and cases.

The question whether the statute of limitations applies to rights of dower is supposed to be decided in the negative by the case of *May v. Rumney*, 1 Mich. 1.

In that case the facts showed that James May, the husband of the defendant, died in January, 1829, having aliened the land in dispute in 1807. On the 5th of November, 1829, a law was passed providing a short period of limitations of ten years for all real and possessory actions where the right of action had then accrued; and it was held Mrs. May's right did not come within the statute.

At the time of Judge May's death there had been no new remedy for the recovery of dower adopted, and it was left to the common-law remedies. The opinion in *May v. Rumney* discusses these fully, and points out that the remedy by writ of dower was not a possessory action, but only determined the right, which, when determined, could afterward be enforced by ejectment. Of course under these circumstances, it would, if the views of the court were correct, preclude the operation of the short law of 1829, and no other statute was in question under the issue. The first statute passed, providing a speedier remedy for dower, was "*An act for the speedy assignment of dower, and for the preventing of strip and waste by tenants therein*," approved October 29, 1829. This act was passed six days before the short statute of limitations. It provided for proceedings by writ of dower, but also gave a writ of seizin, which rendered a supplemental ejectment unnecessary. But this statute required a demand of one month before any action could be brought, and thus rendered it impossible for Mrs. May to sue before the 5th of November.

The Revised Statutes of 1838 seem to have made provision for two remedies. One was the writ of dower, which might be brought after one month and within one year from demand; under which she could recover possession and damages for detention. R. S. of 1838, part 3, title 3, chapter 3. The other was the new statutory action of ejectment, in substance like our present statutes and superseding the ancient action of ejectment previously used. R. S., part 3, title 3, chapter 2. This new action of ejectment differed from the old one in making the judgment conclusive after a certain period, but allowing two new trials. No provision was made for any new trial in the action of writ of dower, which seems to have been an action of

right with some of the remedies belonging to possessory actions.

This anomalous state of things was ended by the revision of 1848, still in force, which abolished all other actions but ejectment, and imposes no conditions on its commencement to recover dower.

There is no reason that we can discover, why a stale claim of dower in lands aliened by the husband deserves any more consideration than any other claim. Every principle of justice and policy is against favoring ancient and dormant claims. These dower claims are often, if not generally, unknown until presented, and it is very difficult in many cases to find out whether they exist or not. The courts under the common law system of procedure appear to have felt themselves bound, for reasons which we do not altogether appreciate, to give to statutes of repose a technical construction whereby they excluded writs of dower because not mentioned, and not in all respects identical with any other form of action. But under our statutes, inasmuch as we have but one form of action, which is statutory ejectment, to reach dower in the same way with other landed interests, we should be obliged, in order to except rights of dower from the operation of the limitation acts, to disregard their language altogether. The words of the statute in force in 1851 are that "no person shall commence an action for the recovery of any lands, nor make any entry thereupon, unless within twenty years after the right to make such entry or bring such action first accrued." R. S., ch. 189, § 1. These terms are free from ambiguity. If Mrs. Bigelow could have brought an action of ejectment in 1851 (and it is not pretended she could not have done so) she comes within the plain terms of the statute. We are not called upon to discuss the propriety of the old decisions, which certainly strained the law very much to favor dower. The forms of remedy under which that over-nice casuistry was adopted have been changed into a single and universal remedy, which will not permit any different treatment of suitors. All must be governed by the same regulations.

We think, therefore, that the plaintiff in error in each of these cases is entitled to have judgment reversed, and a new judgment rendered in his favor with costs of both courts.

LIABILITY OF SAFE DEPOSIT COMPANIES FOR LOSS OF DEPOSITS.

SUPREME COURT OF PENNSYLVANIA, JANU-
ARY 7, 1878.

SAFE DEPOSIT COMPANY, Plaintiff in Error, v.
POLLOCK.

In an action to recover the amount of certain bonds which were lost from a safe hired by plaintiff below from defendant below, a safe deposit company, and which was situated in defendant's fire-proof vault, it appeared that the hiring was subject to these rules: "Wherever a party rents a safe, and deposits therein at pleasure contents not made known to the company, its liability is limited (1) to the keeping of constant and adequate guard and watch over the safe; (2) to the prevention of access by any renter to the safe of any other renter; (3) to the protection of safes and contents from any dishonesty on the part of any of the company's employees." Plaintiff had exclusive possession of the key to the safe. He placed in the safe certain government bonds and looked it. At a subsequent time he opened the safe and discovered that the bonds were missing. There was no evidence that the safe had been broken or the lock tampered with, but the safe must have been opened with a key fitted thereto. Held, that there was evidence of negligence on the part of the company sufficient to go to the jury, and a verdict for plaintiff was sustained.

ERROR to Common Pleas, No. 1, of Allegheny county. The opinion states the case.

MERCUR, J. This action was brought against the plaintiff in error to recover for the loss of some government bonds. Its general business is indicated by its name. It took two classes of risks. In one class it became the absolute guarantor of the safety of the deposit. In the other its liability was qualified and restricted. The present case arose under the latter class. The defendant in error rented a safe in the burglar-proof vault of the company, subject, *inter alia*, to its following rules and regulations:

"Whenever a party rents a safe, and deposits therein at pleasure, contents not being made known to the company, its liability is limited: (1) To the keeping of a constant and adequate guard and watch over and upon the burglar-proof safe. (2) To the prevention of access by any renter to the safe of any other renter. (3) To the protection of safes and contents from any dishonesty on the part of any of the company's employees."

He renewed the lease annually several times and paid the required rent. The safe is closed by an iron door, to which a lock is attached. The valuables are placed in a tin box made to fit into the safe like a drawer. In this box and safe he placed several thousand dollars in government bonds, and had the exclusive possession of the keys to the safe. As the interest fell due on the bonds, he took them out, cut the coupons therefrom, and replaced them in the safe and locked it again. Finally, on taking out the envelope containing the bonds, for the same purpose, he discovered that four bonds, two of \$1,000 each, and two of \$500 each, had disappeared therefrom. The jury have found that he put them in the safe and did not remove them therefrom. There was no evidence that the vault or the safe had been broken, nor that the lock had been tampered with. These facts being unquestioned, and the bonds having been taken from the safe, it necessarily follows that it had been opened with a key suited to the lock. In order to get access to the safe a person would be obliged to step into the vault. If he entered during business hours, one key would enable him to procure the bonds. If at other hours, it would require two keys to reach them from the office. The fact that the bonds were taken under these circumstances, was certainly some evidence that the company had not kept "a constant and adequate guard and watch over and upon the safe," as by its agreement it was bound to do. It further agreed to prevent the access of any other renter to the safe of the defendant in error, and to protect his safe and its contents from any dishonesty of the company's employees. If any third persons were given access to the vault, under circumstances that would have enabled them to unlock the safe and remove the bonds, and they had so done, although a contingency not provided for in the agreement, yet it cannot be pretended that it would not be evidence of a want of ordinary care. So, if the bonds were purloined by either renter or employee, it was certainly evidence to go to the jury of an omission, on the part of the company, to exercise that ordinary care and vigilance which men ordinarily exercise, and ought to exercise, under such circumstances, in the protection of their own property. The vault and the safe were in the possession, and under the protection, of the company. The manner in which the bonds were most probably taken shifted the burden of proof. It threw upon the company the

necessity of making some explanation to rebut its *prima facie* negligence. The case is not like *Finnucane v. Small*, 1 Esp. 315, in which there was no express agreement as to the care to be exercised. Nor is it like *Farnham v. Camden & Amboy R. R. Co.*, 5 P. F. Smith, 53, where it was held that proof merely of loss was not sufficient to put the bailee on his defense. The evidence, in the present case, of the defendant in error did not stop with merely showing the loss. It showed the bonds had been abstracted by some one entering the vault and opening the safe by means of a key. The presumption of want of ordinary care was thereby created. All the evidence calculated to rebut that presumption was fairly left to the jury by the learned judge.

The other assignments have no merit, and were not urged in the argument.

Judgment affirmed.

RECENT AMERICAN DECISIONS.

SUPREME COURT OF PENNSYLVANIA, JANUARY AND FEBRUARY, 1878.

DOMICILE.

Change of residence: what does not amount to: intention.—A, being unmarried, sold his farm in West Virginia and came to Pennsylvania, bringing his personal property with him, and made his home with his brother-in-law, but paid no taxes in either State after he sold his land, and died in Pennsylvania. It was contended that he had not changed his residence and that his estate was not liable for the collateral inheritance tax of this State. 1 Bouv. Law Dic. 489, defines domicile to be "that place in which a person has fixed his habitation without any present intention of removing therefrom. Held, that a mere intention to remove permanently without an actual removal works no change of domicile; nor does a mere removal from the State, without an intention to reside elsewhere. But when a person sells all his land, gives up all his business in the State in which he lived, takes his movable property with him and establishes his home in another State, such acts *prima facie*, prove a change of domicile. *Hindman's Appeal*.

FIRE INSURANCE.

1. *Unsigned conditions printed on back of policy when part of the contract.*—Where a policy of fire insurance, among other provisions and express conditions, provided that the loss should be "payable in sixty days after the notice, proof, and adjustment thereof, in conformity to the conditions annexed to this policy," and certain unsigned provisions, entitled "Conditions of Insurance," were printed on the back of the policy, such indorsed and unsigned conditions are part of the contract between the insurer and insured. *Kensington Nat. Bank v. Yerkes*.

2. *Interpretation of clause providing that policy should become void upon creation of an incumbrance on the premises: confession of judgment, effect of, etc.*—One of the conditions printed upon the back of such a policy provided that "should there at any time, during the life of the policy, an incumbrance fall or be executed upon the property insured sufficient to reduce the real interest of the insured on the same to a sum only equal to or below the amount insured . . . then the policy shall become void;" the insured confessed a judgment greater in amount than the value of the

property. *Held*, that the policy was thereby avoided, even though no execution ever issued upon such judgment. An incumbrance "falls" upon a property when a judgment is entered. *Ib.* (W. Not. Cas.)

STATUTE OF FRAUDS.

Parol promise to answer for the debt of another, when not within the statute: promise to pay out of funds transferred by the debtor for the purpose.—Where one makes a parol promise to pay the debt of another, out of funds transferred to the promisor for the purpose, such promise is not within the statute of frauds. The creditor to be benefited, though not present at the time of the promise, becomes the owner of the fund thus impressed with a trust for him, and as such can sue for it. *Justice v. Tallman* (W. Not. Cas.)

RECENT ENGLISH DECISIONS.

ANIMALS.

Property in wild: embezzlement: master and servant.—A gamekeeper, not authorized to take or kill rabbits for his own use, took and killed some wild rabbits upon his master's land, and converted them dishonestly to his own use by selling them. The taking, killing, removing, and selling, were parts of one continuous action. *Held*, that a conviction of such gamekeeper for embezzlement of the rabbits could not be sustained. *The Queen v. Read*, L. R., 3 Q. B. D. 181.

FIRE INSURANCE.

Interest of plaintiff at time of loss: vendor in possession: intended demolition of premises under compulsory power.—The plaintiff insured his premises in the defendants' office by a policy which provided that their capital should be liable to pay to the assured "any loss or damage by fire to the buildings" not exceeding 1600*l.* The premises were afterward required by the Metropolitan Board of Works under their compulsory powers, in order that they might be pulled down for the improvement of a street, and the amount of purchase-money payable to the plaintiff was assessed by arbitration, according to the Land Clauses Act. After the board had accepted the plaintiff's title, but before he had executed a conveyance, the premises were destroyed by fire. *Held*, that the defendants were liable to pay the plaintiff 1500*l.*, the full value of the buildings at the time of the fire, and not merely the damage done to the buildings considered as old materials, for the dealings between the board and the plaintiff did not affect the defendants' contract. *Collingridge v. The Royal Exchange Assurance Corporation*, L. R., 3 Q. B. D. 173.

MARRIAGE.

Nullity of: consanguinity: marriage illegal by the law of domicile.—The petitioner and respondent, Portuguese subjects domiciled in Portugal, and first cousins to each other, came to reside in England in 1858, and in 1866 they went through a form of marriage before the registrar of the district of the city of London. In 1873 they returned to Portugal, and their domicile throughout continued to be Portuguese. By the law of Portugal a marriage between first cousins is illegal, as being incestuous, but may be celebrated under a Papal dispensation. *Held* (reversing the decision of the court below), that the parties being by the law of the country of their domicile under a personal disability

to contract marriage, their marriage ought to be declared null and void. (*Simonin v. Mallac*, 2 Sw. & Tr. 67; 29 L. J. [P. M. & A.] 971, distinguished.) *Sotomayor v. De Barros*, L. R., 3 P. D. (C. A.) 1.

SALE.

False representation: of personal property: contagious disease, animals affected with: sale in market: implied representation that animals not suffering from disease: conditions of sale: contagious diseases (animals) act, 1869 (32 and 33 Vict., c. 70, s. 57): vendor and purchaser.—The defendant sent for sale to a public market pigs which he knew to be infected with a contagious disease; they were exposed for sale subject to a condition that no warranty would be given and no compensation would be made in respect of any fault. No verbal representation was made by or on behalf of the defendant as to the condition of the pigs. The plaintiff having bought the pigs, put them with other pigs, which became infected; some of the pigs bought from the defendant and also some of those with which they were put died of the contagious disease. The plaintiff having sued to recover damages for the loss which he had sustained. *Held* (reversing the judgment of the Queen's Bench Division), that, although the defendant might have been guilty of an offense against the contagious diseases (animals) act, 1869, he was not liable to plaintiff, for that his conduct in exposing the pigs for sale in the market did not amount to a representation that they were free from disease. *Ward v. Hobbs*, L. R., 3 Q. B. D. (C. A.) 150.

SPECIFIC PERFORMANCE.

Underlease: waiver of objection to title: constructive notice of provisions in original lease: qualified covenant not to assign or underlet without consent: clause of re-entry not applicable to negative covenants: usual covenant: covenant not to mow meadow land more than once a year: clause of re-entry in case of bankruptcy, composition with creditors, or execution issued against lessee: merger: reversion.—Where a parol contract is made for the grant of an underlease subject to a question of title, possession taken with the knowledge and consent of the grantor is not of itself a waiver of an objection to title by the grantee, but it is only evidence of the acceptance of the title, which may be rebutted by other circumstances. Upon an agreement to grant an underlease the grantee has constructive notice of the provisions of the original lease only when he has a fair opportunity of ascertaining what they were. Where a lease provides that the lessee shall not assign or underlet without the consent in writing of the lessor, which, however, is not to be withheld from any assignment or underlease to a respectable and responsible person, it is unnecessary to the validity of an assignment or underlease to a person of that character that the consent of the lessor should be first obtained. *Semble*, that a power of re-entry, upon the lessee willfully failing or neglecting to perform any covenant, does not apply to a breach of a negative covenant. In a lease of a farm a covenant not to mow meadow land more than once a year is not an unusual covenant, so as to excuse an intended assignee from accepting the title. But a power of re-entry in a lease, if the lessee and his assigns become bankrupt, or make a composition with creditors, or if execution should issue against either of them, is unusual, and an intended assignee is not bound to accept an assignment of a lease containing such a covenant. Where a lessor,

being himself a tenant for years, grants to his sub-lessee the residue of his interest from the termination of the existing sub-lease, the grant operates as an *inter esse* terminus, and the existing sub-lease does not merge; and a right of re-entry contained in the original lease would still exist and enable the lessor to re-enter for breach of covenant. *Semble*, where two pieces of land are demised by one lease containing a power of re-entry over both, and afterward the reversion in one of them is assigned to the lessee, the right of re-entry remains intact over the piece of land of which the reversion remains vested in the lessor. *Hyde v. Warden*, L. R., 3 Ex. D. (C. A.) 72.

RECENT BANKRUPTCY DECISIONS.

DISCHARGE.

Petition for: what it should state.—A petitioner for a discharge in bankruptcy should clearly state from what debts he desires to be discharged. Where, in involuntary proceedings against one who is a member of a partnership, the bankrupt files his petition for a discharge, giving no schedule of firm debts and assets, nor praying for a discharge from firm liabilities, the discharge granted upon such petition will only relieve him from his individual indebtedness. *Sup. Jud. Ct. Me. Corey v. Perry*, 17 Nat. Bankr. Reg. 147.

INSOLVENCY.

What constitutes: knowledge: notice.—A person, being a merchant or trader, is insolvent when unable to pay his debts as they mature in the ordinary course of business. The word "knowledge" in section 34, as amended, of the Bankrupt Act, means actual knowledge, as contra-distinguished from constructive knowledge. A person having notice of such a state of facts in regard to the financial affairs of the bankrupt as in law constitute insolvency, either as that term denotes when applied to a merchant or trader, or when used in its general and popular sense, must be presumed to have actual knowledge, upon receiving any payment, assignment or conveyance from the bankrupt, that the same is a fraud upon the Bankrupt Act. *U. S. Dist. Ct. Iowa. In re Hauck*, 17 Nat. Bankr. Reg. 158.

JURISDICTION.

1. *Rights of creditors of bankrupt determined by bankrupt, not by State law.*—Where an adjudication has been had and an assignee under the State law has surrendered the estate in his hands, the rights of creditors are to be determined by the court under the provisions of the Bankrupt Law, and not under those of the State Law. *U. S. Dist. Ct., N. D. Ohio. In re Bousfield & Poole Mfg. Co.*, 17 Nat. Bankr. Reg. 153.

2. *Parties: when assignee not necessary party.*—Where leave has been granted to a creditor, pursuant to the provisions of section 5106, to proceed in a cause which was then pending, a judgment obtained therein is valid, although the assignee is not made a party. *Ib.*

3. *Interest.*—Interest upon the claim accruing, after the commencement of the proceedings, is allowable. *Ib.*

4. *Priority of United States as creditors.*—Where the United States has recovered a judgment in such an action, such judgment, including the damages, costs and interest, is entitled to priority, and no proof of the claim need be made. *Ib.*

MORTGAGE.

To secure future advances: when valid: mistake: foreclosure.—A mortgage executed by a bankrupt prior to

the commencement of the proceedings in bankruptcy, to secure a present indebtedness and also future advances of goods to be made by the mortgagee, is a valid security for such indebtedness and the amount of advances actually made. A mistake in the description of the premises in such mortgage may be corrected as against the assignee of the mortgagor subsequently appointed. Where the mortgagee has proved his debt as a secured claim in the proceedings, an action to foreclose the mortgage should be brought in the Bankrupt Court by leave of the court first obtained. *U. S. Dist. Ct. Wis. Schulz v. Bolting*, 17 Nat. Bankr. Reg. 167.

REDEMPTION.

By assignee of bankrupt's property.—The assignee may redeem property of the bankrupt, which has been sold on execution to the judgment creditor, without paying the unsatisfied balance of the judgment, or taking the property subject to the lien of such judgment. *U. S. Dist. Ct. Cal. Lloyd v. Hoo Lue*, 17 Nat. Bankr. Reg. 170.

UNITED STATES SUPREME COURT ABSTRACT.

CONSTITUTIONAL LAW.

Congress may control telegraphs: State law giving exclusive right to maintain telegraphs invalid.—Under the power given to Congress to regulate commerce among the several States, control may be exercised over telegraphs, and laws of States, in conflict with congressional legislation on the subject, are invalid. Accordingly, a law of Florida, giving an exclusive right to a company to maintain a telegraph line in a portion of that State, held inoperative against a company entitled to the privileges of the act of Congress of July 24, 1866, in relation to telegraphs. Decree of Circuit Court of Florida affirmed. *Pensacola Telegraph Co., appellant, v. Western Union Telegraph Co.* Opinion by Waite, C. J.

MUNICIPAL BONDS.

When county bonds invalid in hands of bona fide holder.—By a statute of Missouri, it was enacted, that whenever twenty-five persons, tax payers and residents of a municipal township, should set forth their desire to subscribe to the capital stock of a railroad company proposing to build a road into or near said town, it should be the duty of the County Court to order an election to determine if such subscription should be made; and if it should appear that two-thirds of the qualified voters voting at such election were in favor of such subscription, it should be the duty of the County Court to make such subscription in behalf of the township, according to the terms and conditions thereof, and to issue bonds in the name of the county. On the 5th of May, 1870, the County Court of Bates county, having received a proper petition, ordered that an election be held in a township to determine whether the town should subscribe \$90,000 for the stock of the C. R. R. Co., to be paid in county bonds, and the agent was directed to make such subscription on the books of the company, and report to the court what he had done. The agent applied to the company, but it had no books, and for other reasons he did not make the subscription, and reported to the court that "the bonds of said township are not subscribed," which report was formally approved. Afterward the County Court made another order, stating that the subscription had been made to the C. rail-

road; that a consolidation had been made between that road and another, resulting in the G. Railroad Co.; that \$90,000 in bonds of the county be issued in payment of such subscription; and that B, an agent to receive and dispose of the bonds, be authorized to subscribe for the stock of the G. Co. The stock was subscribed for, in accordance with this order, and the bonds issued. *Held*, that the subscription to the stock of the G. Co. was not valid, and the bonds issued therefor were invalid, even in the hands of *bona fide* holders for value. Judgment of Circuit Court, W. D. Missouri, reversed. *County of Bales, plaintiff in error, v. Winters*. Opinion by Hunt, J. Clifford, Swayne and Strong, JJ., dissented.

PRE-EMPTION.

Right to, cannot be obtained by intruder upon lands of another.—No right of pre-emption can be established by a settlement and improvement on public lands where the claimant has obtained possession by breaking into the inclosure of one who has already settled upon, improved, and inclosed the same land. Such an intrusion, though made under pretense of pre-empting the land, is but a naked, unlawful trespass, and cannot initiate a right of pre-emption. Judgment of Supreme Court of California reversed. *Atherton v. Fowler*. Opinion by Miller, J. Waite, C. J., and Clifford, J., dissented upon a question of fact in the case.

COURT OF APPEALS ABSTRACT.

AGENCY.

Agent of trustee cannot bind trust estate.—Plaintiff, who did certain work for a trust estate, testified that he made the contract to do the work with one O. who was acting in the matter as the agent of the trustee. The trustee claimed that he did not employ plaintiff, but that he employed O. to do the work. *Held*, that while the trustee might, if he had no funds in his hands to pay for work done on the estate, and the work was necessary for its preservation, make such work a charge on the estate, yet his agent would have no authority to do so and could only charge him personally on his contract, and that plaintiff could not hold the trust estate for work done by him under a contract with the agent, but only the trustee personally. Judgment below affirmed. *New v. Nicoll*. Opinion by Earl, J.

[Decided March 19, 1878.]

CONTRACT.

Contract for storage at fixed rate: termination of contract: notice to remove or pay higher rate: implied contract.—Defendants had stored in plaintiff's warehouse a quantity of Brazil wood at an agreed price for storage of 12½ cents a ton per month, the contract being terminable at the end of any month by either party. Plaintiff gave defendants notice to remove the Brazil wood by the end of a certain month, stating that if not removed by that time the price for storage thereafter would be \$2 per ton per month. Defendants declined to remove the Brazil wood, claiming that the contract for storage was to last until it should be sold, and it remained in plaintiff's warehouse for some months after the time its removal was demanded. The market rate of storage at the time for the article was 12½ cents a ton a month. *Held*, that a contract to pay \$2 per ton for storage could not be implied from the acts of defendants, and they were liable only

for the market rate. Judgment below affirmed. *Haselton v. Weld*. Opinion by Andrews, J.
[Decided March 26, 1878.]

CRIMINAL LAW.

1. *Murder in the second degree: what facts will justify conviction for.*—Defendant was on trial for murder by shooting deceased with a pistol. It was shown that the pistol was used, and the evidence tended to show that it was used intentionally, and in such close proximity to a vital part of deceased that it would scarcely fall of a fatal result and there was doubt whether defendant was at the time in any peril, or, if so, whether he attempted to escape. *Held*, that the submission to the jury of the question whether defendant was guilty of murder in the second degree was not error. Judgment below affirmed. *Blake, plaintiff in error, v. People*. Opinion by Folger, J.

2. *Evidence: responsive answer.*—A witness for the people was asked, on cross-examination, if he would swear that the deceased was not at the time choking prisoner? He answered, "I would not swear it, but don't think he was." *Held*, that it was not error to refuse to strike out the words, "but don't think he was," on motion of defendant. *Ib.*

3. *Evidence: testifying not positively, but to best of belief.*—Testimony of witnesses who would not state positively, but said what they stated was "to the best of my knowledge;" "I believe it was, etc." *Held*, not objectionable on that ground. *Ib.*

4. *Evidence: questioning accused as to motive of acts.*—The district attorney put questions to the prisoner on cross-examination calling for the motives which influenced him in certain actions. *Held*, not objectionable. *Ib.*

[Decided March 19, 1878.]

MUNICIPAL CORPORATION.

Powers conferred on common council cannot be delegated by it to agent.—By the charter of the city of Binghamton it is provided that improvements to sidewalks shall be made at the expense of the premises in front of which they are required, and that the common council shall order the work to be done within a specified time, of which notice shall be given to the owner of the premises interested, and that "if any work shall not be done within the time limited therefor the common council shall, by contract or otherwise, cause it to be done and assess the expense thereof upon said premises or upon the owner thereof." The common council passed a general resolution directing the superintendent of streets, when the owner neglected to do the work by the time limited, "to cause the same to be done." *Held*, that the power conferred upon the common council involved an exercise of discretion and could not be delegated by it to the street superintendent, and that the ordinance in question was invalid. Judgment below reversed. *Birdsall v. Clark*. Opinion by Church, C. J.

[Decided March 19, 1878.]

PRACTICE.

Assignment of claim which has been sued on: assignee takes cum onere: costs.—Where a party brought action and a demurrer was interposed to the complaint and sustained, and instead of amending his complaint he transferred the cause of action to plaintiff who brought suit thereon in her own name: *Held*, that an order of

the Supreme Court requiring plaintiff to pay the costs accrued in the former action was proper and could be enforced. When plaintiff took the claim against defendants she took it *cum onere* and was liable to the same extent as the former owner. Order below affirmed. *Barton v. Speis*. Opinion *per Curiam*. [Decided March 19, 1878.]

PROMISSORY NOTES.

Defense to: consideration: condition precedent.—Where promissory notes were given in pursuance of a stipulation to discontinue a suit, and an agreement to deliver releases, and such agreement and stipulation formed in part the consideration for the notes, but the suits were not to be discontinued until the notes should have been paid, and the releases if delivered before were not to become operative and binding until that time: *Held*, that the discontinuance of the suits and the delivery of the leases were not conditions precedent to but were independent of the notes, and the failure to do these acts would not furnish a defense to the notes. Judgment below affirmed. *Bruce v. Carter*. Opinion by Rapallo, J. [Decided February 22, 1878.]

TRUSTS.

Work done for trust estate on credit of trustee.—Where a party has done work for the benefit of a trust estate, upon the personal responsibility of the trustee, he can get no lien upon the estate by the mere promise of the trustee to pay him out of the estate. Motion for re-argument denied. *New v. Nicoll*. Opinion *per Curiam*. [Decided April 2, 1878.]

INTERNATIONAL LAW.

LETTER FROM PROF. LORIMER.

THE UNIVERSITY OF EDINBURGH, }
March 27th, 1878. }

To the Editor of the Albany Law Journal:

SIR—May I venture, through your widely circulated columns, to call the attention of American Jurists to three very remarkable articles on the organization of the union of European States (*Die Organisation des europäischen Staatenvereins*) which Dr. Bluntschli, the celebrated Professor of International Law, at Heidelberg, has recently contributed to the "*Gegenwart*."*

In the first of these essays Dr. Bluntschli has explained the scheme which Sully ascribed to Henry IV and to Queen Elizabeth, with great clearness, and with a more enlightened and cordial appreciation than has commonly been bestowed upon it, and concludes with a few somewhat disparaging remarks on the proposals of the Abbé de St. Pierre and Rousseau. In the second he has done me the honor to criticize a paper on the same subject, which I published in the *Revue de Droit International*† under the title of *Le Problème final du Droit International*. The third he has devoted to his own views, and to the plan for their realization, which has occurred to himself. The interest which at any time would attach to the discussion of such a theme by the distinguished President of the Institute of International Law is en-

hanced, not only by present circumstances, but by a hint of much significance which he throws out, almost incidentally, as it would seem, towards the conclusion of the third article. "I know not," he says, "when another earnest effort to solve this problem may be expected in the actual life of the world. But I am confident that, at no distant date, one if not more (*lin oder linige*) great European statesmen will undertake it. *The work is a far lighter one than the founding of the German Empire.*" Those who know the relation in which Dr. Bluntschli stands to the German Empire and to the great Chancellor will have no difficulty in ascribing their due value to these words, and they will probably be of opinion that a problem which is thus spoken of is not very far beyond the boundaries of the narrow region over which even diplomatic vision extends.

In the general views for which I contended, I am gratified to find that Dr. Bluntschli is altogether with me. He admits: 1st. The impossibility of conferring on international law the character of a positive system, otherwise than by the action of factors analogous to what, in municipal law, we call legislation, jurisdiction and execution. 2nd. That the realization of these factors, within the sphere of the relations of separate States, is not permanently shut out by any facts or laws inherent in their character. 3rd. That the failure of all previous schemes of international organization can be satisfactorily explained by their aiming at two impossible objects: (a) the establishment of an international organism which should be immutable; and (b) the political equalization of recognized states. As the basis of his scheme Dr. Bluntschli frankly accepts the *de facto* principle which lies at the root of the doctrine of recognition; and in thus breaking with the revolutionary schemes of his predecessors, I am sure he is eminently right. 4th. Dr. Bluntschli farther admits the necessity of conforming to modern conceptions of liberty by recognizing the public opinion of the several states directly by means of representatives chosen by or from the various municipal legislatures. So far, I believe, then, I have the concurrence of my eminent colleague, and it goes pretty nearly all the length that I care for. The scheme which I suggested in the *Revue*, I intended as an illustration of these principles, rather than as a suggestion for their realization. I am, consequently, not much moved by the allegation that I have dreamt the English constitution, or rather, as he says, the constitution of the United States, whereas he prefers to dream the German Bund. It is very possible that neither of them may offer a model which admits of imitation in international relations, and the former has surely as good a municipal history as the latter to recommend it. But on the practical branch of the subject I am far from wishing to dogmatize. That I shall gladly leave in the hands of "one or more great European statesmen," and shall only be too well pleased if, to any extent, however insignificant, I may have contributed to bring it under their notice. This object will be far better effected should Dr. Bluntschli's views elicit the criticism of such men as Wm. Beach Lawrence, and President Woolsey, and it is as an appeal to them and to the other eminent international Jurists, of whom it is your good fortune to have so many, rather than to the public or even to the profession, in the first instance, that I now write. Your obedient servant,

* Nos. 6, 8 and 9: 9th February, 23d February, and 2nd March, 1878.

COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, April 9, 1878:

Judgment affirmed with costs—*Staats v. Bristow*; *Wallace v. Vreeland*; *Clusman v. Long Island Railroad Co.*; *Sandford v. Wheeler*; *People ex rel. Haneman v. Commissioners of Taxes*; *The Third National Bank of Buffalo v. Blake*; *Higgins v. Murray*.—Order affirmed with costs—*White v. Bogart*.—Motion denied without costs—*Rathbun v. The Citizens' Steamboat Company of Troy*.—Motion for reargument denied with \$10 costs—*Phelps v. Naulen*.—Judgment reversed and new trial granted; costs to abide event—*Dutchess County Mutual Insurance Company v. Hackfield*; *Elsworth v. Etna Insurance Co.*—Order reversed and new trial granted; costs to abide event—*Jennings v. Conboy*.—Order granting new trial reversed, and judgment ordered on verdict, with costs—*Moore v. The Mayor, etc., of New York*.—Order of General Term reversed, and order of Special Term affirmed, with costs—*People ex rel. Thompson v. Board of Supervisors of Hamilton Co.*

CORRESPONDENCE.

THE POSITION OF THE COURT OF APPEALS AS TO WHOM AN INSURANCE AGENT REPRESENTS.

To the Editor of the Albany Law Journal:

SIR—I have been much astonished to find in the foot note to page 629 of Mr. Wood's Treatise on The Law of Fire Insurance, a book which otherwise I have found to be very carefully prepared, the remarkable statement, in discussing the subject of the power of the insurer, as he styles it, "to make its agent the agent of the assured," that the decision in *Train v. Holland Purchase Ins. Co.* leaves the whole doctrine unsettled in the Court of Appeals of this State. This statement is so entirely erroneous, and so likely to mislead some who may read this book and accept it as authority that it ought to be immediately corrected. The decision in *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, written by Judge Folger, and in which all the judges concurred, placed beyond the reach of a doubt the right of an insurance company to insert in its policy the clause in question that "any person other than the assured who may have procured this insurance to be taken by this company shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever or in any transactions relating to this insurance," and established the binding effect, of such a clause in the contract, upon the assured who accepts the policy. What language could be stronger than that of Judge Folger in this case, where he says that "the plaintiff and defendant have in the policy, the contract between them expressly agreed that Brand should be deemed the agent of the plaintiff and not of the defendant under any circumstances whatever;" and again where he says: "But we must take the contracts of the parties as we find them and enforce them as they read."

This decision of the Court of Appeals in *Rohrbach v. Germania Fire Ins. Co.*, which Mr. Wood cites, was followed by the same court in *Alexander v. Germania Fire Ins. Co.*, decided February 22d, 1876, and reported in 66 New York Repts. 464, a case which Mr. Wood has

wholly overlooked and has not cited at all in the note referred to, although he had previously cited it as affirming this very doctrine on page 412 of his book, and afterward on another point on page 637, wrongly indexed page 635. In this case the court, Rapallo, J., said: "But the policy now in question contains an express agreement that any person other than the assured who may have procured the assurance to be taken by the company shall be deemed to be the agent of the assured and not of the company under any circumstances whatever or in any transaction relating to the assurance. In *Rohrbach v. The Germania Insurance Company* (62 N. Y. 47) this court decided that this clause was operative and precluded the assured from claiming that the company was bound by the knowledge of a similar agent through whom a policy had been procured." All the judges, except Church, C. J., and Miller, J., who did not vote, concurred in the opinion following the decision in *Rohrbach v. Germania Ins. Co.*

How can Mr. Wood say that *Train v. Holland Purchase Ins. Co.* leaves the whole doctrine unsettled? It does not appear by the decision which was rendered by Judge Miller in that case that the question was considered at all by the Court of Appeals. "The only question," the judge says, "arising upon this appeal is whether, at the time when the plaintiff and defendant entered into the contract contained in the policy of insurance upon which this action was brought, there was another policy in the Andes Insurance Company in violation of the contract between the parties," and having thus stated the question he proceeds upon the assumption that Goggin, the agent who procured the insurance, was the agent of the plaintiff, as the defendant claimed, and, without entering into the discussion of any other question, he affirms the judgment upon the ground of the fact that the surrender and cancellation of the Andes policy was complete before the insurance in the defendant's company was effected. I cannot perceive the slightest sign here of the Court of Appeals wavering or receding by a single step from the position taken by it in the decisions first above cited, or any ground for Mr. Wood's statement that the case last cited leaves the whole doctrine unsettled. On the contrary, the Court of Appeals has, by their decisions in the cases cited, without a dissenting opinion, determined and set the question forever at rest in every case where the clause in question is contained in the policy, and I think no company now issues any policy without this clause in it.

M. WINBLOW.

NEW YORK.

[To this letter Mr. Wood makes the following answer.—Ed. A. L. J.]

To the Editor of the Albany Law Journal:

SIR—Your correspondent (Mr. Winblow) calls attention to an erroneous citation upon page 629 of my work on Fire Insurance. The case intended, is "*Sprague*" v. *Holland Purchase Ins. Co.* instead of "*Train*," and it will be seen that this is the case intended by reference to page 628, and to the case cited at the end of the note on page 627. I had previously discovered the error and caused the correction to be made in the plates. I regret that the error should have crept into the work, but, I have never yet seen a law book citing numerous cases in which more or less such mistakes did not occur. The most patient and careful proof-reading will not detect every error, and it often happens that the

printers fail to make corrections, when the proof is in fact corrected. With this correction, I think my remarks in reference to the condition of the question, as to the power of the insurer to make its agent the agent of the assured by the insertion of such a provision in its policy, is fully justified. In that case the court held that such a provision in a policy can have no application, when the insurer requires that the application shall be filled out by its agent. Now I insist, that this doctrine involves, to say the least, a great relaxation of the rule adopted in *Rohrbach v. Germania Fire Insurance Co.*, and *Alexander v. the same*, and shows a strong tendency on the part of the court to recede from the doctrine established by the latter cases. As I said before, I regret that the mislocation occurred, but I hardly think that any mischief could result therefrom, as I give in the same note so much of the opinion of Folger, J., in *Rohrbach v. Germania Fire Insurance Co.* as relates to the question, and leave the doctrine of the Court of Appeals standing precisely as it does stand, that the agent of the insurer may, by a provision in the policy, be converted into the agent of the assured, as to the filling up of the application, *unless he is required by the insurer to perform that duty*. I do not desire here, to enter into a discussion as to the soundness of this doctrine, but I hardly feel as confident as your correspondent does, that the question "is put forever at rest" by these decisions of the Court of Appeals, or even that the Court of Appeals itself, will long adhere to this doctrine even as modified by *Sprague v. Holland Purchase Insurance Co.* This latter case, at least, affords a loop-hole through which the assured can generally escape the effects of such provisions.

H. G. WOOD.

NEW BOOKS AND NEW EDITIONS.

BUMP'S NOTES OF CONSTITUTIONAL DECISIONS.

Notes of Constitutional Decisions: being a digest of the judicial interpretation of the Constitution of the United States, as contained in the various Federal and State reports, arranged under each clause of the Constitution. Together with an appendix, containing the Declaration of Independence and Articles of Confederation. By Orlando F. Bump, New York: Baker, Voorhis & Co., 1878.

THE subject of constitutional law is one which has always been of very great importance in this country, and its importance bids fair to increase rather than diminish, as the country grows older, from the radical and extensive changes which are from time to time made in the fundamental law of the nation and in that of the various States. The Federal Constitution has required a vast amount of judicial explanation and construction, and the reports of the Federal and State courts are full of cases wherein the various powers, conferred by that instrument upon the general government, or taken away from the States, are defined and ascertained. The volume before us contains the Federal Constitution, with notes under each clause and section, referring to the various cases where such section or clause has been construed or applied. The value and convenience to the lawyer, and, in fact, to almost every one, of such a work, cannot be overestimated. The results embodied therein constitute the permanent, fundamental and supreme law of the country, and to know and understand this law thoroughly is a matter of prime necessity to every educated person. We know of no book wherein the case law, upon this subject, is so well, and fully, and systematically exhibited, as here. As above stated,

the order of the Constitution, itself, is followed, but where the cases, upon any particular principle, have been numerous, the notes have been arranged under appropriate subdivisions. Appended to the main body of the work are the declaration of independence and the articles of confederation, which formed the basis of the government before the adoption of the Constitution. The index is good; there is a table of cases cited, and the book is excellently printed and bound.

SAWYER'S REPORTS, VOLUME IV.

Reports of cases decided in the Circuit and District Courts of the United States for the Ninth Circuit. Reported by L. S. B. Sawyer, Counselor at Law. Volume IV, San Francisco: A. L. Bancroft & Co.

Among the decisions of value contained in this volume, we notice these: *Chapman v. Toy Lung*, p. 28. Under the treaty between the United States and China, Chinamen are entitled to reside in the United States upon the same terms as the subjects of Great Britain and France, and this implies the right to follow any lawful pursuit or calling not prohibited to the subjects of those two powers. *In re Temple*, p. 92. The assignee in bankruptcy is entitled to recover property assigned in fraud of the bankrupt act, though such assignment was made in strict compliance with the insolvent law of the State, and was for the equal benefit of all the creditors. *The Ocean Spray*, p. 106. The rule that freight is the mother of wages does not apply to a fishing or whaling voyage, and appears to be abolished altogether by section 4525 of the Federal Revised Statutes. *Cody v. Cent. Pacif. R. R. Co.*, p. 115. A contract for "one continuous emigrant passage from Omaha to San Francisco," is not a contract to carry one from Omaha to an intermediate station and a second from that station to another, and so on, but only a contract to carry the same person through the entire route, and is only enforceable as such a contract. *In re Wolf*, p. 168. The mere letting a note, payable one day after date, remain unpaid forty days after it falls due, is not an act of bankruptcy in the absence of any demand for payment. *Dowell v. Cardwell*, p. 217. An agent employed to collect a claim against the government for a certain per centum of the amount realized, whether in bonds, drafts or cash, has a lien on the fund for his compensation. *United States v. Greathouse*, p. 457. The term "enemies," as used in the constitutional clause, defining treason (Const., art. III, § 3) applies only to the subjects of a foreign power, and does not embrace rebels. *United States v. Knowles*, p. 517. Allowing a sailor, who has fallen overboard, to drown, is not murder on the part of the one in command of the ship; it would be no more than manslaughter. The reporting is well done; the index is fair, and in other respects the volume is fully up to the average law report.

TEXAS COURT OF APPEALS REPORTS, VOLUME II.

Cases argued and adjudged in the Court of Appeals of the State of Texas, during the Austin Term, 1877, and part of the Tyler Term, 1877. Reported by Jackson & Jackson. Volume II. St. Louis: Soule, Thomas & Wentworth, 1878.

This volume brings the reports of the Court of Appeals, of Texas, to a comparatively late date in 1877. The reporting is carefully done, and the cases as a rule valuable. Among those of general importance we would refer to the following: *Ex parte Schwartz*, p. 75. The constitutional guaranty of the right of bail is not

operative after trial and conviction. *Kellman v. State*, p. 222. A canvas tent, kept for the purpose of public prostitution, held to be a disorderly house under the statute. *Pringle v. State*, p. 300. In the absence of any thing in the record of a capital case, to show that the accused was either arraigned or that he pleaded to the indictment, the judgment of conviction will be reversed and the cause remanded. *Davis v. State*, p. 425. A license, granted under the provisions of a city charter, to keep a house of prostitution, held to be a defense to an indictment for the offense of keeping such a house under a statute enacted previously to the granting of the charter. *Haney v. State*, p. 504. Upon the trial of an indictment for burglary the jury found the prisoner guilty of "burglarly and theft." Held, a ground for arrest of judgment. In *Pugh v. State*, p. 539, drunkenness is held, not to mitigate voluntary crime, and in *Coldbath v. State*, p. 391, temporary insanity, caused by drunkenness, is said not to excuse crime, though the fact that the accused was drunk at the time is admissible as evidence upon the question, whether the murder was of the first or second degree. *Holoman v. State*, p. 610. Selling candy in packages, containing prizes, held to be a violation of the law against lotteries.

NOTES.

THE April number of *The American Law Review* contains several articles of interest to the profession in a general way, and a single one on criminal law of practical value. The opening essay upon the "Nicholas Plan for electing the President," by Temple Bodley, Esq., of Louisville, Ky., will be read with interest by those who are engaged in political life. "The Turf Frauds and the Detectives," is an interesting history of a prosecution which occupied the attention of the English authorities and public within the past year, and attracted considerable notice elsewhere as showing the defects of the detective system. Mr. John Wilder May discusses, under the head of "Mens Rea," the question whether one who does an act which appears to him to be lawful, but which is in fact unlawful, should be convicted. The concluding article is entirely made up of two letters written by Chancellor Kent upon the subject of codification and the penal law. The digests, book notices and other editorial matter in the present number are, as usual, interesting and valuable.

A correspondent of the London *Times* quotes from Professor Leone Levi, in his "International Commercial Law," the following account of the legal modes of accepting bills in various countries of Europe: "Denmark and Sweden—Acceptance is expressed by the word 'accept' written on the bill itself, and followed by the signature of the drawee. Netherlands and Portugal—The acceptance must be clearly expressed in the bill itself, and must be written and signed by the acceptor. Russia—The acceptance is expressed by the word 'accepted' written on the bill itself, followed by the signature of the acceptor. Spain—If the drawee accept, he must express it in the bill itself in such words as 'I accept,' or 'We accept.' The acceptance must be written. Italy—The requisites of bills of exchange are the same as those expressed by the French code."

The English judiciary seem to secure for their relatives and those bearing their names very many lucra-

tive appointments. The following list of officers and their names shows the advantage of having a friend in court: Secretary of Presentations, the Hon. E. P. Thesiger, 400*l.*; Secretary of Commissions, Mr. W. M. Cairns, 300*l.*; Secretary of Causes, Mr. J. Romilly, 1,000*l.*; Clerk of Records and Writs, the Hon. E. Romilly, 1,200*l.*; Registrar in Lunacy, Mr. C. N. Wilde, 1,000*l.*; Queen's Coroner and Attorney, Mr. Fred. Cockburn, 1,200*l.*; Master at the Crown Office, Mr. J. R. Mellor, 1,200*l.*; Associate, Mr. T. W. Erie, 1,000*l.*; Associate Exchequer Division, Mr. H. Pollock, 1,000*l.*; Master, Sir F. Pollock, 1,500*l.*; ditto, Mr. G. F. Pollock, 1,500*l.*; Queen's Remembrancer, Sir F. Pollock, 2,000*l.*; Secretary to Sir J. Hannen, Mr. J. C. Hannen, 300*l.*; Secretary to Sir R. Phillimore, Mr. Walter Phillimore, 300*l.*; Register in Bankruptcy, Mr. J. R. Brougham, 1,300*l.*; Clerk of Assize for Home Circuit, the Hon. R. Denman, 953*l.*; Associate, Mr. R. Denman, Jr.; Clerk of Assize, Midland Circuit, Mr. Arthur Duke Coleridge (salary not mentioned); Clerk of Assize, Oxford Circuit, Mr. E. Archer Wilde, 1,000*l.*; and Clerk of Assize, Western Circuit, Mr. W. C. Bovill, 1,000*l.* Some people call this sort of thing nepotism. The judges think that it is a man's duty to look after his relations, when he can do so without injury to the public service; and no one can say that the judges have been unmindful of their duty in this respect.

Lord Justice Brett made some useful observations at Manchester, England, a few weeks since, on the difficulty of measuring sentences. A few days before he had inflicted on a prisoner, convicted of forging bills of exchange, a penalty of twenty years' penal servitude; in the case before him he sentenced a prisoner, convicted of the same offense, to fifteen months' imprisonment. The difference between the sentences was great, but so, also, was the difference between the guilt of the prisoners. The first was an old offender, who had been five times convicted of gross dishonesty, and three times of forgery; the second prisoner had borne a good character for honesty, frugality, and careful attention to business, and had been tempted to commit the crime by trade difficulties arising out of the present state of affairs abroad. The first, in short, was about as bad a case, and the second as mild a case as could well be imagined; and the discretion allowed to judges in regard to sentences would be a mockery if no difference were to be made in the penalties inflicted. The motive which sometimes seems to operate to prevent the proportioning of sentences to the guilt of the prisoner in the accurate mode adopted by Lord Justice Brett is the necessity of making a public example. It may be said that forging negotiable instruments is a very serious offense in a commercial country, and the public who hear that a light penalty has been inflicted are not aware of the circumstances of mitigation, and consequently complain of the sentence.

The St. Louis Court of Appeals, in the case of *State v. Doecke*, decided on the 19th ult., hold that a coffin used to cover a corpse may, after burial, be the subject of larceny. The court say: and the property may be said to be in the person who bought the coffin for the purpose of interment. Articles which have no market value may, nevertheless, have a value which the law will recognize. It is competent for a jury, in case of larceny of a coffin, to arrive at the value of the coffin at the time it was stolen, from the fact that the coffin was new, and from the price shown to have been paid for the coffin when bought. And, where it was shown that the coffin cost \$35, they might well, under the circumstances, find the offense grand larceny, under an instruction that, to so find, they must find the coffin to be worth more than ten dollars. In a buried coffin containing a corpse there is no ownership that can be asserted by one person against another in a civil action; but an ownership of a character sufficient to support a charge of larceny will be taken to exist somewhere. It is not necessary for the purposes of the criminal law to fix this ownership, and an indictment is sufficient which charges that the coffin is the property of some person to the jurors unknown.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, APRIL 20, 1878.

CURRENT TOPICS.

THE United States Senate, on Monday last, by the decisive vote of 87 to 6, passed a bill to repeal the bankrupt law. The very large majority given for this measure in the more conservative branch of our National legislature, indicates that the people of the country are not in favor of the law, and sustains the belief we have frequently expressed that its continued existence is due to a very small body of interested persons who derive profit from its operation. Years ago it became manifest that the expectations which existed when the present bankrupt law went into force would never be realized. Twice before the experiment of a uniform bankrupt law had been tried, namely, in 1800 and 1841, and both times a repeal had followed the enactment. It was said, however, that each of these acts were defective and one sided; one of them unduly favoring the creditor, and the other the debtor. The act of 1867, it was claimed, avoided all the mistakes of its predecessors, and it was believed that it would, at the same time, afford to the honest but unfortunate insolvent a means of relief, and prevent the perpetration of frauds by the dishonest one. That these anticipations have not proved correct is a patent fact. The law, at first, afforded relief to a few who for years had been oppressed by debts which were beyond their power to satisfy, but since then it has been a source of trouble to almost every business man. Dishonest men have been able to use it to protect themselves from the consequences of unlucky ventures, while honest tradesmen, temporarily embarrassed, have frequently been ruined by it. It has interfered with the operation of the ordinary laws for the collection of debts, and has discouraged the exercise of vigilance by creditors. While professing to be uniform it has as many rules as to exemption as there are States in the Union, allowing the bankrupt in California to retain a greater proportion of his property than the bankrupt in New York. That it is generally believed to have failed in its purpose, the vote in the Senate emphatically shows. The bill now goes to the House of Representatives, and its fate there, if a vote is reached, cannot be doubtful. The popular body, at a former session, pronounced very strongly in favor of repeal, but the bill did not pass the Sen-

ate. The only hope of those who favor the continuance of the law is in delaying a vote upon it, which we trust will not be permitted.

That a uniform bankruptcy law might be devised which would be a benefit to the country, we do not pretend to deny. But to amend the present law in such a way as to render it a useful one, and at the same time satisfactory to those who now actively favor a bankrupt law, is not possible. A statute somewhat similar to the law regulating assignments for the benefit of creditors, now in force in this State, with a provision that on the payment of a certain percentage of his debts, the insolvent might be released, would be unobjectionable. But this would do away with the various official fees which now appertain to the administration of the bankrupt law, and would of course meet with no favor from the registers, marshals, etc., who receive such fees. Under the New York law, if a debtor is insolvent and desires to fairly divide his property among his creditors, he makes an assignment to some business friend who is able to give security that he will deal with the estate for the best interest of the creditors. This assignee is under the control of the court and liable to those injured if he makes an improper use of his trust. The estate is not subject to the burden of any official fees, and only a trifling commission is allowed to the assignee. Under the bankrupt law a large sum must be deposited in court; the property of the debtor must oftentimes pass through the hands of the marshal who obtains a large sum for his services; the register must be paid for every step taken; process connected with the proceeding must be served by marshals, and the assignee must be paid heavy and uncertain fees and expenses. The result is that the creditor gets little or nothing though the debtor's estate may be solvent. Abuses exist under the State law, and some estates are not prudently administered, but in nearly every case the creditor receives more than he possibly could under the bankrupt law.

The decision of Judge Baxter in the United States Circuit Court for the Northern District of Ohio, in the case of *Bank of Toledo v. Cumming*, on the 8th inst., passes upon a question of considerable importance to stockholders in National banks. In the year 1876 complainant's capital stock was assessed for local taxes at its full value, while all other property was assessed at from thirty to forty per cent only of its value. Complainant applied for an injunction restraining the collection of this tax. The court granted the relief asked to the extent of sixty per cent of the tax, saying that whether the result of the assessment was from inadvertence or design, it was an injustice that contravened the provisions of the Constitution of Ohio, as well as those of the National Banking Law, and was a wrong which the

courts might take cognizance of and redress. To an objection that the tax was a wrong to complainant's shareholders, against whom the tax was assessed, and not against the complainant, the court said that it involved the rights of the complainant as well as the rights of its corporators; that it was a trustee for them, and would, if it refused to pay the taxes, expose itself to vexatious and expensive suits, and entail upon itself irremediable injuries, and that in its corporate capacity it was entitled to a standing in court and to relief. As the assessors of local taxes in other parts of the country are accustomed to discriminate against banks in the same manner as was done in the case mentioned, it is well to have a judicial declaration that there is power in the Federal courts to intervene and redress the wrong, and that they will do it when properly applied to.

A bill introduced on Thursday in the Senate of this State provides that no contract for insurance upon the life of any person, hereafter made, shall be invalidated by any misrepresentation of any matter to said corporation in the making of such contract, "unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it has so contributed in any case shall be a question for the jury." There ought to be no objection to the passage of this bill, which is designed to prevent the interposition in actions upon life insurance policies of a kind of defense that is almost always without merit.

A bill of some importance in relation to the sale of personal property, under a contract where the vendor retains the title to the property until paid for, was introduced in the State Senate last week. It provides that one so selling and delivering property shall, within five days thereafter, file in the town clerk's office where such purchaser shall reside a statement in writing containing a description of the property, the date of the sale, the consideration and the terms of payment.

In the Supplement accompanying our present number appears an act (chap. 126) amending subdivision 17 of what is known as the repealing act of 1877, in relation to the admission to practice of students in attendance upon the various law schools of the State. The amendment consists in appending to such subdivision a provision that the repeal of the laws conferring upon graduates of the law schools the right to admission to the bar shall not affect the right of any person, "who, but for the repeal of the said laws, would have been entitled to be admitted as an attorney as aforesaid, to be so admitted as an attorney at any time within one year after this act takes effect, upon his complying with

the existing laws," etc. The purpose of this amendment is to entitle classes who graduate in the law schools in May, 1878, to admission to practice under the provisions of the laws mentioned as repealed. Whether it will accomplish this result, we leave those who are interested in the matter to judge.

NOTES OF CASES.

IN the case of *Berghum v. Great Eastern Ry. Co.*, 88 L. T. Rep. (N. S.) 160, decided by the English Court of Appeal on the 14th of January last, it is held that the liability of railway companies as common carriers does not apply in the case of luggage over which they have not absolute control. In this case plaintiff went to defendant's station some time before the train started. A porter, by plaintiff's direction, placed his bag in the carriage. Plaintiff went away for a short time, and on his return the bag was gone. He brought action to recover the value of the bag, and the jury found that neither defendant nor plaintiff had been guilty of negligence. The Court of Appeal held, affirming the decision below, that defendant was not liable as a common carrier, and therefore was entitled to judgment. The general rule has heretofore been supposed to be that a carrier of passengers is liable for baggage the traveler takes into the same carriage with him. "If a man travel in a stage coach," says Chambre, J., in *Robinson v. Dunmore*, 2 B. & P. 419, "and take his portmanteau with him, though he has an eye upon the portmanteau, yet the carrier is not absolved from his responsibility but will be liable if the portmanteau be lost." See, also, *Le Conteur v. Lond. & S. W. Ry.*, L. R., 1 Q. B. 54; *Richards v. Lond. & S. W. Ry. Co.*, 7 C. B. 39; *Hannibal, etc., R. R. Co. v. Swift*, 12 Wall. 262; *Cohen v. Frost*, 2 Duer, 335. But the rule that binds common carriers absolutely to insure the safe delivery of the goods, except against the act of God and the public enemy, whatever may be the negligence of the passenger, has never been applied. *Talley v. Great W. Ry. Co.*, L. R., 6 C. P. 44. Here it was shown that the passenger, when changing cars, left his portmanteau unprotected, and the railway company was held not liable for a robbery of the portmanteau. And it has been held that a railway company is not liable for articles carried on the traveler's person, nor for overcoats, canes, and umbrellas, such as he usually has under his exclusive supervision. See *Steamboat Palace v. Vanderpoel*, 16 B. Monroe, 303; *Tower v. Utica & S. R. R. Co.*, 7 Hill, 47.

In *Mulliner v. Florence*, 88 L. T. Rep. (N. S.) 167, decided by the English Court of Appeal, on the 28th of January last, one Bennett purchased horses and carriages of plaintiff and took them to defendant's inn, where he was entertained, and his horses and

carriages kept for a long time. Bennett never paid plaintiff the price of the horses and carriages, and absconded from defendant's inn without paying his bill, and leaving the horses and carriages there. Subsequently, having been taken into custody on a charge of swindling, he re-assigned the horses and carriages to plaintiff, to whom, however, defendant refused to give them up until Bennett's bill was paid. Defendant afterward sold the horses by public auction, and still retained the carriages. The court held, first, that defendant's lien upon the horses and carriages was a general one for the whole of Bennett's bill, and that plaintiff, not having tendered the amount of it to defendant, was not entitled to maintain his action to recover possession of the carriages or damages for their detention, and second, that the sale by defendant of the horses was a wrongful conversion, for which plaintiff could maintain his action, and that the measure of damages was the value of the horses. The decision as to the lien of an innkeeper, extending to all the property brought to the inn by the guest for all his expenses, is in accordance with the view taken by Story (Story on Bailm., § 476), who says that the cases do not support the doctrine advanced by some that a horse can be detained only for his own meals. See *Thompson v. Lacy*, 3 B. & A. 388; *Sunbolf v. Alford*, 3 M. & W. 248; *Proctor v. Nicholson*, 7 C. & P. 67; *Jones v. Thurloe*, 8 Mod. 172. The innkeeper cannot sell the property of his guest, but only detain it, and a sale is a conversion. *Jones v. Pease*, 1 Stra. 557; *Luckbarrow v. Mason*, 6 East, 21, note; *Walter v. Smith*, 5 B. & A. 439; *Cortelyou v. Lansing*, 2 Ca. Cas. 200.

In the case of *Manson v. Thacker*, *ex parte Croshaw*, 88 L. T. Rep. (N. S.) 209, decided by Vice-Chancellor Malins on the 7th of February last, Croshaw had purchased freehold premises described as suitable for a building site, paid his purchase-money, and took a conveyance. Several months afterward he discovered that a culvert ran underneath the property, to the use of which other persons were entitled, and he claimed compensation in respect thereof. The particulars of sale did not mention the existence of the culvert, but no fraud was imputed to the vendors. The conditions of sale provided that any error or misstatement in the particulars should not annul the sale, but that a compensation should be paid to or by the purchaser. The existence of the culvert might have been discovered by the purchaser before completion if he had carefully inspected the property. The court held that, having completed his purchase, the purchaser could not enforce compensation in respect of the culvert. The court disapproved and refused to follow the case of *Bos v. Hildham*, L. R., 2 Ex. 72, where a purchaser was allowed compensation for misrepresentation where the error

was discovered after the conveyance. But in *Cann v. Cann*, 8 Sim. 447, the vendor was held liable where a misstatement as to the annual value of the property was discovered after conveyance. In *Hart v. Swaine*, 37 L. T. Rep. (N. S.) 376, property was sold as freehold, which after the conveyance the purchaser discovered to be copyhold, and it was held that, assuming the vendor to have made the misrepresentation *bona fide*, it amounted to a legal fraud, and the sale was set aside. But see, as sustaining the principal case, *Early v. Garrett*, where a purchaser took the estate with all defects in title, and the vendor stated that no rent had ever been paid, which turned out to be false, and the title was merely under a lease, and it was held that the purchaser could not recover his purchase-money. *Thomas v. Powell*, 2 Cox's C. C. 394; *Legge v. Croker*, 1 Ball & Beav. 506. In the latter case, after the completion of the purchase, a right of way was discovered to exist, and the purchaser claimed compensation. It was held that no relief could be given, because the purchaser ought to have satisfied himself about the right of way before accepting the conveyance. See, also, *Caballero v. Henty*, 80 L. T. Rep. (N. S.) 814; *Parham v. Randolph*, 4 How. (Miss.) 435; *Denston v. Morris*, 2 Edw. Ch. 87; *Abbott v. Allen*, 2 Johns. Ch. 528; *Chesterman v. Gardner*, 5 id. 29.

The Court of Appeals of Kentucky, in the case of *Greer v. Church et al.*, decided on the 23d of November, 1877, passes upon the effect of a contract purporting to be for the renting of a piano. The contract, which was in writing and signed by both parties thereto, set forth that Church & Co. had rented to one Mrs. Martin a piano valued at \$550, and that she agreed to pay as rent for the same \$400 for the first month; \$10 per month for six months thereafter, and \$20 per month afterward. Mrs. Martin was entitled to become the purchaser of the piano at \$550, and the sums received for rent for the first eleven months were to be allowed toward the purchase-price. It was in evidence that Mrs. Martin purchased the piano, paid on the contract \$410 and took possession of the piano, which she subsequently sold to appellant Greer. Church & Co. then replevied it. The court below instructed the jury, at the trial of the replevin action, that if the rent paid by Mrs. Martin on the piano did not amount to \$550, the plaintiff should recover. The Court of Appeals reversed a judgment for plaintiff, holding that the transaction was a purchase and not a lease, and that no matter whether the parties intended the title to pass or not the law would, in furtherance of public policy and to prevent fraud, treat the title as being where the nature of the transaction required it to be. See, as sustaining a similar doctrine, *Domestic Sewing Machine Co. v. Anderson*, 15 Alb. L. J. 64, where the Supreme Court of Minnesota held in the case of a sewing machine which was alleged to be leased and a written contract of leasing produced, that parol evidence was admissible to establish a contract of sale, antecedent to the lease, and that the lease was in consequence void for want of consideration. See, also, note of case upon *Victor Sewing Mach. Co. v. Hardus*, 16 Alb. L. J. 442, where a similar agreement, in respect to a sewing machine, was treated as invalid upon other grounds.

BRITISH EXTRADITION PRECEDENTS.

BY SAMUEL T SPEAR, D. D.

(CONCLUDED.)

5. The fifth case is that of Burley who, in 1864, was demanded from Canada by the United States, on the charge of having committed robbery on board the steamer "Philo Parsons" on Lake Erie. He claimed in Canada that he acted as an officer in the service of the Confederate States, then at war with the United States, and, hence, that he was protected against the charge by the right of belligerency; and yet he was surrendered by the Canadian authorities. Mr. Clarke, in his work on Extradition, sec. ed., p. 90, says that when he was brought to trial in the State of Ohio, "the judge ruled that if the acts complained of had a belligerent object, and were done under the authority of a Confederate commission, the *animus furandi* was wanting, and he must be held not guilty. The jury disagreed, and the prisoner, being released on moderate bail, did not reappear." That was, consequently, the end of the case, so far as the prisoner was concerned.

Judge Fitch, who tried this case, told the jury that "the theft must be found to have been made with felonious intent," and that the prisoner "had a right, if commissioned, to take the boat, money, or other property, for the furtherance of his Government." He also said that "a state of war existed between the Federal Government and the Confederate Government, so called, and it made no difference whether the United States Government admitted it or not." "The charge was applicable only to a state of war." He consequently held that, "as a soldier of the Confederate States Government, he [Burley] had a soldier's right to capture the steamer and appropriate her, and any money belonging to her, to the cause of his Government." Foreign Relations of the United States, 1876, p. 264. The language of Judge Fitch implies that robbery was the offense for which Burley was tried; and his doctrine is that, if the prisoner acted as a soldier of the Confederate Government, the "State of war" secured to him immunity against conviction on this charge.

The importance of this case grows out of the fact that, under the apprehension that Burley was about to be tried for piracy, the attention of the British Government was called to it, and that the question whether this would be consistent with the treaty of 1842 was submitted to the then law-officers of the Crown. The evidence taken in 1868 by the select committee of the House of Commons on Extradition, contains the following statement as to this case made before the committee by the Right Hon. Edmund Hammond, the permanent Under-Secretary for Foreign Affairs:

"It was suggested that the American Government contemplated putting him (Burley) on his trial for piracy, which, however, did not prove to have been the case; but he seems to have been charged in the United States, though not before the Canadian authorities, with assault with intent to commit murder. The question was referred to the law officers in this country, and it was held that, if the United States put him *bona fide* on his trial for the offense in respect to which he was given up, it would be difficult to question their right to put him upon his trial also for piracy, or any other offense which he might be accused of committing within their territory, whether or not such offense was a ground of extradition or even within the treaty." Answer, 1082.

"We admit in this country that if a man is *bona fide* tried for the offense for which he was given up, there is nothing to prevent his being subsequently tried for another offense, either antecedently committed or not." Answer, 1086. See Clarke on Extradition, sec. ed., note, pp. 90, 91.

Secretary Fish refers to this opinion of the then law officers of the British Government, as sustaining his view, and inconsistent with that of Lord Derby. He hence uses the opinion as an argument of the *ad hominem* character. Foreign Relations of the United States, 1876, p. 214.

What then did the British Government do with this opinion, and especially what did it say to the Government of the United States? Lord Russell, in a dispatch dated February 25th, 1865, to Mr. Burnley, Her Majesty's representative at Washington, after referring to the application made in behalf of Burley, proceeded to say:

"I have to state to you that, having considered this application in communication with the proper law officers of the Crown, Her Majesty's Government are of opinion that if the United States Government, having obtained the extradition on the charge of robbery, do not put him on his trial upon this charge, but upon another, namely, piracy (which, if it had been made before the Canadian authorities, they might have held not sufficiently established to warrant his extradition), this would be a breach of good faith against which Her Majesty's Government might justly remonstrate. If, however, the United States Government does *bona fide* put Burley on his trial for the offense in respect to which he was given up, it seems to Her Majesty's Government that it would be difficult to question the right of that Government to put him upon his trial for piracy also, or any other offense which he may be accused of having committed within their territory, whether such offense was or was not a ground of extradition, or even within the treaty. Accordingly Her Majesty's Government can only so far comply with the application of Mr. Burley, senior, as to instruct you to protest against any attempt to change the ground of accusation upon which Burley was surrendered in pursuance of the treaty." Foreign Relations of the United States, 1876, pp. 261, 262.

This is what Her Majesty's representative was directed to say in regard to the case. What he did say we have in the following communication to Secretary Seward:

"Her Majesty's Government, having considered this application, are of opinion that if the United States Government, having obtained the extradition on the charge of robbery, do not put him on his trial upon this charge, but upon another, namely, piracy (which, if it had been made before the Canadian authorities, they might have held not sufficiently established to warrant extradition), this would be a breach of good faith against which Her Majesty's Government might justly remonstrate. Her Majesty's Government are, therefore, willing, should the grounds upon which Burley is to be tried take the above turn, to comply so far with the application of Mr. Burley, Sr., as to instruct me to protest against any attempt to change the ground of accusation upon which Burley was surrendered in pursuance of the treaty." *Id.*, p. 292.

This letter, addressed to Secretary Seward on the 15th of March, 1865, was a formal protest against putting Burley on trial for piracy when his extradition had been obtained on the charge of robbery, and against any attempt to change the ground of accusation upon which he was surrendered. It did not communicate to Mr. Seward that part of the dispatch of Lord Russell, in which his Lordship adopts the opinion of the law officers of the Crown. That opinion sustains the doctrine of Secretary Fish, with the qualification that the extradited person must first have a *bona fide* trial upon the charge in respect to which he was given up. Lord Russell adopted it, and communicated it to Her Majesty's representative at Washington; but the latter did not communicate it to the Government of the United States.

Mr. Seward, on the 20th of March, 1865, replied to the protest as follows:

"Sir, I recur to your note of the 15th of March, which relates to B. G. Burley. The Honorable the Attorney-General informs me that it is his purpose to bring the offender to trial in the courts of the States of Ohio and Michigan, for the crimes committed by him against the municipal laws of those States, namely: robbery and assault with intent to commit murder. He was delivered up by the Canadian authorities upon a requisition which was based upon charges of those crimes, and also upon a charge of piracy, which is triable not by State courts, but by the courts of the United States. I am not prepared to admit the principle claimed in the protest of Her Majesty's Government, that the offender could not legally be tried for the crime of piracy under the circumstances of the case. Nevertheless, the question raised upon it has become an abstraction, as it is at present the purpose of the Government to bring him to trial for the crimes against municipal law only." *Id.*, p. 280.

The answer of Mr. Seward shows that he regarded the letter of Mr. Burnley as a protest against putting Burley on trial for piracy, when, as the case was stated to him by the representative of the British Government, he had been delivered up simply on the charge of robbery. He says that he was not prepared to admit the principle set forth in the protest, but held that Burley, having been surrendered,

as he understood it, upon the charge of piracy, as well as upon that of robbery and an assault with intent to commit murder, might be tried for the piracy. The question, however, was a mere "abstraction," since the Government did not propose to try him on the piratical charge.

There was evidently some confusion of understanding between the two governments as to the charge on which Burley was extradited; yet, so far as Mr. Seward was officially informed, the attitude of the British Government was simply that of a protest against his trial for piracy, on the ground that this was not the offense for which the prisoner had been surrendered. Secretary Fish, in the Winslow correspondence, says that Burley was tried for assault with intent to commit murder, which Mr. Seward understood to be embraced in the charge on which he was delivered up; and in regard to this statement Lord Derby remarks that the British Government had no knowledge of this fact, if fact it was, until so informed by Secretary Fish in 1876. *Id.*, p. 281.

We have, then, in this case, the following facts: 1. That the law officers of the Crown, being consulted, did express the opinion that if the United States put Burley on trial, *bona fide*, for the crime in respect to which he had been surrendered, it would be allowable to try him afterward for piracy, or any other crime of which he might be accused, whether within the treaty or not, and whether committed before or after his extradition. 2. That Lord Russell, in his dispatch to Mr. Burnley, having expressed the opinion that it would be a breach of good faith to put Burley on trial for piracy when he had been delivered up simply on the charge of robbery, qualified the expression by adopting and stating the opinion of the law officers of the Crown, and then directed Mr. Burnley "to protest against any attempt to change the ground of accusation upon which Burley was surrendered in pursuance of the treaty." 3. That Mr. Burnley, in his letter to Mr. Seward, made the protest as directed, but said nothing about the opinion of the law officers of the Crown, or its adoption by Lord Russell. 4. That Mr. Seward, not informed of this opinion, regarded the letter as a protest against trying Burley for piracy, when, as the British Government understood and officially stated the case, he had been surrendered simply on the charge of robbery.

All, then, that there is in this case, considered as a question of *actual* diplomacy between the two governments, is exactly in harmony with the general doctrine maintained by Lord Derby in 1876. What is not in harmony with that doctrine is the opinion of the law officers of the Crown, adopted by Lord Russell, but not communicated to the Government of the United States. It was not the subject of any correspondence between the two governments;

and the United States had no knowledge of it until after the case was entirely disposed of. The most that can be said is that such an opinion was held by one party to the treaty, but was not communicated to the other, or made the basis of any action as between the two parties. It never became a diplomatic fact; and this very materially changes its character, considered as an *argumentum ad hominem* addressed in 1876 to the British Government.

6. The sixth case is that of Caldwell, examined in a previous article so far as the action of the United States is concerned, but not with reference to the action of the British Government. Caldwell was extradited from Canada to the United States on the charge of forgery, and was not tried for that offense at all, but was in 1871 tried and convicted on the charge of bribing an officer of the United States. Being apprised of the purpose of the Government to try him for the latter offense, he addressed a memorial to the Governor-General of the Dominion of Canada, asking his interposition to prevent a trial for any other than the extradition offense.

This memorial was transmitted to Her Majesty's Secretary of State for the Colonies. The Secretary, in his reply to the Governor-General, says that he has been in communication with Her Majesty's Secretary of State for Foreign Affairs in regard to the case, and that the opinion of the law officers of the Crown has been taken upon it. He further says that Her Majesty's Government are advised that there is no occasion for "claiming the surrender of the petitioner from the United States Government;" that, as it appears, "he has been duly indicted for the offense by reason of which he was surrendered, and it seems that he is to be tried for it;" and that "Her Majesty's Government are further advised that there is nothing in the convention which would preclude the indictment of the petitioner in the United States for an additional offense which is not enumerated in the convention, so long as such proceedings were not substituted for proceedings against him on the charge, by reason of which he was surrendered." *Foreign Relations of the United States*, 1876, pp. 265-268.

No correspondence was opened by the British Government with the United States in regard to this case; and hence it here ended so far as the action of the former was concerned. The British Government, supposing that Caldwell had been "duly indicted for the offense by reason of which he was surrendered," and that he was about "to be tried for it," thought that he might be tried "for an additional offense" not enumerated in the treaty, "so long as such proceedings were not substituted for proceedings against him on the charge by reason of which he was surrendered." The fact in the case is that Caldwell was not tried at all on the charge of forgery. That charge was abandoned, and "proceedings" on the charge of bribing an officer of the

United States were "substituted," under which he was tried, convicted and punished.

The opinion of the British Government that, having been *bona fide* tried for the extradition offense, the prisoner might thereafter be put on trial for "an additional offense," does not come up to the doctrine of Secretary Fish, who excluded this qualification altogether, and passes beyond the doctrine maintained by Lord Derby, who insisted that there could not, in consistency with the treaty, be any trial except for the offense for which the party was surrendered. It does not perfectly fit the doctrine of either. It contradicts that of Secretary Fish in part, and that of Lord Derby in part. The British Government in 1871 supposed that the United States were about to do, and only to do, what Lord Derby in 1876 claims as the only thing that was allowable; and yet it then expressed an opinion as to trial for "an additional offense," which Lord Derby in 1876 held to be incorrect.

The Lord Chancellor of England, in his speech in the House of Lords, disposes of this case by simply saying: "I think that the less said about the case of Caldwell the better." *Id.*, p. 298.

Lord Derby, in his speech in the House of Lords, deals with the case and that of Burley more seriously. After saying, in regard to Caldwell, that "the decision not to interfere in the matter was communicated to the governor of Canada, and there the case ended so far as we are concerned," he proceeded to say:

"Now, I am not about to deny that these two cases show clearly enough that the view of our international duty taken by the then law-officers is different from that which we have been advised to adopt. But I deny altogether that that difference of views disposes of our case. I speak with the highest respect of the legal advisers of the governments of 1864 and 1870, but they would not claim that their opinion could bind their successors. And I observe this, that though they do not advise that in certain cases a claim should be pressed, though they express doubt whether it ought to be pressed, yet in no part of this correspondence has the claim ever been abandoned. We have never said to the American Government that we thought it one which could not be justly advanced. We have simply forbore to press it in certain cases, and it is possible and conceivable that other motives may have operated besides those of a judicial or administrative character. I can quite understand that both in 1864 and 1870 reasons of a political character may have indisposed the then governments to press any demand on the United States as to which in their minds any doubt may have existed. I am not attacking what they did; but I contend that to waive a right on one occasion, or on two, is not to abandon it; that the opinions of the law-officers of our Government, however deserving of respect, are not international documents; and that, as between the United States and England, nothing has passed which amounts to an abandonment of the claim which we put forth in this correspondence." *Id.*, p. 281.

Lord Derby here concedes — what is undoubtedly

the fact — that the law-officers of the Crown and the British Government in 1864 and 1870 took a view which is different from that adopted by another set of law-officers and the British Government in 1876. He is entirely correct in saying that nothing ever passed between that Government and the United States committing the former to the view expressed in 1864 and 1870. Secretary Fish, in order to find it, had to go outside of the records of his own office. Not a syllable of correspondence, containing the view, had ever passed between the two governments. The protest of the British Government as to the case of Burley was exactly in harmony with the theory maintained by Lord Derby in 1876; and as to the case of Caldwell there was no correspondence.

It is true, however, that the opinions of the law-officers which were held in 1864 and 1870, but not communicated to the United States, were in 1876 rejected by the British Government; and Secretary Fish, in the Winslow correspondence, had whatever argumentative advantage could arise from this contrariety of opinions. This point he pressed. The fact itself admitted of no denial.

Lord Derby, and the Lord Chancellor of England, while treating the opinions of the former law-officers courteously, maintained that they were not correct; and, for the purpose of establishing this proposition, they appealed to the nature and design of extradition as set forth by European text writers, to the language used in the treaty of 1842, and to the legislation of both governments for its execution. It is a noticeable feature of the correspondence that Secretary Fish nowhere attempts any reply to this argument. As already remarked, his main efforts consisted in the citation of adverse British precedents, which he did not analyze with a view to ascertain their exact character. The precedents sought in the cases of Heilbronn, Von Aernam, Paxton, and Rosenbaum, the last three of which occurred in Canada, are not relevant, since they do not bear upon the direct point under discussion, which was not whether the prisoner could set up the treaty in his plea of defense, but whether the government surrendering him, could by the terms of the treaty claim that he should be tried only for the offense on which the surrender was grounded.

The precedents furnished by the cases of Burley and Caldwell, though they involve the action of the British Government, and contain the expression of an opinion different from that held in 1876, possess, as to that opinion, no international character whatever. The opinion was not communicated to the United States, and was not the basis of any action as between the two governments. The United States had no diplomatic right to that opinion, since it was never the subject of diplomacy at all. Though inconsistent with the position taken in 1876, it had never assumed such a form of expression as to make it a diplomatic fact. And, moreover, it was quali-

fied by the condition that the surrendered person must first have a *bona fide* trial for the crime in respect to which he was delivered up, before he could be put on trial for any "additional offense;" and this condition was excluded by the doctrine of Secretary Fish.

The vital question, however, was not whether all the public men of England had always held the same opinions on the subject of extradition, but whether the treaty of 1842 between the two governments did, in virtue of an implication resulting from its express stipulations, sustain the doctrine that a person extradited under it could be tried *only* for the offense charged against him in the proceedings and which was the basis of the surrender. The position of Secretary Fish, in respect to this question, renders meaningless the provisions, found in all the extradition treaties of the United States, that relate to the crimes for which extradition may be had, to the necessity of specifically charging some one or more of these crimes, and to the evidence which must be submitted to the delivering government in proof of the same. It is to be remembered that each government assumes, as its starting point in making an extradition treaty, that every person within its jurisdiction and not violating its laws, is entitled, as against all the world, to the *prima facie* right of undisturbed and protected asylum. Now, neither government agrees to a withdrawal of this right in respect to any accused party, and neither agrees to place that party in the custody of the other, except upon specified conditions distinctly stated in the treaty, and for a purpose as distinctly stated in the proceedings required by the treaty; and hence it is simply monstrous to assume that these conditions and this purpose are operative only for securing the surrender, and absolutely of no effect the moment the surrender has been actually obtained. And yet this was the position of Secretary Fish.

Extradition is certainly not a proceeding for its own sake, but simply a means to an end; and that end is to give the receiving government the opportunity to put the accused party on trial, and, if convicted, to punish him according to law. A trial for what? The treaty answers this question, in a general manner, by naming the offenses for which, and for which only, extradition may be obtained at all. It further answers the question, in a specific and definite manner, by requiring that some one or more of these offenses shall be charged by the demanding government, and then proved to the satisfaction of the government asked to make the delivery, as indispensable conditions of the right to claim the person of the alleged fugitive on the charge and for the purpose set forth. To ignore these limitations that lie in extradition as a means and that govern it as such, and regard them as of no consequence when the delivery has been made, is, upon the very face of the statement, a palpable

perversion of the remedy itself. This being legitimate, then all the conditions and qualifications, found in extradition treaties, sink into absolute insignificance, and become the sheerest surplussage imaginable. The extradition treaties of the United States would not, upon this construction, be respectable, even as literary documents.

RUFUS CHOATE.

XI.

FOR the annexed letter we are indebted to the Hon. Nathan Crosby, one of Mr. Choate's friends, now of over thirty years' judicial service. The reader will think it quite natural that old college friends of Mr. Choate in writing about him should recur to those early days; also that this letter, in connection with the letters already published, does ample justice to that portion of Mr. Choate's life.

A short time before the death of the Rev. Joseph Tracy, D. D., he had written an article on the religious character of Mr. Choate, intended for publication in some religious magazine. But it would seem that, for some reason, the article was not given to the public. Judge Crosby has been kind enough to obtain it from the family or representatives of the writer and send it to us.

After stating the fact that much had been written about Mr. Choate, and suggesting that much yet remained to be written, Dr. Tracy asks: "But what have we orthodox reviewers to do with Rufus Choate?" and answers, "Much, on many accounts. In all the religious or ecclesiastical relations which he sustained he was one of us. He was educated from his earliest infancy in our faith. He studied it, understood it, was convinced of its truth, avowed and defended it on what he deemed proper occasions, public or private, to the end of his life."

He proceeds to illustrate that view by references to Mr. Choate's example, opinions and addresses, making special use of his remarks on the occasion of the twenty-fifth anniversary of Dr. Adams' pastorate of the Essex street church, in which—the last public address ever made by Mr. Choate—he avowed his faith in the doctrines there taught.

We may refer gratefully to this article hereafter.

J. N.

LOWELL, February 26th, 1878.

MY DEAR JUDGE.—Mr. Choate was one year before me in college. When I entered he had already acquired the reputation of leader of his class. My earliest personal knowledge of him was obtained through two of his rivaling classmates, Heydock and Tracy, who had been with me in Salisbury Academy. Mr. Choate came to Hanover at an opportune period, as in fact we all did. The college difficulties had just divided the old residents into two parties, though quite unequal bodies, both of which changed the former limited courtesies extended to students into open

blandishments and friendly alliances. President Brown was young and enthusiastic, and desirous not only that the students should acquire themselves well as scholars, but that they should be kindly received and should make friends for themselves and the institution in the village, and so carry with them to their homes good accounts of the college and the people. Mr. Choate found an old and valuable friend in Dr. Mussey, the head of the medical school. Dr. Mussey had practiced in Essex during the childhood of Mr. Choate, and had boarded in his father's family. Upon being appointed to a professorship he had given up his practice to Dr. Sewell, who afterward married Mr. Choate's sister and first taught Latin to Rufus.

He was fortunate, therefore, in his surroundings at Hanover, but more fortunate in his eagerness to learn and his aptitude for study. His ambition, which we saw in his acts and habits, appears now, by confession as it were, in the letters of his college life, recently furnished by your correspondent, the Rev. Dr. Putnam. The amenities of the people and the absence of rowdism on the part of the students were alike notable during President Brown's administration, and many who were there at this period, besides Mr. Choate, owe much to the graceful influences of the cultured ladies of their early acquaintance.

Mr. Choate was sociable as well as studious, but did not care for play. He found exercise in walks over the hills around the college, and up and down his room while pursuing his studies. His most frequent outdoor companion was his classmate, Tenney, who furnished a ready laugh to Choate's equally ready wit. Tenney was a jolly, light-hearted youth, well suited to clear the cobwebs from an overworked brain, and as such doubtless he ministered, perhaps unconsciously, but none the less beneficently, to his friend. Choate's room was of ready access to his mates and was a sort of center of mirth and wit, but when sport was over he turned to his studies with avidity. He possessed a wonderful power of concentration of his mental faculties, and studied with great intensity. I roomed near him for a year, and could appreciate this somewhat, as he studied very much aloud, making his voice and ear, and his gestures too probably, contribute each its power of impression upon the memory. He dropped into study readily, as a habit, and thus, at brief intervals, doubtless, through life added much to his stores of knowledge. We boarded together for a while at Prof. Adams' and when in the dining room before the bell called us to take our seats at the table, Mr. Choate would stand at the sideboard where lay a large reference Bible, and turn over the leaves from place to place, as if tracing out some chain of theological inquiry.

Mr. Choate by ardent, if frequently interrupted labor, became the ideal scholar and the pride of the college. No one had ever so completely won the admiration of the faculty, of his fellow students, and of the people of Hanover. Not a slip of irregularity, of incivility, or neglect was heard against him from any quarter. But toward the close of his college life he became an invalid, was emaciated, walked feebly, his place in the recitation room was often vacant, his condition a source of anxiety and alarm. Dr. Mussey took him to his house and watched over him by day and by night. At length the appointments for commencement were made, and Mr. Choate was set down for the valedictory. Great fears were entertained that he

might be unable to participate in the exercises. As the day drew near the leading topic of inquiry and discussion was his condition: the last report from his chamber the most important news; and old graduates, as they arrived from day to day to participate in the proceedings, came to share in the anxiety and feared that they might not hear him whom they perceived to be so universally admired and beloved. The day came at length and with it uncertain reports intensifying the anxiety, and casting doubt not only on the probability of his appearance on the platform, but as to the duration of his life. The procession was formed without him and moved to the church, amid general gloom, for the public exercises. The place was crowded; the graduating class responded to the orders of the day down to the valedictory. Then a few moments of hushed suspense and Mr. Choate was called. He advanced slowly and feebly, as if struggling to live and to perform this as a last scholarly duty. Tall and emaciated, closely wrapped in his black gown, with his black curly hair overshadowing his sallow features, he tremblingly saluted the trustees and officers of the college and proceeded in tremulous and subdued tones with his address, which was full of beautiful thoughts couched in chaste and elegant language. When he came to say the words of parting to his classmates his heart poured forth treasures of affectionate remembrance, and closing with swelling fervor and inimitable power as he exhorted them not to slacken or misapply their intellectual energies and tastes, but to press on to the highest attainments in the domain of learning: "the world from this day and place opens wide before you. You are here and now to drop the power and aid of the association and emulation of our happy days, and strike single-handed and alone into the manly struggles of life. You may sow and reap in whatever field or realm you choose and gather the glorious rewards of intellectual culture of pure minds and diligent hands. Go, go forward, my classmates with all your honors and all your hopes. You will leave me behind, lingering or cut short in my way, but I shall carry to my grave however, wherever, whenever I shall be called hence, the delightful remembrance of our joys and of our love." I can only give a faint and imperfect impression of his loving words, but my memory of the scene is fresh and vivid. The great congregation, from admiration, excitement and grief, found relief in a flood of tears. As was said of Mr. Webster's closing appeal in the United States court in the Dartmouth College case, "there was not one among the strong-minded men of that assembly who would think it unmanly to weep."

Mr. Choate remained in Hanover one year as tutor, and was the central figure of a set of linguists then connected with the college. James Marsh and George Bush, distinguished scholars, just before him, George P. Marsh and Folsom, of my class, and Washington Choate, brother of Rufus, Perley and Williston, two classes next after mine, gave an impulse to the study and love of classical literature, unknown before or since in that college. Friendly emulation and student pride led to the daily canvassing of books published, authors read and works studied. Folsom, W. Choate and Williston, died early; the other scholars named became eminent men. Washington Choate was regarded as equal to his brother in scholarship, and was eminent for his piety. I allude to this era of classical

study as an exhibition of Mr. Choate's literary influence.

Mr. Choate had great respect and love for his Alma Mater, and contributed from his early professional income toward her support as well as to influence her advancing curriculum, but was greatly disquieted, and even vexed, when declared rank in scholarship was abolished. He believed in laudable ambition and honorable competition. The old Puritan school-house system of rising from the foot to the head of the class stirred the little scholar with an ambition which grew with his years, and which he thought should not be ignored or repudiated in higher fields of study. He held that a great principle of human action was invaded by neglecting to rank scholarship, that life is largely made up of struggles for superiority in mental and physical efforts; that its rewards are won by merit; that the diligent, exact scholar should receive his merited honors, and the idle or stupid should not be protected from the exposure of misspent time, opportunity and money. His own life was spent in incessant, honorable competition and legitimate reward.

From 1826 for several years I practiced law in Essex county at the same courts with Mr. Choate, and from 1838 for a few years I lived in Boston, kept up my acquaintance with him, and knew quite well his habits. He died daily, retiring to bed exhausted, under great nervous prostration, with headache. Yet he would rise early, often long before daylight, and take a literary breakfast before his family or business claimed his attention. His clients, the courts, and classics compelled long days and short nights. I called upon him once in the afternoon and asked him how early the next morning I could confer with him upon a matter I wished to investigate during the evening. "As early as you please, sir; I shall be up." "Do you mean before breakfast, Mr. Choate?" "Before light if you wish." I called at the earliest dawn and found him at his standing table with a shade over his eyes under a brilliant light, pressing forward some treatise upon Greek literature, which he said he hoped to live long enough to give to the public. The night had restored his wearied powers; he was elastic, as cheery and brilliant as the stars I had left shining above me.

Seeing and hearing Mr. Choate in the trial of causes was a perpetual surprise and pleasure. It seemed to make little difference with him whether his cause was of great or small importance; he tried to win it if possible and ceased not to contest it until every consideration favorable to his own side, and every one inimical to his adversary had been presented.

It has already been mentioned by one of your correspondents that Mr. Choate was offered a seat upon the bench of the Supreme Court of Massachusetts, but declined. It may be proper for me to add that in view of his health, and the arduous nature of his professional exertions, I pressed him to seek the higher honor of a seat upon the bench of the United States Supreme Court, and so escape the waste of his powers in the excitements of the advocate, and attain the more quiet and dignified life of the Bench. Judge Woodbury's seat was at the time vacant, and Mr. Webster was Secretary of State, and I believed he could secure the appointment. He was then fifty years of age, and in the highest sense eligible. "But," said he, "I am too poor. I must remain as I am, live or die. I know my power and reputation in my profession and I love it, but I do not know what the

change would bring upon me, or whether I should like it. I cannot leave my profession." He only survived eight years.

He spent his money well for his family and his library; gave freely to the necessitous, and gave up liberally of his well-earned fees when full payment might have embarrassed his client. On one occasion I was in his office when a client asked for his bill for a written opinion upon a question of importance. Said Mr. Choate, "Hand me one hundred dollars and I will give you a receipt in full; if you go to my partner in the other room who keeps the books he will make you pay one hundred and fifty, sure."

Mr. Choate, like Webster and Everett, was an old Whig, politically, and "to the manner born," but, toward the close of his life, party lines underwent rapid changes, and men were very unceremoniously laid upon the shelf who were not thought to keep up with the "march of improvement." Mr. Webster lost the nomination for the Presidency, and soon after died at Marshfield, and although the nation honored his obsequies with every token of mourning, Mr. Choate could not smother his indignation toward the rising elements of power. He regarded Mr. Webster's death as a political murder. The great expounder and statesman had been rejected through unworthy combinations, his chief, worthy of all homage and confidence, leader of the Whig party, and the supporter of its glory for twenty years, had been slaughtered in the house of his friends, sacrificed to the cry of "availability!" and the tomb only saved him from further ingratitude. It is impossible to appreciate the depth of Mr. Choate's sorrow. He had been at the death-bed, and could perhaps have derived some formal comfort in the commonplace reflection that his friend had lived his three score years and ten, and that great men die like other men, but the poignancy of his grief came from the undeserved obloquy heaped upon him after his 7th of March speech. He knew the fervor and intensity of Mr. Webster's love of the Union, and his forebodings of civil war, and believed in the wisdom and justice of his efforts to compromise, and that he should go to his tomb under the impeachment of old friends, filled Mr. Choate with inexpressible anguish. He rebelled against pacification; the wound would not heal, nor could he afterward hold fellowship with the party which had rejected the great statesman of the age. His horror of new combinations and platforms drove him to Buchanan. "I can go nowhere else," said Mr. Choate to me when I had a long interview with him in regard to his purpose. "But, Mr. Choate, what becomes of your long cherished Whig principles?" "Whig principles! I go to the Democrats to find them. They have assumed our principles, one after another, till there is little difference between us." Here he traced them one after another as they had found adoption. "And what becomes of your Whig anti-slavery opinions?" "I have settled that matter," said he; "I am bound to seek the greatest amount of moral good for the human race. I am to take things as I find them, and work according to my best judgment for the greatest good of the greatest number, and I do not believe it is the greatest good to the *slave* or the *free* that four million of slaves should be turned loose in all their ignorance, poverty and degradation, to trust to luck for a home and a living." He amplified somewhat this statement, but the above represents fairly the conclusions of his argument. Mr. Choate's problem, how to ac-

complish the greatest good for the greatest number, has been worked out on a different plan from that which he wished to see adopted. The war, the death lists, pollution of morals, destruction of prosperity, national debt, present condition and future destiny of the colored race, and sectional discords, are present elements in the scales testing Mr. Choate's sagacity. Happy for us if we can find advantages to counter-balance them!

Yours truly,

NATHAN CROSBY.

GOVERNMENT CONTROL OVER TELEGRAPHS.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

PENSACOLA TELEGRAPH CO. V. WESTERN UNION TELEGRAPH CO.

Under the power given to Congress to regulate commerce among the several States control may be exercised over telegraphs, and laws of States in conflict with congressional legislation on the subject are invalid. Accordingly a law of Florida giving an exclusive right to a company to maintain a telegraph line in a portion of that State, held inoperative against a company entitled to the privileges of the act of July 24, 1865, in relation to telegraphs.

APPPEAL from the Circuit Court of the United States for the Northern District of Florida. The opinion states the case.

Mr. Chief Justice WAITE delivered the opinion of the court.

In 1859 an association of persons, known as the Pensacola Telegraph Company, erected a line of electric telegraph upon the right-of-way of the Alabama and Florida Railroad from Pensacola, in Florida, to Pollard, in Alabama, about six miles north of the Florida line. The company operated the whole line until 1862, when, upon the evacuation of Pensacola by the Confederate forces, the wire was taken down for twenty-three miles, and Cooper's station made the southern terminus. In 1864 the whole was abandoned, as the section of the country in which it was situated had fallen into the possession of the United States troops.

On the 1st December, 1865, the stockholders met, and it appearing that the assets of the company were insufficient to rebuild the line, a new association was formed for that purpose with the old name, and new stock to the amount of five thousand dollars subscribed. A resolution was adopted by the new company to purchase the property of the old at a valuation put upon it in a report submitted to the meeting, and a new board of directors was elected.

A meeting of the directors was held on the 2d January, 1866, at which the president reported the completion of the line to Pensacola, and a resolution was adopted authorizing the purchase of wire for its extension to the navy yard. The attorneys of the company were also instructed to prepare a draft of a charter to be presented to the legislature for enactment.

On the 24th July, 1866, Congress passed the following act:

"AN ACT to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any telegraph company now organ-

ized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"SEC. 2. *And be it further enacted*, That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

"SEC. 3. *And be it further enacted*, That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person: *Provided*, however, that the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

SEC. 4. *And be it further enacted*, That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General, of the restrictions and obligations required by this act." 14 Stat. 221; Rev. Stat., § 5263 *et seq.*

All railroads in the United States are by law post-roads. Rev. Stat., § 3964; 17 Stat. 308, § 201.

On the 11th December, 1866, the legislature of Florida passed an act incorporating the Pensacola Telegraph Company and granting it "the sole and exclusive privilege and right of establishing and maintaining lines of electric telegraph in the counties of Escambia and Santa Rosa, either from different points within said counties or connecting with lines coming into said counties, or either of them, from any point in this (Florida) or any other State." The capital stock was fixed at five thousand dollars, with privilege of increase to such an amount as might be considered necessary. The company was authorized to locate and construct its lines within the counties named "along and upon any public road or highway, or across any water, or upon any railroad or private property for which permission shall first have been obtained from the proprietors thereof." In this act of incorporation

all the stockholders of the new association which had rebuilt the line were named as incorporators. No meeting of the directors of the association was held until January 2, 1868, when the secretary was instructed to notify the stockholders "that the charter drawn up by Messrs. Campbell & Perry, attorneys, as per order of board, January 2, 1866," had been passed.

On the 5th June, 1867, the directors of the Western Union Telegraph Company, the defendant and a New York corporation, passed the following resolution, which was duly filed with the Postmaster-General:

"*Resolved*, That this company does hereby accept the provisions of the act of Congress entitled 'An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes,' approved July 24, 1866, with all the powers, privileges, restrictions, and obligations conferred and required thereby; and that the secretary be, and he is hereby, authorized and directed to file this resolution with the Postmaster-General of the United States, duly attested by the signature of the acting president of the company and the seal of the corporation, in compliance with the fourth section of said act of Congress."

In 1872 the property of the Alabama and Florida Railroad Company, including its right-of-way and railroad, was transferred to the Pensacola and Louisville Railroad Company, and on the 18th February, 1873, the legislature of Florida passed an act which, as amended February 18, 1874, authorized the last-named company "to construct, maintain, and operate a telegraph line from the Bay of Pensacola along the line of the said (its) road as now located, or as it may hereafter be located, and along connecting roads in said county to the boundary lines of the State of Alabama, and the said lines may connect and be consolidated with other telegraph companies within or without the State, and said company may pledge, mortgage, lease, sell, assign, and convey the property appertaining to the said telegraph lines, and the rights, privileges, and franchises conferred by this act, with full power in such assignees to construct, own, and operate such telegraph lines and enjoy all the privileges, rights, and franchises conferred by this act, but in such case the said railroad company shall be responsible for the proper performance of the duties and obligations imposed by this act."

This was within the territory embraced by the exclusive grant to the Pensacola Telegraph Company.

On the 24th June, 1874, the railroad company granted to the Western Union Telegraph Company the right to erect a telegraph line upon its right-of-way, and also the rights and privileges conferred by the acts of February, 1873 and 1874. The Western Union Company immediately commenced the erection of the line, but before its completion, to wit, July 27, 1874, the bill in this case was filed by the Pensacola Telegraph Company to enjoin the work and the use of the line on account of the alleged exclusive right of that company under its charter. Upon the hearing in the Circuit Court the bill was dismissed and this appeal was taken from that decree.

Congress has power "to regulate commerce with foreign Nations and among the several States" (Art. I, § 3, par. 3), and "to establish post-offices and post-roads." *Id.*, par. 7. The Constitution of the United States, and the laws made in pursuance thereof, are the supreme law of the land. Art. VI, par. 2. A law of Congress made in pursuance of the Constitution sus-

penda or overrides all State statutes with which it is in conflict.

Since the case of *Gibbons v. Ogden*, 9 Wheat. 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because being National in their operations they should be under the protecting care of the National government.

The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances. As they were intrusted to the general government for the good of the Nation, it is not only the right but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily incumbered by State legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence; cargoes secured and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour by inquiry what is transpiring anywhere that affects the interest they have in charge. Under such circumstances it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile State legislation. In fact, from the beginning it seems to have been assumed that Congress might aid in developing the system, for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago, with money appropriated by Congress for that purpose (5 Stat. 618), and large donations of land and money have since been made to aid in the construction of other lines. 12 Stat. 489, 772; 13 id. 365; 14 id. 292. It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service and exclude all

others from its use. The present case is satisfied if we find that Congress has power, by appropriate legislation, to prevent the States from placing obstructions in the way of its usefulness.

The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole Nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the National rights which belong to all.

The State of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. This embraces the two westernmost counties of the State, and extends from Alabama to the gulf. No telegraph line can cross the State from east to west, or from north to south within these counties, except it passes over this territory. Within it is situated an important sea-port, at which business centers, and with which those engaged in commercial pursuits have occasion more or less to communicate. The United States have there also the necessary machinery of the National government. They have a navy yard, forts, custom-houses, courts, post-offices, and the appropriate officers for the enforcement of the laws. The legislation of Florida, if sustained, excludes all commercial intercourse by telegraph between the citizens of the other States and those residing upon this territory except by the employment of this corporation. The United States cannot communicate with their own officers by telegraph except in the same way. The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction.

It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The statute of July 24, 1866, in effect, amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place, by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines, shall not be excluded by another from prosecuting their business within its jurisdiction if they accept the terms proposed by the National government for this National privilege. To this extent certainly the statute is a legitimate regulation of commercial intercourse among the States, and appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business, but it does provide that whenever the consent of the owner is obtained no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.

It is insisted, however, that the statute extends only to such military and post-roads as are upon the public domain; but this, we think, is not so. The language is, "through and over any portion of the public do-

main of the United States; over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States." There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way the grant evidently extends to the public domain, the military and post-roads, and the navigable waters of the United States. These are all within the dominion of the National government to the extent of the National powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only National privileges are granted.

The State, law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of Congress. To that extent it is, therefore, inoperative as against a corporation of another State entitled to the privileges of the act of Congress. Such being the case the charter of the Pensacola Company does not exclude the Western Union Company from the occupancy of the right-of-way of the Pensacola and Louisville Railroad Company under the arrangement made for that purpose.

We are aware that in *Paul v. Virginia*, 8 Wall. 168, this court decided that a State might exclude a corporation of another State from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Art. IV, § 2. That was not, however, the case of a corporation engaged in inter-state commerce, and enough was said by the court to show that if it had been, very different questions would have been presented. The language of the opinion is (p. 182): "It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. * * This State of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations. * * The defect of the argument lies in the character of their (insurance companies) business. Issuing a policy of insurance is not a transaction of commerce. * * Such contracts (policies of insurance) are not inter-state transactions, though the parties are domiciled in different States."

The questions thus suggested need not be considered now, because no prohibitory legislation is relied upon except that which, as has already been seen, is inoperative. Upon principles of comity, the corporations of one State are permitted to do business in another unless it conflicts with the law, or unjustly interferes with the rights of the citizens of the State into which they come. Under such circumstances no citizen

of a State can enjoin a foreign corporation from pursuing its business. Until the State acts in its sovereign capacity individual citizens cannot complain. The State must determine for itself when the public good requires that its implied assent to the admission shall be withdrawn. Here, so far from withdrawing its assent, the State, by its legislation of 1874, in effect, invited foreign telegraph corporations to come in. Whether that legislation, in the absence of congressional action, would have been sufficient to authorize a foreign corporation to construct and operate a line within the two counties named, we need not decide; but we are clearly of the opinion that, with such action and a right of way secured by private arrangement with the owner of the land, this defendant corporation cannot be excluded by the present complainant.

The decree of the Circuit Court is affirmed.

REPORT OF EX PARTE JUDICIAL PROCEEDINGS NOT A LIBEL.

ENGLISH HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION, JANUARY 30, 1878.

USILL V. HALES.

An *ex parte* application was made to a police magistrate in open court by certain persons who had been employed by the plaintiff upon a railway, for a summons against the plaintiff under the Masters and Servants Act, 1867 (30 & 31 Vict., c. 141), on the allegation that he had not paid them their wages, though he had received funds to enable him to do so. The magistrate refused to grant their application, on the ground that the facts as stated by them did not bring the case within his jurisdiction to do so, and afforded no ground for criminal proceedings. The defendants, who were newspaper proprietors, published a fair report of the proceedings before the magistrate, which contained matter defamatory to the plaintiff. *Held*, that the defendants were protected by the privilege which attaches to all fair and impartial reports of judicial proceedings, and that such privilege was not taken away either by the fact that the magistrate decided that he had no jurisdiction, or that the application was made *ex parte*.

ACTION for libel, brought against the proprietors of a newspaper (the *Daily News*) for the publication of certain matter defamatory to the plaintiff.

Two other actions brought by the same plaintiff against the proprietors of the *Standard* and *Morning Advertiser* were by agreement argued at the same time.

The defamatory matter complained of was contained in a report of an application to a London police magistrate, which had appeared in the three publications. The application was for a summons under the Masters and Servants Act, 1867 (30 & 31 Vict., c. 141), to compel the plaintiff to pay certain wages alleged to be due to the applicants, who had been employed by him upon an Irish railway. The applicants stated that the plaintiff, their employer, had himself received payment from the contractor, and complained of his conduct in withholding from them what they had earned. The magistrate, after hearing the facts, refused to grant their application, on the ground that the facts afforded no ground for criminal proceedings.

The action was tried before Lord Coleridge, C. J., at Westminster, and the jury found that the report was a fair and impartial one of what took place. The judge ruled that the report, if fair, was privileged, and the plaintiff obtained a rule nisi for a new trial, on the ground of misdirection.

Sir H. Gifford, Solicitor-General (with him *Bremner Yelverton* and *Arthur Child*), showed cause.

Sergt. Ballantine and *Short*, in support of rule.

LORD COLERIDGE, C. J. I am of opinion that this rule should be discharged. This was an action against a newspaper for a *bona fide* and fair report of a proceeding before a magistrate. Three persons who had been employed by a civil engineer upon an Irish railway, and who had heard that this civil engineer had been paid, whilst they themselves, as they said, had not been paid by their superior officer, the plaintiff in the action, went before a police magistrate in London; and I must take it for the purpose of my judgment that they applied to him for a summons under the Masters and Servants Act. That means that, if there had been materials at the hearing upon which the magistrate thought that the case had been made out, he would have had jurisdiction to issue that summons. Supposing that the complainants had, in his opinion, substantiated their complaint, in that event he would have had jurisdiction to issue an order under the Masters and Workmen Act, 30 & 31 Vict., c. 141. In the result, however, he thought that the facts stated by the complainants showed that there was no ground either for summonses against the complainant, or for an answer under the Masters and Workmen Act; and it turned out, therefore, in the result that, in a certain sense, the application had been made to him with regard to matters in which he had no jurisdiction. But it has long been held, and most properly held, that it is not the result but the nature of the application made to a magistrate which founds his jurisdiction, and that, whenever there is an application, made to a magistrate as to a matter over which he has jurisdiction, he has then jurisdiction for the purpose of ascertaining whether the facts make out the case for the exercise of that jurisdiction. The distinction between the cases where there is an inherent want of jurisdiction on account of the nature of the complaint, and where there is what may be called want of jurisdiction because the facts do not make out the charge, is very well explained in the case of *Reg. v. Bolton*, 1 Q. B. 66, which is founded on the decision of *Brittain v. Kenaird*, 1 B. & B. 432, and the judgment of *Richardson, J.*, in that case. Therefore, in this matter I must take it that the magistrate had jurisdiction to enter upon the inquiry. What, therefore, was done during this inquiry upon which the magistrate had jurisdiction to enter can only be described as a judicial proceeding. It was a proceeding before a judge who, so far as the jurisdiction went, had jurisdiction to conduct it. That seems clear both upon principle and upon authority. If so, this is *prima facie* a privileged publication, because it is found to be a fair and *bona fide* report of a judicial proceeding, and it is too late now to dispute whether the rule of privilege does or does not extend to the publication of such proceedings. It has been laid down again and again in broad terms that the publication of proceedings in a court of justice are privileged if the report of such proceedings be fair and honest; and the report in this case has been found to be so. An attempt has been made, however, to distinguish this case, and to take it out of the general proposition by bringing it within an undoubted qualification that has been grafted upon the general rule. It is contended that this is what may be called a report of an *ex parte* or preliminary proceeding. Now, there is no doubt that, in the cases which have been

referred to by the plaintiff's counsel, the term *ex parte* proceeding has been over and over again used by judges of great eminence: sometimes affirmatively, in saying that an *ex parte* proceeding is not privileged; and sometimes negatively, for example, in saying "this being a proceeding not *ex parte* is privileged." I do not doubt, for my own part, that if this argument had been addressed to the court some sixty or seventy years ago, it might have met with a different result from that which it is about to meet with to-day. That the cases cited in support of it have made a certain impression upon our minds it is useless to deny. It seems to me in vain to say that, in the judgment of the great judges referred to, we do not find a rule laid down that an *ex parte* or preliminary proceeding is not privileged; and upon this ground, good or bad, that it is very hard on an individual to have a matter which was stated against him behind his back, with no means of answering it, reported in the public papers, while his answer is not similarly reported. There are strong observations in the case of *Duncan v. Thwaites*, *ubi supra*, which no doubt go far toward establishing that proposition. There is also a dictum of one of the greatest legal authorities reported. Lord Eldon in that case said that every lawyer would be startled by the proposition that a report of an *ex parte* application was privileged; and undoubtedly there have been few greater lawyers than Lord Eldon. But we are not now living, so to speak, within the shadows of these cases; and it is idle to deny that in cases decided since that time learned judges have come to conclusions which it is not for me to say are inconsistent, but which at least appear to my mind irreconcilable with these earlier decisions. I find some excellent good sense in the judgment of the Court of Queen's Bench in the case of *Wason v. Walters*, and there is a passage in it which I should desire to adopt. It is said that whatever disadvantage might attach to a system of unwritten law, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the various conditions of society and to the habits of the age in which we live, so as to avoid the inconsistencies which might otherwise arise. In this way only the law of libel has gradually developed itself into any thing like a settled form, and I entirely concur in the opinion there expressed. It is well known that, in important cases, *ex parte* proceedings are published day by day, especially in some particular cases of inquiry which would be excluded from privilege according to the rule proposed. It is well known that in the course of inquiries before coroners cases are reported from day to day in the newspapers, and it is unheard of that an action should be brought by persons affected by such reports, if they are *bona fide*. That seems to introduce this element into the determination of these cases, that there is a certain elasticity in the rules which are to be applied to the question of privilege—development is perhaps the more correct word to employ—and courts have from time to time applied, as best they might, that which they think to be the good sense of the rules which exist to cases which have not been positively decided to have come within them. If there had been a case directly in point with the present—a case in which the proceedings had begun and terminated with an *ex parte* application, and where the jury had found that the report of the proceedings was *bona fide* honest and fair—if there had been a case similar to this in which the report had been held not to be privi-

leged, I do not hesitate to say, for my own part, that I would gladly have acted upon such a case; for I do not disguise that my own judgment is not at all satisfied with the alleged enormous advantage to the public from these small cases being published from day to day, although they inflict pain upon individuals, nor do I see the extreme good resulting which is supposed to justify them. But it is, of course, the duty of the judge, nevertheless, to declare the law, not in accordance with what he thinks it ought to be, but as it is; and if he finds a rule established and laid down, it is far better that he should accept and apply it judicially and honestly, even if he is not satisfied in his own mind with the application of that rule. Therefore I come to the consideration of this case, feeling that the general tendency of the law has been of late years to hold such publications as this as privileged. I do find one case which to the best of my judgment appears to cover the present one; and that is the case to which much reference has been made—the case of *Lewis v. Levy*, *ubi supra*. I do not propose to take up time by reading the whole of this judgment, or any thing like it; but I find that what was held to be entitled to privilege there was this—the publication of a fair and correct report of proceedings taking place in a public court of justice; and it was accepted as a part of the rule that the privilege extended to proceedings taking place publicly before a magistrate, on the preliminary investigation of a criminal charge, terminating in the discharge of the person charged. I am perfectly aware that there may be a distinction—a subtle distinction, a distinction which I will not say is a mere shadowy distinction, but a subtle distinction—between the case before us and the case of *Lewis v. Levy*. But I cannot disguise from myself that the argument by which the Court of Queen's Bench was led in that case, the *ratio decidendi* upon which the court acted, covered the present case. This is a case, as I have already explained, in which there was a judicial proceeding terminating, not in the discharge of the party charged, but in the refusal of the magistrate to grant a summons against the person charged, on the ground that such a proceeding was not warranted by the facts disclosed. I think, therefore, resting my judgment upon this case, and upon *Currie v. Walter*, *ubi supra*, the principles of which it adopts, that these rules must be discharged.

LOPES, J. In this case three men, who believed themselves aggrieved by the conduct of the plaintiff in respect of the payment of their wages, applied to a magistrate in open court for a summons under the Masters and Servants Act, and the magistrate refused the application, considering it a matter for civil and not a criminal court. The defendants afterward published a report which the jury have found was a fair report of what occurred. On principles of public convenience the ordinary rule is that no action can be maintained in respect of a fair and impartial report of a judicial proceeding, though the report contain matter of a defamatory kind and injurious to individuals. It was argued that the matter in respect of which the application was made was not within the jurisdiction of the magistrate. But the cases are clear to show that want of jurisdiction will not take away the privilege if it is maintainable on other grounds. Nor do I think the privilege is confined to the Superior Courts. It is not the tribunal, but the nature of the alleged judicial proceedings, which must be looked at. The point mainly relied on by the defendants was, that

the application to the magistrate was *ex parte*, and as such could not be privileged. Had the matter before the magistrate been in the nature of a preliminary inquiry, and if the ultimate judicial determination was to remain in abeyance until a further investigation, I should have thought there was authority at any rate for the defendants' contention, though how far these authorities might be followed in the present day I think doubtful; but the matter of the application was finally disposed of by the magistrate, and I can find no case where a fair report of a judicial proceeding finally dealing with the matter in open court has been held libelous. There are authorities which, until they are carefully examined, would seem to support the contention that an *ex parte* proceeding in court is not privileged; but, so far as I can ascertain, these are the cases where the proceeding was preliminary, and where there was no final determination at the time of the alleged libelous report. On the other hand *Currie v. Walters* and *Lewis v. Levy*, *ubi supra*, are strong authorities in favor of the report in this case being protected. I am of opinion, therefore, that these rules must be discharged.

Rules discharged.

RECENT AMERICAN DECISIONS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1878.

ASSAULT AND BATTERY.

Justification: excluding manager of alma-house from witnessing performance of priestly functions.—In an action for assault and battery, it appeared that plaintiff's husband was the keeper of an alms-house, of which she was at that time in charge; that the defendant, McKeuna, a Catholic priest, was endeavoring to administer the sacrament of penance to a sick inmate of the house, who was a Catholic, and had requested him to administer it; that such administering required entire secrecy between the defendant and the sick person; that the plaintiff had refused to leave the room after being requested to retire; and that a sufficient and proper amount of force was used to compel her to leave. *Held*, that the plaintiff being rightfully in the room, and the defendant a mere visitor, there was nothing in the priestly character of the defendant, or in the offices of religion which he was about to perform, that gave him the control of the room, or any legal authority to exclude or remove from it by force any person lawfully there, and the facts relied upon in justification did not, as matter of law, furnish any defense. *Cooper v. McKenna*. (Mass. L. Rep.)

CONTRACT.

Acceptance of order payable on happening of future event: construction of. The following order was presented to defendant for acceptance: \$445. "Lowell, Feb. 3d, 1875. Mr. Blodgett please pay to C. H. Robbins the sum of four hundred and forty-five dollars, and oblige, to be paid when the house is finished. J. T. Willis." Across the face of the order was written, "I accept the order. Chas. A. Blodgett." The order was given by Willis, a contractor, to the plaintiff for work done by him on the house in question, belonging to the defendant, for Willis, while the latter was still at work under his contract. The house was finished but not by Willis; and the house was sold in an unfinished state by the defendant to one Litchfield, who

finished it. In an action in the order against defendant, *held*, that the order being general in its terms and payable absolutely when the house is finished, it was immaterial who completed it. If the defendant wished to limit his liability, he should have done so when he accepted the order. *Cook v. Wolfendale*, 105 Mass. 401; *Russell v. Barry*, 115 id. 300; *Somers v. Thayer*, id. 163. The time when the defendant's liability accrued being dependent on the happening of an event, the contract between Willis and the defendant was competent, as bearing on the question whether the time had arrived when the defendant became liable (*Robbins v. Blodgett*, 121 Mass. 584); but it is not competent to limit the extent, or change the character of the liability, created in express terms by the order and acceptance. *Robbins v. Blodgett*. (Mass. L. Rep.)

FIRE INSURANCE.

Mortgagor and mortgagee: when mortgagee not entitled to insurance money on mortgaged premises.—Under a provision in a mortgage the mortgagor was to keep the house on the mortgaged premises insured against fire for not less than \$3,200 for the benefit of the mortgagee. The mortgagor procured from defendant a policy insuring, in his name, the house for \$1,500 and the furniture for \$500. The defendant did not know of the provision in the mortgage. The house being burned, the mortgagee notified defendant of his claim and defendant paid the amount of the insurance to the mortgagor. *Held*, that the mortgagee had no right of action against defendant for the amount of insurance on the house. *Stearns v. Quincy Mutual Fire Ins. Co.*

RECENT ENGLISH DECISIONS.

BILL OF EXCHANGE.

Acceptance by signature: words of acceptance.—A bill of exchange is not sufficiently accepted by the acceptor's name being written across the face of it. There must be an acceptance in writing on the bill, and the signature of the acceptor. In an action by the drawer against the acceptor of a bill, it was proved that the bill was directed to the defendant, that the defendant was seen to write his name across it, and that it was given for value. Neither the word "accepted," nor any thing beyond the bare signature of the defendant, was written upon the bill. *Held*, that the action was not maintainable. Com. P. Div., March 2, 1878. *Hindpough v. Blakey*, 38 L. T. Rep. (N. S.) 221.

CARRIER OF PASSENGERS.

Railway company: liability as carriers of passengers' luggage: duty at end of journey: delivery to owner.—It is the duty of a railway company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery until the owner in the exercise of due diligence can call and receive it; and it is the owner's duty to call for and remove it within a reasonable time. Ex. Ch. Div., January 21, 1878. *Patscheeder v. Great West. Railway*, 38 L. T. Rep. (N. S.) 149.

MASTER AND SERVANT.

Fellow-servant: "joint station staff": injury to servant of one company by negligence of servant of another

company.—A person who is injured by the negligence of another's servant cannot be a fellow-servant with the servant whose negligence causes the injury, so as to exempt the master from liability, unless he is under the control and orders of the master. Defendants and the G. N. Company owned adjoining stations, which were worked by a "joint station staff," the cost of whose salaries was borne equally by the two companies. S., one of such staff, was hired by the G. N. Company, and received his salary from them. While engaged in his duty as signalman, S. was killed by the negligence of defendants' engine driver. *Held* (reversing the judgment of the Exchequer Division), that S. was not defendants' servant, so as to be a fellow-servant with the engine driver; and therefore his widow could recover damages from defendants for his death. Ct. App., February 23, 1878. *Swanson v. North E. Ry. Co.*, 38 L. T. Rep. (N. S.) 201.

OBSCENE LIBEL.

Indictment: omission to set out the words of the libel: arrest of judgment.—An indictment for publishing an obscene book, which does not set out the passage or passages of such book alleged to constitute the offense, but only refers to the book by its title, is bad, and the defect is not cured by verdict. Ct. App., February 12, 1878. *Regina v. Bradlaugh and Besant*, 38 L. T. Rep. (N. S.) 118.

RECENT BANKRUPTCY DECISIONS.

COMPOSITION.

Practice in proceedings for: dismissal.—A resolution of composition was adopted in this case, by which the creditors agreed to accept notes of a new firm to be composed of two members of the old firm and such other person or persons, if any, as they might associate with them, with a fresh capital of at least twenty thousand dollars, which, if borrowed, should not be withdrawn until the composition was paid. The new firm was formed of all the members but one of the old firm, with the capital required, and a deed of release was signed by the creditors. The capital had been borrowed and was repaid soon after. The new firm paid the first and second installments of the composition, but stopped payment on the third. A day or two before this the case had been dismissed. *Held*, that the dismissal should not be vacated and the case sent back into bankruptcy, because (1) creditors of the new firm could not prove their debts or be paid in this proceeding, and (2) because the remaining partner, himself innocent, lost his opportunity, by the discharge, of seeing that the composition was faithfully and fully carried out. U. S. Dist. Ct., Mass. *In re Ewing*, 17 Nat. Bankr. Reg. 109.

DISCHARGE.

1. *Will not release lien of judgment.*—A discharge in bankruptcy will not release the lien of a judgment which was not proved. Sup. Ct., Ga. *Darsey v. Mumpford*, 17 Nat. Bankr. Reg. 181.

2. *Homestead exemption.*—The lands, etc., claimed to be exempt under the Homestead Exemption Law of Georgia, must be laid off and designated as such homestead before the debtor is entitled to such exemption; and this, although such lands had been previously set apart to him in proceedings in bankruptcy as exempt under such law. *Ib.*

FIDUCIARY DEBT.

1. *Executor, when not discharged.*—Where an executor has so administered as to render himself personally liable to the creditors of the testator, his debt to them is a fiduciary debt, and unaffected by a discharge granted to him in bankruptcy. Sup. Ct., Ga. March 19, 1878. *Lawrence v. McKenite*.

2. *Enforcement of judgment not discharged in bankruptcy.*—Such a debt having been found against the executor by an award of arbitrators on the reference of a cause pending in court, and the award having been excepted to before the adjudication of bankruptcy, and the exceptions having been withdrawn and the award made a judgment of the court while the proceedings in bankruptcy were pending, the judgment may, after discharge granted or before, be enforced by execution, both against property acquired subsequently to adjudication, and against property set apart by the assignee as exempt. Ib.

3. *Proof of fiduciary debt.*—The proof in bankruptcy of a fiduciary debt, and the receipt of a dividend thereon out of the bankrupt's estate, constitute no obstacle to the collection of the balance, though the dividend was, by consent of all the creditors, larger than the debt was entitled to in the regular course of bankruptcy administration. Ib.

LIEN.

1. *Secured creditor: practice.*—Where a secured creditor has proved his claim without stating the fact that such claim was secured, and has received a dividend thereon, if those interested in the distribution of the estate do not take advantage of the forfeiture of the security caused thereby, third parties, not being so interested, have no standing to do so. Sup. Ct., Penn. *Bassett v. Baird*, 17 Nat. Bankr. Reg. 177.

2. *Release of lien.*—The bankrupt, previous to the commencement of the proceedings, sold certain premises. Parties who had, prior to the conveyance, performed work upon the premises subsequently filed a lien therefor, and proved their claim in the bankruptcy proceedings, but neglected to state that it was secured by the lien, and received a dividend. In an action to foreclose the lien, held, that the grantee of the premises could not claim that the lien was thereby released. Ib.

MECHANIC'S LIEN.

Discharge in bankruptcy no defense to.—Where the creditor of a bankrupt, having part of his debt secured by a mechanic's lien, proved his debt and elected to retain his lien at an appraised value, the discharge of the bankrupt is no defense in a suit on the lien. Sup. Ct., Penn., Feb. 25, 1878. *Streeper v. McKee*.

PARTNERSHIP.

Proof: individual property of partners pledged: evidence.—Where the individual property of one of the members of a firm is pledged for a debt of the firm, the creditor may, and indeed is bound to prove at the request of the separate creditors, his whole debt without deduction against the joint assets; but can only prove the deficiency, after disposing of the security, against the separate assets of such partner. Evidence is always admissible between principal and surety to show what their equitable rights toward each other are. U. S. Dist. Ct., Mass. *In re May. Ex parte Mass. Hoep. Life Ins. Co.*, 17 Nat. Bankr. Reg. 192.

COURT OF APPEALS ABSTRACT.

APPEALABLE ORDER.

Construction of New Code, § 1241: exercise of discretion of court below as to arrest not reviewable in Court of Appeals.—The provision of the New Code, § 1241, providing that a judgment may be enforced in certain cases by punishing the judgment debtor for a contempt of the court does not compel the court below to act and punish where the facts bring the case within the purview of the section. The court below has a discretion in the matter, and when it exercises that discretion by refusing to grant an order of arrest an appeal does not lie to this court. Appeal dismissed. *Cochrane v. Ingersoll*. Opinion per Curiam.

[Decided April 16, 1878. Reported below, 11 Hun, 342.]

CARRIER OF PASSENGERS.

1. *Not liable for loss by robbery of valuable securities carried on person of passenger.*—Plaintiff was a passenger on defendant's railway holding the ordinary passage ticket for which he had paid the usual price. He carried in his clothing upon his person without the knowledge of defendant or notice to it, solely in his own care and custody, a package of negotiable securities of \$16,000 in value. These securities were taken from him in the car of defendant, by violence, by three men who had no connection with defendant and whose presence in the car was not known to defendant though it might have been. The jury found that the plaintiff was not guilty of negligence and that the defendant was guilty of negligence in not caring for the protection of the plaintiff, and that in consequence of that negligence the robbery took place. Held, that defendant was not liable for the value of the securities carried by plaintiff, and in an action for the loss accruing to plaintiff from the robbery, they could not enter into an estimate of the damages. Order below affirmed. *Weeks v. N. Y., N. H. & Hartf. R. R. Co.* Opinion by Folger, J.

2. *How far carrier liable for neglect to protect passenger from robbery.*—Though a carrier of passengers is bound to guard one going in his vehicle, from violence, the damages he must pay if he neglects his duty are such as would ordinarily result therefrom, as would naturally be contemplated by the parties. The carrier would be liable only for the safety of the passenger, his ordinary baggage, and such articles as are usually required by a passenger and reasonable for his personal use while on his way or at his place of destination. Ib. [Decided January 15, 1878. Reported below, 9 Hun, 609.]

CRIMINAL LAW.

False pretenses: post-dated check.—On the 28th of August the prisoner, having bargained for some goods of complainant, sent out from complainant's residence where he was, a friend who was with him to get, as he said, the money to pay for the goods. The friend soon after returned with a check on a bank, purporting to be drawn by one Steinbach, and dated August 29. This, prisoner represented to be a valid security, and attention being called to the fact that it was dated the 29th, stated that this was done because it was so late in the day and the bank was closed. No account was kept at the bank by any Steinbach, and the check was worthless. The check was taken and prisoner and his friend took away the goods. Held, to constitute a false pretense, and the fact that the check was post-

dated would not be ground to set aside a conviction for obtaining goods under false pretenses. Judgment below affirmed. *Lesser v. People*. Opinion by Rapallo, J.

[Decided March 19, 1878. Reported below, 12 Hun, 668.]

DAMAGES.

Measure of, in contract to pay in specified bonds: when judgment for face value of bonds not allowable.—By a contract between defendant C., and plaintiff and S., C. was to pay plaintiff and S. \$50,000 in cash and \$50,000 in Northern Pacific bonds. Plaintiff and S. performed the contract on their part. The cash was paid, but each claimed the entire amount of the bonds, and demanded them of C., and each one forbade him to pay any of the bonds to the other. Plaintiff then brought this action against S. and defendant, asking for an accounting with S., and that plaintiff pay \$50,000 in money or deliver the amount in bonds to a receiver to be appointed, and be forbidden from paying any part of them to S. The complaint did not state any value to the bonds, or set up any claim for damages for the non-delivery of the bonds. A reference was had, and it was determined that plaintiff and S. were each entitled to one-half of the bonds. *Held*, that a judgment in the action against C. for the nominal value of the bonds in money was erroneous. Judgment below reversed. *Wintermute v. Cooke*. Opinion by Rapallo, J.

[Decided March 19, 1878.]

FIRE INSURANCE.

1. *Conditions in policy: occupation of buildings: saw-mill.*—In a policy of insurance upon a saw-mill operated by water was a condition that if the premises should become "vacant and unoccupied" the policy should be void. *Held*, that the meaning of the condition would be affected by the nature of the property insured, and in this case a temporary interruption in the business of the mill caused by breaking of the machinery, low water or lack of custom, would not be in violation of such condition. Accordingly, when, for sixteen days previous to the destruction of the mill by fire, which was in the month of May, there had been no sawing done, but lumber was sold from the yard during that time, and logs were at the mill ready to be sawed, and nothing appeared to show that the owner of the mill intended to discontinue its use, *held*, that the mill was not vacant or unoccupied within the meaning of the policy. Judgment below affirmed. *Whitney v. Black River Ins. Co.* Opinion by Andrews, J.

[Decided January 15, 1878. Reported below, 9 Hun, 87.]

2. *Increase of risk: condition as to, applies only to future acts.*—The policy contained a condition avoiding it if the insured premises "shall be occupied or used so as to increase the risk," without the consent of the company. *Held*, that this only prohibited a new and different use of the property from that to which it was applied at the time the policy was issued by which the risk would be increased, and the circumstance that the risk to the mill was greater by the use of a planer, which was in it unknown to the company, would not be a violation of the condition in the absence of fraud and misrepresentation. *Ib.*

[Decided January 15, 1878.]

3. *Conditions in policy: use of kerosene: single and general use: use by others than insured.*—A fire insurance policy provided that the company should not be

liable for loss occasioned by the use of kerosene oil as a light in any barn or outbuilding. *Held*, to refer to a single use of kerosene on any occasion, and not an habitual use. *Held*, also, that the fire causing the loss must be occasioned by kerosene, and if a lamp fed by kerosene should set fire when one fed by another lighting material would have done the same, the condition would not exempt the company from loss. *Held*, further, that the use of kerosene by any member of the household of insured lawfully in the barns was provided against, and not alone its use by him personally. Judgment below reversed. *Matson v. Farm Building Fire Ins. Co.* Opinion by Rapallo, J.

[Decided April 16, 1878. Reported below, 9 Hun, 415.]

JURISDICTION.

1. *General appearance by non-resident defendant gives personal jurisdiction.*—Where a non-resident defendant makes a general appearance in an action commenced in a court of this State, by attachment, the court acquires jurisdiction of his person, and this is not affected by the fact that he appears because his right to the attached property is imperiled by the proceedings. Judgment of General Term reversed, and judgment on verdict ordered. *Olcott v. McLean*. Opinion *per Curiam*.

2. *Alienage not defense to violation of bankrupt law.*—Alienage and non-residence do not relieve a defendant from liability, under the provisions of the bankrupt act, to account for property transferred to him by the bankrupt in fraud of that act. When an alien comes here and violates the bankrupt law he subjects himself and his property, if found here, to the remedies given by the law, and alienage gives no immunity. *Ib.*

[Decided April 2, 1878. Reported below, 11 Hun, 394.]

SLANDER.

Evidence in: circumstances in mitigation must be pleaded.—In actions for slander, circumstances in mitigation must be set up in the answer in order to be admissible in evidence. Accordingly, when defendant in such an action was asked, when testifying in her own behalf, if, during the conversations in which it was claimed that the slanderous words were uttered, certain statements were made in respect to improper relations between plaintiff and defendant's husband, *held*, that if this was offered in mitigation of damages, it should have been pleaded. Judgment below affirmed. *Willower v. Hull*. Opinion by Rapallo, J.

[Decided January 15, 1878.]

NOTES OF RECENT DECISIONS.

CIVIL DAMAGE LAW: WIFE CANNOT RECOVER UNLESS ACTUALLY DAMAGED: STATUTORY CONSTRUCTION: EXEMPLARY DAMAGES.—Threats and vulgarity directed by the husband to the wife, unaccompanied by physical injury, will not entitle her to recover either actual or exemplary damages under the Iowa statute authorizing the wife to recover for injury to her person caused by the sale of intoxicating liquor to her husband. The words "in person," as used in that statute, mean *in body*, and hence threatening language or vulgar conduct not resulting in the impairment of her health does not constitute a ground for the recovery of actual damages. There can be no exemplary

damages when there are no actual damages. Sup. Ct., Iowa, December, 1877. *Calloway v. Layton* (West. Jurist).

CRIMINAL LAW: ENTERING NOLLE PROSEQUI DOES NOT BAR SECOND INDICTMENT.—A prisoner, under indictment for murder, pleaded in bar a former arrest and indictment for the same offense and discharge under the statute after remaining untried for two terms of court. The record showed that soon after the second term of court, held subsequent to the prisoner's commitment, had expired, a *nolle prosequi* was entered in his case and on motion he was discharged. Held (affirming the judgment of the court below), that the record did not show a discharge under the two term provision of the statute, and the entry of the *nolle prosequi* was not a bar to the second indictment. Per Woodward, J. At common law a *nolle prosequi* may at any time be retracted, and it not only is no bar to a subsequent prosecution on another indictment, but may be so far canceled as to permit a revival of proceedings on the original bill. Sup. Ct., Pennsylvania, October 2, 1877. *Hester v. Commonwealth* (W. Not. Cas.).

DAMAGES: WHAT ARE NOT TOO REMOTE.—In a suit against a railroad company for loss by fire, alleged to have been occasioned by sparks from its engine, the damages are not too remote to authorize the plaintiff to recover where the fire that did the injury originated in an adjoining field and spread from that to plaintiff's. Ct. of App., Texas, January 19, 1878. *Houston & T. C. R. R. Co. v. McDonough* (Texas L. J.).

PROMISSORY NOTES: INDORSEMENT: NOTICE OF PROTEST.—Where a banker makes use of the public mail in forwarding a note for collection, and, through its interference or neglect, the letter containing the note is not delivered to the receiving bank, it does not excuse the indorser, even though the interference was caused by the postmaster's knowledge that the receiving bank had failed, and the postmaster believed he was doing the forwarding bank a favor by returning the letter. Although a bank fails pending the forwarding of a letter containing a note, it is fair to presume that its business, in the way of presenting notes for payment, will continue, and the failure of such bank, although causing some fifteen days' delay in the presenting of a note, does not release the indorser. Sup. Ct., Missouri, October, 1877. *Pier v. Heinrichshofen* (Cent. L. J.).

REMOVAL OF CAUSE TO FEDERAL COURT.—Under the act of Congress of 1875, a cause in equity, brought by a complainant, who is a citizen of Virginia, against defendants, all of whom reside in Georgia except one, who was a member of a Georgia firm but now lives in New York, will be removed from the Superior Court of Georgia to the Circuit Court of the United States for the Southern District of Georgia, on petition and affidavit in due form, although the defendants may set up certain equities among themselves by cross bill or other proceedings, the application for removal having been made at the first term of the Superior Court to which the bill was returnable. Sup. Ct., Georgia, March 5, 1878. *Tarver v. Vicklin*.

SCHOOLS: RIGHT OF PUPIL TO SELECT STUDIES AT PUBLIC SCHOOL.—A pupil in a public school has a right to elect which studies he will take, and when passed

into a higher grade he may take up such branches as he has carried satisfactorily in the lower grade, although he may have failed in others; but he cannot take up studies in which he failed to pass. Sup. Ct., Illinois, January 22, 1877. *People v. Van Allen* (West. Jur.).

STATUTE OF LIMITATIONS: PROMISE BY PARTNER OF DISSOLVED FIRM DOES NOT BIND FIRM.—A promise by a member of a late copartnership, made after dissolution and before a suit is barred by the statute of limitations, to pay a partnership debt, will not prevent the running of the statute so as to estop the other partner from availing himself of the defense of the statute as against the original cause of action; and this, whether the creditor was aware of the dissolution or not. Nor does an admission by one partner, after dissolution, that a debt is due, bind the other late partner so as to take the case out of the statute as to the latter. A member of a copartnership, after the dissolution, has no agency growing out of the former partnership relation to create or to perpetuate a liability of his late copartners for partnership indebtedness, as against the operation of the statute of limitations. Sup. Ct., Florida, January Term, 1878. *Tate v. Clements*.

STATUTE OF FRAUDS: ASSUMPTION IN PURSUANCE OF AN ACT OF ASSEMBLY OF A STATUTORY LIABILITY OF ANOTHER, NOT WITHIN: CONTRACT: CONSIDERATION.—The O. and P. Railroad Co. entered into an agreement to pay the plaintiff an annuity of \$100, in composition for the loss of her husband's life, caused by an accident on the said railroad. The O. and P. Railroad Co. was afterward merged in the P. Railroad Co. By a special act of Assembly, approved March 31st, 1860, it was provided that in case the P. Railroad should be sold under certain mortgages, the purchasers should become a body corporate, with power to assume the debts of the P. Railroad, and issue stock for the payment of the same. The P. Railroad was sold under certain mortgages, and was afterward transferred to the P. Railway Co., a corporation formed in pursuance of the act of 31st March, 1860. In an action by the plaintiff against this latter company for the payment of her annuity, held (reversing the judgment of the court below), that the question whether the P. Railway Co. assumed the liability of the O. and P. Railroad, under its agreement to pay the plaintiff an annuity, was one of fact, and ought to have been submitted to the jury. Held, further, that the Statute of Frauds did not apply to this case. Held, further, that there was a sufficient consideration to support an assumption of this debt by the new company; in fact, that this was a statutory liability of the O. and P. Railroad. Sup. Ct., Pennsylvania, November 12, 1877. *Pittsburgh, F. W. & C. Ry. Co. v. Stokes* (W. Not. Cas.).

WAREHOUSE RECEIPT: ON SAME FOOTING AS BILL OF LADING.—The possession of a warehouse receipt, even though indorsed in blank, is presumptive evidence of ownership of property named therein; hence it is negotiable and passes title by indorsement same as a bill of lading. But notice given by owner that the holder of receipt was only agent for sale of the property, would retain ownership. Sup. Ct., California, March 21, 1878. *Davis v. Russell* (California Leg. Rec.).

COURT OF APPEALS DECISIONS.

THE following decisions were passed down Tuesday, April 16, 1878:

Judgment affirmed with costs—*Meyer v. Lathrop*; The Trustees of St. Jacob's Lutheran church v. Bly; *Madan v. Sherrard*; *White's Bank of Buffalo v. Myles*; *Eleventh Ward Savings Bank v. Koehler*; *Odell v. Hoyt*; *Lynch v. McNally*; *Griffith v. Mangam*.—Order affirmed with costs—*Roberts v. White*.—Order granting new trial affirmed, and judgment absolute for plaintiff on stipulation with costs—*Krekeler v. Thaulé*.—Appeal dismissed with costs—*Kennedy v. Kennedy*; *Cochran's executor v. Ingersoll*.—Motion denied with \$10 costs—*Davis v. Toulmin*.—Judgment reversed and new trial granted, costs to abide event—*Black River Insurance Company v. New York State Loan and Trust Company*; *Beers v. Shannon*; *Matson v. Farm Building Insurance Company*; *Gildersleeve v. Landon*; *Hill v. Syracuse, etc., Railroad Co.*; *Jenkins v. Fahey*; *Kennedy v. The Mayor, etc.*—Order granting new trial reversed and judgment on report of referee affirmed, with costs—*Comstock v. Hier*.—Judgment reversed, and judgment for plaintiff on demurrer, with leave to defendants to answer, costs to abide event of the action—*Guest v. City of Brooklyn and Whitney*.—Order of General Term modified, and judgment ordered for plaintiff upon the verdict, with costs, unless the defendant, within thirty days after notice of filing the remittitur, cancels and returns the notes in suit to the plaintiff and pays the plaintiff's costs, in which case the complaint is dismissed—*Thayer v. Manley*.

NEW BOOKS AND NEW EDITIONS.

NEVADA REPORTS, VOLUME XII.

Reports of cases determined in the Supreme Court of the State of Nevada, during the year 1877. Reported by Chas. F. Bicknell, clerk of the Supreme Court, and Hon. Thomas F. Hawley, Chief Justice. Volume XII. San Francisco: A. L. Bancroft & Co., 1878.

THE present volume of these reports has a number of cases of general value, among which we notice the following: *State v. Thompson*, p. 140. Temporary insanity produced by intoxication does not destroy responsibility so as to excuse a party who has committed homicide, if he, when sane, made himself voluntarily intoxicated. *Ex parte Robinson*, p. 263. An act of the State legislature taxing commercial travelers held to be constitutional. *State v. Croster*, p. 300. When any part of a statute is declared unconstitutional such part is regarded as having never at any time been possessed of any legal force. *State v. Corvell*, p. 337. In order to constitute the crime of burglary it is just as essential to prove the intent as to prove the entry. *Courtney v. Turner*, p. 345. An alien will be protected in the possession of the public lands, the same as a citizen, against mere naked trespassers who do not connect themselves with the government title. The reporting is carefully done and the book is well printed and bound.

SHARSWOOD'S TABLE OF CONNECTICUT CASES.

A table of cases in the reports of the State of Connecticut which have been cited, explained, limited, doubted or overruled in subsequent decisions. By George Sharswood, Jr., of the bar of New London county. Philadelphia: T. & J. W. Johnson & Co., 1878.

This is one of those works which every one who has occasion to examine case law finds exceedingly

useful, in fact almost indispensable to guard him against mistake as to the authority of reported decisions. The value of such a work entirely depends upon the thoroughness and accuracy with which it is prepared. This book, so far as we are able to judge, is carefully done. The labor of preparation must have been considerable, the editor having examined more than seven thousand three hundred cases and noted whether the case under examination was overruled, doubted, explained or limited. To Connecticut lawyers the volume will be a necessity, and to those of other States having occasion to examine Connecticut law it will prove a great assistance.

GIFFARD ON THE JURISDICTION OF MAGISTRATES.

Summary and Tutory Jurisdiction of Magistrates under 11 and 12 Vict., c. 43, and appeal from the decisions of Justices. By H. Stanley Giffard, of The Inner Temple, Barrister at Law, London: Reeves & Turner, 1878.

This work is a carefully prepared treatise on the summary jurisdiction of magistrates in England. While it must be a very convenient book for the English practitioner it will be found of but little use to most of the profession on this side of the water. The practice as well as the law administered is very largely statutory, and the statutes are so many of them unlike those in force here that the remarks made thereon and explanations given can be of but little help to us. A criminal lawyer with an extensive business might, however, find the book sometimes useful, and to such we would recommend it.

OBITUARY.

E. DELAFIELD SMITH.

E. Delafield Smith, a well-known member of the New York bar, died on the 12th inst., at Shrewsbury, N. J., aged 52 years. He was for some years district attorney of New York, and afterward corporation counsel. He edited the well-known Reports of the New York Court of Common Pleas, in four volumes bearing his name.

GEORGE TYLER BIGELOW.

George Tyler Bigelow, formerly Chief Justice of the Supreme Court of Massachusetts, and a jurist of eminence, died on the 12th inst., at his residence in Boston, at the age of 68. Mr. Bigelow was born in 1810, at Watertown, Mass., and was educated at the Boston Latin School and subsequently at Harvard College.

NOTES.

MESSRS. Little, Brown & Co. have issued a Catalogue of Law Books, published or for sale by them, which is in some respects a model catalogue, and is in every respect worthy of a place on every lawyer's table. It contains an Index of Subjects, the full titles of law books with dates and places of publication, list of American Reports, abbreviations used in referring to American law reports, lists of English, Scotch, Irish and Colonial reports and explanations of abbreviations used in reference to them.

Judge Peck of the Court of Claims has resigned. The prominent candidates for the place are ex-Congressman Paine of Wisconsin, Kenneth Raynor, solicitor of the treasury, and Judge Hunt, of Louisiana, candidate for Attorney-General on the Packard ticket. It is said that Judge Hunt will probably receive the appointment.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, APRIL 27, 1878.

CURRENT TOPICS.

THE case of *Commonwealth v. Hawes*, decided by the Kentucky Court of Appeals on the 17th inst., and reported in our present issue, is a very important one upon the question of the right of the courts of this country to try a person who has been surrendered under the extradition treaty with Great Britain, for an offense different from the one for which he was surrendered, and not included in the list of offenses for which a surrender is to be made. One Hawes was indicted in one of the Kentucky courts for embezzlement and also for forgery. At the time he resided in the Dominion of Canada and his surrender was demanded upon the charge of forgery, and he was given up and brought to trial. He was acquitted on the charge of forgery, and the prosecuting attorney then moved his trial for embezzlement, but the trial court held that this could not be done without first allowing the defendant an opportunity to return to Canada. The 10th article of the treaty mentioned provides for the delivery up for trial of persons who may be charged with any one of certain enumerated offenses, among which is forgery but not embezzlement. The Court of Appeals sustains the decision of the trial court, saying that the right of one government to demand and receive from another the custody of an offender, who has sought an asylum upon its soil, depends upon the existence of treaty stipulations between such governments, and in all cases is derived from and is measured and restricted by the provisions, express and implied, of the treaty. That the view taken by the court as to the meaning of the extradition treaty was the one which prevailed when such treaty was entered into is indicated by the legislative enactments in both England and the United States, made for the purpose of effectively carrying out that and other like treaties. An act of Parliament passed in 1848, referring to this treaty, directed that persons should be delivered up thereunder to be conveyed "to the United States to be tried for the crime of which such person shall be accused;" and an act of Congress passed in 1848, provides for the surrender of persons demanded under the extradition treaties with various countries, and declares the purpose of the surrender to be that the alleged offender may "be tried for the crime of which such person may be

accused." The conclusion of the court is in accordance with the views so ably maintained in this Journal by Dr. Spear, and establishes the only safe rule, and one which we believe was accepted by most persons, until doubt was thrown thereon by the decisions in *Caldwell's Case*, 8 Blatchf. 131; *United States v. Lawrence*, 13 id. 295; and *Adrianse v. Lagrave*, 59 N. Y. 110.

The question whether a municipal corporation, having authority from the State in which it is situated to impose taxes upon real and personal property within its limits, may tax a debt owed by it as property and deduct the amount of the tax from the interest it has agreed to pay, has just been settled in the negative by the Supreme Court of the United States in *Murray v. City Council of Charleston* and another case, appearing in our present number. The court in its opinion says that the provision of the Federal Constitution forbidding States to pass laws impairing the obligations of a contract is a limitation upon the power of taxation, as well as upon other legislation. "A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by the exertion of the taxing power than it can be by the exertion of any other power of a State legislature." A disposition to change the expressed stipulations of contracts by means of an exercise of the taxing power is very frequently manifested by State legislative bodies, notably in a bill now pending in the legislature of this State designed to shift the burden of taxation from mortgaged real estate to the holders of mortgages thereon. In reference to this kind of legislation, the Supreme Court says: "It may then safely be affirmed that no State, by virtue of its taxing power, can say to a debtor 'You need not pay to your creditor all of what you have promised him, you may satisfy your duty to him by retaining a part for yourself, or for some municipality or for the State treasury.'" In the imposition of taxes the State must deal with the owner of the property and collect its taxes from him and it cannot permit or require a debtor to assume the duty of paying the taxes of his creditor out of the money he has agreed to pay such creditor. The court does not enter into the question whether a State can tax a debt due by one of its citizens to a non-resident creditor, but it expresses itself emphatically against all legislation which under the guise of an exercise of the taxing power attempts to relieve debtors from their contract obligations.

A bill designed to render possible the collection of debts due from defaulting States to citizens of this State has been introduced in the Senate. As a State cannot be sued in the Federal courts by a private person, and many of the States make no provision for the enforcement of claims against

them in their own courts, when one of these organizations sees fit to repudiate its obligations, those to whom it is bound can do nothing but submit to the wrong. Usually where a State is guilty of this dishonesty, its creditors are for the most part non-resident there, and very generally residents of our own State. A State, however, can maintain an action against another State in the Federal Supreme Court, and the object of the bill mentioned is to authorize the transfer to this State of debts due to its citizens from other States, and the institution of suits thereon in the Supreme Court in the name of the State against the debtor. The plan proposed is certainly an ingenious one, but the idea of the State going into the business of collecting bad debts will, we think, hardly meet with general approval.

It is said that there is a possibility that the repeal of the bankrupt law may be defeated in the House. The judiciary committee of the House to which the Senate bill was referred, was understood to be in favor of reporting that bill without amendment, but it is now stated that this course will not be taken. There is a very great pressure for the passage of the Senate bill from the mercantile and other interests of the country, one petition alone from the city of New York containing more than a thousand names of merchants and prominent business men. It remains to be seen whether the small but active and persistent body of individuals who make profit by the continuance of the bankrupt law can perpetuate its existence in defiance of the wishes of a great majority of the people of the country.

The *London Lancet* is publishing some interesting contributions upon surgical evidence in courts of law, written by a certain Mr. Erichsen. The writer reaches the not very satisfactory conclusion that juries cannot be made to understand the meaning of medical witnesses. The use of medical terms is necessary to convey the exact truth, but these are intelligible to medical men only and incomprehensible to courts and juries. He suggests that what he names accident cases be tried before juries composed of surgeons. We are confident the writer underestimates the comprehension of the average jury. There may indeed be cases where the exact idea of a witness who uses without explanation technical terms may be lost, but in most instances physicians intersperse enough English through their testimony to enable a man of ordinary intelligence to understand what they mean. Then most of the terms used are capable of translation and can be explained; indeed, in very many instances there is no need of using them at all, and they would not be used if witnesses did not wish to impress the jury and court with a high notion of their learning and skill.

On Wednesday, after a protracted and heated debate, the Assembly refused, by a vote of 52 to

48, to concur in the Senate's resolution for the appointment of a Joint Committee to consider the question of Code Revision. A motion to reconsider was tabled and it is not unlikely the matter may come up again; but whether or not a different result be reached, the vote shows very clearly that the Governor's veto of the nine chapters will be sustained by the Assembly. We are to repeat the folly of 1849 and have but a fragmentary Code. A numerous signed petition has been prepared, asking that a committee be appointed to revise the Codes reported by the former Code and Practice Commissions and that such Codes, as so amended, be adopted. The petition contains the names of some ten or eleven judges.

NOTES OF CASES.

AN interesting question, under the law of set-off, was passed upon in the case of *Matter of Receiver of New Amst. Sav. Bank v. Tartter*, 54 How. 385, decided by Mr. Justice Westbrook. On the 5th of July, 1875, Tartter borrowed of the New Amsterdam Savings Bank five thousand dollars, for which he executed his bond and mortgage. On the 20th of September, 1876, the bank became insolvent, and a receiver was appointed. At that time Tartter had on deposit in the bank \$1,748.01. The court held that he was entitled to set off his deposit against the amount of the bond and mortgage. The court distinguished the case from those of *Holbrook v. Receiver of Am. Fire Ins. Co.*, 6 Paige, 620, and *Lawrence v. Nelson*, 21 N. Y. 158. In the first of the cases cited a debt due from two persons jointly to an insolvent corporation was held not subject to the set-off of a claim due from the corporation to one of them alone. In the last cited case, the debtor, a member of a mutual insurance company, asked to set off the amount due on adjusted loss due him on a policy of the company, against premiums owed by him to the company. This was not allowed, the court holding that in this way the debtor would have an advantage over other members of the company who must pay their premiums in full. The decision in the principal case is in direct conflict with that in *Osborn v. Byrne*, 43 Conn. 151; 21 Am. Rep. 641, where it is held that, upon the insolvency of a savings bank, a depositor cannot set off his deposit against a debt due from him to the bank. The ground taken in the latter case is that a savings bank is the agent for the depositor, and, if it loses his money by unfortunate business transactions, he must bear the loss, and not the bank. Set-off against banks other than savings banks has been allowed in numerous cases, but not on all demands. The proceeds of a discounted note on deposit in the bank which discounted it have been allowed against the note, but not a check drawn by another depositor. *Butterworth v. Peck*,

5 Bosw. 341. Bank bills held at the time of the failure of the bank but not those acquired afterward have been allowed to be set off against the bank. *Jefferson Co. Bk. v. Chapman*, 19 Johns. 323; *Diver v. Phelps*, 34 Barb. 224. See, also, *Gee v. Bacon*, 9 Ala. 609; *Exchange Bank v. Knox*, 19 Gratt. 739; *Hallowell, etc., Bk. v. Howard*, 13 Mass. 235.

The case of *Carty v. Shields*, 5 Week. Not. Cas. 241, decided by the Supreme Court of Pennsylvania on the 18th February last, illustrates the principle that an existing right of way cannot be enlarged or altered by uses not contemplated by the parties at the time of its creation. One Carty was the owner of two lots fronting upon a railroad, the larger of which he used as a coal yard. He connected the tracks of the railroad with his coal yard by a side track passing over the smaller lot, and over this side track he carried on the business of a coal dealer. He sold the smaller lot to one Shields without any terms as to way or incumbrances. After the sale Carty established a lime business on the larger lot, in addition to the coal business, and used the siding for the passage of cars employed in both these trades. Shields threatening to tear up the track, Carty filed a bill to restrain him from so doing. The court, in affirming a decree forbidding Shields from interfering with the use of the track by Carty for his coal business, held that Shields, in the absence of terms in his deed, could not be presumed to have accepted it burdened with a larger use or incumbrance than his observation gave him notice of, and that Carty was entitled only to the use of the track for coal and could not use it for his lime business. The case of *Onthank v. Lake Shore & Mich. So. R. R. Co.*, 16 Alb. L. J. 428, decided by the Court of Appeals of this State in November last, enunciates a similar principle. In that case plaintiff, by a written instrument, gave defendant a right to lay and maintain across his land a pipe to convey water from a spring. The instrument did not specify the size of the pipe or where it should be laid. The defendant laid pipe of a particular size which it maintained for a number of years. Afterward it laid a larger size of pipe carrying from the spring a much greater supply of water. The court held that by laying pipe of a particular size, defendant fixed the extent of its easement and was not thereafter entitled to lay a larger pipe. See, also, *Jennison v. Walker*, 11 Gray, 428; *Wynkoop v. Barger*, 12 Johns. 223; *French v. Hays*, 43 N. H. 30; *Bannon v. Angier*, 2 Allen, 128; *Kirkham v. Sharp*, 1 Whart. 328.

In the case of *State v. Amery*, decided by the Supreme Court of Rhode Island, the question was whether a statute of that State which prohibited the sale of intoxicating liquors, and makes no exception in favor of importers selling in the original pack-

age, and was therefore void as to importers, was for that reason unconstitutional and void as to all other persons. The court held that it was not so void, saying that if a law which is constitutional under certain limitations exceeds those limitations, it may still be operative within its legitimate sphere and void only for the excess. See, as holding a similar doctrine, *Commonwealth v. Kimball*, 24 Pick. 359, where Chief Justice Shaw says, in respect of a similar statute of Massachusetts: "Supposing the law could be construed to be repugnant to the Constitution of the United States in so far as it prohibited the sale of imported spirits by the importer in the original packages, it would be void thus far and no farther, and in all other respects conforming to the acknowledged power of the State government, it would be in full force." The general principle is that where a part of a statute is unconstitutional that fact does not authorize the courts to declare the remainder void also unless all the provisions are connected in subject-matter depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. If a statute attempts to accomplish two or more objects and is void as to one it may still be in every respect valid and complete as to the other. See *Commonwealth v. Clapp*, 5 Gray, 100; *State v. Copeland*, 3 R. I. 33; *Armstrong v. Jackson*, 1 Blackf. 374; *People v. Hill*, 7 Cal. 97; *Thompson v. Grand Gulf R.R. Co.*, 3 How. (Miss.) 240; *Mobile & Ohio R.R. v. State*, 29 Ala. 573; *Santo v. State*, 2 Iowa, 165; *People v. Briggs*, 50 N. Y. 566; *State v. Esterbrook*, 3 Nev. 173; *Hagerstown v. Dechert*, 32 Md. 369.

In *Jerome v. Smith*, 48 Vt. 280, plaintiff bought a ticket over defendant's railroad with checks attached. While riding over the route a conductor detached and retained one of the checks and gave plaintiff in lieu thereof a conductor's check which was a full equivalent for the check retained. This check plaintiff lost. Before plaintiff arrived at the point in his journey to which the conductor's check entitled him to ride, another conductor took the train. He demanded of plaintiff the production of the conductor's check or payment of fare, and refused to let him ride on the passage ticket held by him. Plaintiff being unable to find the conductor's check and refusing to pay fare, he was ejected from the train. The court held that he was lawfully ejected. This decision seems to be supported by a number of authorities. Among the most nearly in point are *Hamilton v. N. Y. C. R. R. Co.*, 51 N. Y. 100; *Standish v. Narragansett Steamship Co.*, 111 Mass. 512; *Townsend v. N. Y. C. R. R. Co.*, 56 N. Y. 295; *Duke v. G. W. Ry. Co.*, 14 U. C. C. P. 369. See, however, *Pittsburgh R. R. Co. v. Hennigh*, 39 Ind. 509; *Palmer v. Charlotte R. R. Co.*, 3 S. C. (N. S.), 580; *Marony v. Old Col. R. R. Co.*, 106 Mass. 153; *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25; *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465.

SOME RECENT DECISIONS — TWENTY-SECOND AMERICAN REPORTS.

ON the subject of life insurance we find two cases directly in conflict. In *Guardian Mutual Life Insurance Company v. Hogan*, 80 Ill. 35, it is held that the relation of father and son does not give the son an insurable interest in the life of the father, unless the son has a well-founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father. On the other hand, in *Reserve Mutual Insurance Company v. Kane*, 81 Penn. St. 154, it is held that the son has an insurable interest in the life of his father, especially where the son is liable under the poor law for the support of the father. We vote with Illinois on the point. The matter being one simply of pecuniary interest, no person has an insurable interest in the life of another unless it is a pecuniary advantage to him to have the other live. In the Pennsylvania case it was for the son's interest to have the insured die.

Dogs and "niggers" make a good deal of trouble in this volume. In *Heisrodt v. Hackett*, 34 Mich. 283, a statute authorized "any person" to kill a dog going at large, and not licensed or collared. In an action to recover for the killing of plaintiff's dog by defendant's dog, held no defense that plaintiff's dog was not licensed and collared, as defendant's dog was not a "person." We know the converse of this to be urged once. Sidney Smith, when solicited by Landseer, the famous animal painter, to sit to him for his portrait, exclaimed: "Is thy servant a dog, that he shall do this thing?" In *Rider v. White*, 65 N. Y. 54, it is laid down that one injured by the bite of a dog may recover damages of the owner on proof that the dog was vicious, and that the owner knew it, without showing that it had ever bitten any one. So much for dogs. Now for the other "animals" mentioned. Down in North Carolina the law-makers have such a delicate sense of the fitness of things that they regulate marriage somewhat by complexion, and pronounce marriages between negroes and white persons unlawful. (Probably they will not suffer Othello to be acted in their theatres.) So in *State v. Ross*, 76 N. C. 242, the court had a good deal of self-command to adjudge that where a white woman left the State to be married, in another State, to a negro resident thereof, but not intending to return, but was so married and afterward did return, the marriage was lawful in North Carolina. But, in *State v. Kennedy*, 76 N. C. 251, where a negro man and a white woman left the State to be married, with intent to evade the law and to return, and were married in another State where such marriages were lawful, and did return, the marriage was held invalid in North Carolina. But not only do live "niggers" make the courts trouble, but dead ones do also. In *Mount Moriah*

Cemetery Association v. Commonwealth, 81 Penn. St. 235, it is held that a by-law of a cemetery association prohibiting the burial of negroes therein is void as to persons who were lot owners when the by-laws were passed. We have known of cemeteries prohibiting the interment of dogs, but this is the first instance of the extension of the prohibition to negroes that has come to our notice. Judge Gordon sits down on the cemetery folks in this lively manner: "In a sound code of ethics this prejudice never had a respectable standing, for it was but the child of an abnormal servile system that was entitled to no man's respect outside of the country and laws which maintained it. But at this time, when this prejudice is under the ban of recent constitutional and legal provisions, expressly designed for its suppression and extinction, it is scarcely to be expected that we can be induced to indorse its respectability, or to encourage it to linger on ger around the halls of justice." Judge Sharewood said, "I dissent from this judgment and opinion."

We don't often run across an elegant classical quotation in a judicial opinion, but C. J. Appleton makes one in *Meador v. White*, 66 Me. 90. It is here held that an action cannot be maintained to recover money loaned on the Lord's day. The court regretting the statute, and pointing out the anomaly that while both parties are equally guilty, one is punished and the other is rewarded, quote from Juvenal.

"Multi
Committunt eadem, diverso crimina fato;
Ille crucem pretium sceleris tulit, hic diadema."

which, if we may be allowed to serve as interpreter, may be thus rendered into the vernacular.

"Of two who equally deserve law's frown,
One gets the cross, the other takes the crown."

New Hampshire still continues the banner State for long opinions. Here in *Hardy v. Merrill*, 56 N. H., we have twenty-two pages to demonstrate that non-professional witnesses may testify to their opinion of a testator's sanity, founding their opinion upon their knowledge and observation of his appearance and conduct. A good deal of the opinion was omitted, too. An interesting opinion, however, on a very important subject. The court made one mysterious observation, namely: In *McKee v. Nelson*, the court says: "There are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot specify; precisely what Judge Bellows, in *Whittier v. Franklin*, said of the frightened mental condition and sulky disposition of a horse." We did not know that the equine race are peculiarly subject to the "tender passion," but it seems to be judicially affirmed. Again, the court say: "Evidence of this character was received a few weeks ago, in the trial of Magoon, for murder, in Rockingham county, without the intimation of a doubt concerning its

competency; and the very able and vigilant counsel, upon both sides, in that cause, knew what they were about, and omitted nothing of their duty to the prisoners or to the public." Assuming that the counsel really did "know what they were about," it seems a rather curious reason for judging of the competency of evidence. Then the court wax quite lively: "But one witness says, 'he did not appear as usual; he did not appear natural.' Now, let us imagine a scene that might very probably be exhibited where the Massachusetts rule prevails. 'Very well,' says a learned barrister, 'very well, Mr. Witness, you may say that, that is quite regular, that is your opinion. Now tell us in what respect he did not appear 'as usual' or 'natural.' 'Well, I can't describe it, but I should call it wandering, delirious; he was incoherent in his talk.' 'Very well, Mr. Witness, you acquit yourself like a sensible man. Now tell the jury, whether, in your opinion, he was then of sound mind.' 'I object!' thunders the learned barrister on the other side. 'I object!' thunders the opposing junior, 'counsel know better. It is an insult and outrage to put such a question.' 'I object!' 'I object!' echoes from every side. The court-room is in an uproar. The judge has to exert himself to keep the peace. The lawyers on each side are all talking at the same time in a very delirious and incoherent manner. The witness is confounded. The jury are confounded. Everybody is confounded," etc. So are we. Are we reading a grave law-opinion or one of Charles Reade's court scenes? Sometimes the court in the "Granite State" indulges in a little pardonable sarcasm on the rhetoric of the attorneys. Thus, in *Simpson v. City Savings Bank*, 56 N. H. 466, the court observe: "In the plaintiff's brief it is suggested that 'this law of 1874 touches the heart blood of this plaintiff,' etc.; 'but now, if he suffer in the matter of costs, his tribulation will be caused not so much by the law of 1874, as by his own persistent disregard of the law.'" Truly, it was a great mistake on the part of the New Hampshire legislature to endeavor to compel the judges of that State to write shorter opinions.

Several cases in Wisconsin are of interest. *Hoyt v. Hudson*, 41 Wis. 105, holds that the burden of proving contributory negligence is on the defendant, and that the plaintiff is not bound to show an absence of negligence on his part;—a holding which strikes us as more reasonable than our own rule. In *Hart v. Stickney*, 41 Wis. 680, a note, bearing interest payable annually, and transferred after maturity of interest and non-payment of interest, was held open to all defenses, even in the hands of an innocent holder; which is consistent with *Newell v. Gregg*, 51 Barb. 263. In *State ex rel. Drake v. Doyle*, a statute was held constitutional, which required foreign insurance companies, as a condition precedent to being licensed to do business in that State, to agree

not to remove into the Federal courts any actions brought against them in the State courts. The U. S. District Court of the Western District of Wisconsin had previously held the act void.

The case of *Hayes v. Livingston*, 84 Mich. 384, is very interesting and will probably give rise to considerable discussion, although decided by a very able court. The decision is in effect that under the statute of frauds it is not permissible that an estoppel *in pais* should work a transfer of the legal title to land. The court concede that the rule is different in respect to personal property. They concede, too, that in regard even to real estate the rule is different in Maine, Georgia, Vermont, Pennsylvania, Connecticut and New York. They seem to concede too that the injured party might find relief in equity, and distinguish the New York doctrine on the ground of the abolition of the distinction here between the legal and the equitable tribunal. It may be that the inability of the courts of law to take cognizance of the facts constituting the estoppel may support the decision in this case; but we cannot quite clearly see any other reason for it. We cannot at this moment assent to the idea of the court that it would be impolitic to defeat the statute of frauds "by a technicality so shadowy and unsubstantial." Still we offer these views with diffidence, and shall endeavor hereafter to examine the matter more thoroughly.

This volume has many valuable notes.

TAXATION BY MUNICIPALITY OF ITS OWN BONDS.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

MURRAY V. CITY COUNCIL OF CHARLESTON.

JENKINS V. CITY COUNCIL OF CHARLESTON.

Under the provisions of its charter, authorizing it to impose taxes upon property within its limits, the city of Charleston, S. C., by ordinance imposed a tax of two per cent upon all property therein, and directed that the tax assessed upon the city stock, which represented the indebtedness of the city, should be deducted by the city treasurer out of the interest thereon. Held (reversing the decision of court below, 5 S. C. 593; 22 Am. Rep. 14) that the ordinance as to such city stock was void, as in conflict with the provision of the Federal Constitution forbidding State legislation impairing the obligation of a contract.

No municipality of a State can, by its own ordinances, under the guise of taxation, relieve itself from performing to the letter all it has expressly promised to its creditors.

IN error to the Supreme Court of the State of South Carolina. The facts appear in the opinion.

Mr. Justice STRONG delivered the opinion of the court.

The plaintiff, a resident of Bonn, in Germany, was, prior to the first day of January, A. D. 1870, and he still is, the holder and owner of \$35,262.35 of what is called stock of the city of Charleston. The stock is in reality debt of the city, the evidence of which is certificates, whereby the city promises to pay to the owners thereof the sums of money therein mentioned, together with six per cent interest, payable quarterly. One-third of the interest due the plaintiff on the first

days of April, July, and October, 1870, and January and July, 1871, having been retained by the city, this suit was brought to recover the sums so retained, and the answer to the complaint admitted the retention charged, but attempted to justify it under city ordinances of March 20, 1870, and March 21, 1871. By these ordinances, set out in full in the answer, the city appraiser was directed to assess a tax of two cents upon the dollar of the value of all real and personal property in the city of Charleston, for the purpose of meeting the expenses of the city government, and the third section of each ordinance declared that the taxes assessed on city stock should be retained by the city treasurer out of the interest thereon, when the same is due and payable. On these pleadings the case was submitted to the court for trial without a jury, and the court made a special finding of facts, substantially as set forth in the complaint and averred in the answer, upon which judgment was given for the defendant. This judgment was subsequently affirmed by the Supreme Court, and the record is now before us, brought here by writ of error. It is objected that we have no jurisdiction of the case, because, it is said, no Federal question was raised of record or decided in the Court of Common Pleas where the suit was commenced.

The city of Charleston was incorporated in 1783, before the adoption of the Federal Constitution. Among other powers conferred upon the city councils was one to "make such assessments on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit, and advantage of the city, as shall appear to them expedient." It was under this authority, repeated in subsequent legislation, the city ordinances of 1870 and 1871 were made. It may well be doubted whether the acts of the legislature were intended to empower the city to tax for its own benefit the debts it might owe to its creditors, especially to its non-resident creditors. Debts are not property. A non-resident creditor cannot be said to be, in virtue of a debt due to him, a holder of property within the city, and the city councils were authorized to make assessments only upon the inhabitants of Charleston, or those holding taxable property within the same. To that extent the Supreme Court of the State has decided the city has power to assess for taxation. That decision we have no authority to review. But neither the charter itself nor any subsequent acts of legislation directly or expressly interfered with any debts due by the city or gave to the city any power over them. They simply gave limited legislative power to the city councils. It was not until the ordinances were passed under supposed authority of the legislative act that their provisions became the law of the State. It was only when the ordinances assessed a tax upon the city debt and required a part of it to be withheld from the creditors, that it became the law of the State that such a withholding could be made. The validity of the authority given by the State, as well as the validity of the ordinances themselves, was necessarily before the Court of Common Pleas when this case was tried, and no judgment could have been given for the defendants without determining that the ordinances were laws of the State, not impairing the obligation of the contracts made by the city with the plaintiff. And when the case was removed into the Supreme Court of the State, that court understood a Federal question to be before it. One of the grounds of the notice of the appeal was "that such a tax is a violation of good faith in the contract of

loan, impairs the obligation of said contract, and is, therefore, unconstitutional and void." It is plain, therefore, that both in the Common Pleas and in the Supreme Court of the State a Federal question was presented by the pleadings and was decided,—decided in favor of the State legislation and against a right the plaintiff claims he has under the Constitution of the United States. The city ordinances were in question on the ground of their repugnancy to the inhibition upon the States to make any law impairing the obligation of contracts, and the decision was in favor of their validity. Nothing else was presented for decision, unless it be the question whether the acts of the State legislature authorized the ordinances, and that was ruled affirmatively. The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of State legislation this court is authorized to interfere. The form and mode in which the Federal question is raised in the State court is of minor importance, if, in fact, it was raised and decided. The act of Congress of 1867 gives jurisdiction to this court over final judgments in the highest courts of a State in suits "where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity." Not a word is said respecting the mode in which it shall be made to appear that such a question was presented for decision. In the present case it was necessarily involved, without any formal reference to any clause in the Constitution, and it is difficult to see how any such reference could have been made to appear expressly.

In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State court expressly assert a right under the Federal Constitution. The true test is, not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held that we may review the judgments of a State court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised. In *Crowell v. Randall*, 10 Peters, 368, it was laid down, after a review of almost all our previous decisions, "that it is not necessary the question should appear on the record to have been raised, and the decision made in direct and positive terms, *in ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment." This case was followed by *Armstrong et al. v. Treasurer*, 16 Pet. 281, where it was held sufficient to give this court jurisdiction if it appear from the record of the State court that the Federal question was necessarily involved in the decision and that the court could not have given the judgment or decree which they passed without de-

ciding it. See, also, *Bridge Proprietors v. Hoboken Company*, 1 Wall. 118, and *Furman v. Nichol*, 8 id. 44.

That involved in the judgment of the Court of Common Pleas and in that of the Supreme Court of the State was a decision that the city ordinances of Charleston were valid, that they did control the contract of the city with the plaintiff, and that they did not impair its obligations is too plain for argument. The plaintiff complains that the city has not fully performed its contracts according to their terms, and it has paid only four per cent interest instead of six per cent which it promised to pay, and that it has retained two per cent of the interest for its own use. The city admits all this, but attempts to justify its retention of one-third of what it promised to pay by pleading its own ordinances directing its officer to withhold the two per cent of the interest promised whenever it became due and payable according to the stipulations of the contract, calling the amount detained a tax. Of course the question is directly presented whether the ordinances are a justification; whether they can and do relieve the debtor from full compliance with the promise; in other words, whether the ordinances are valid and may lawfully be applied to the contract. The court gave judgment for the defendant, which would have been impossible had it not been held that they have the force of law, notwithstanding the Constitution of the United States, and the Supreme Court affirmed the judgment. Our jurisdiction, therefore, is manifest.

We come, then, to the question whether the ordinances decided by the court to be valid did impair the obligation of the city's contract with the plaintiff. The solution of this question depends upon a correct understanding of what that obligation was. By the certificates of stock, or city loan, held by the plaintiff, the city assumed to pay to him the sum mentioned in them, and to pay six per cent interest in quarterly payments. The obligation undertaken, therefore, was both to pay the interest at the rate specified, and to pay it to the plaintiff. Such was the contract and such was the whole contract. It contained no reservation or restriction of the duty described. But the city ordinances, if they can have any force, change both the form and effect of the undertaking. They are the language of the promisor. In substance they say to the creditor: "True, our assumption was to pay to you quarterly, a sum of money equal to six per cent per annum on the debt we owe you. Such was our express engagement. But we now lessen our obligation. Instead of paying all the interest to you we retain a part for ourselves, and substitute the part retained for a part of what we expressly promised you." Thus applying the ordinances of the contract it becomes a very different thing from what it was when it was made, and the change is effected by legislation, by ordinances of the city, enacted under asserted authority of laws passed by the legislature. That by such legislation the obligation of the contract is impaired is manifest enough, unless it can be held there was some implied reservation of a right in the creditor to change its terms, a right reserved when the contract was made—unless some power was withheld, not expressed or disclosed, but which entered into and limited the express undertaking. But how that can be—how an express contract can contain an implication, or consist with a reservation directly contrary to the words of the instrument, has never yet been discovered.

It has been strenuously argued on behalf of the de-

fendant that the State of South Carolina and the city council of Charleston possessed the power of taxation when the contracts were made; that by the contracts the city did not surrender this power; that, therefore, the contracts were subject to its possible exercise, and that the city ordinances were only an exertion of it. We are told the power of a State to impose taxes upon subjects within its jurisdiction is unlimited (with some few exceptions) and that it extends to every thing that exists by its authority or is introduced by its permission. Hence it is inferred that the contracts of the city of Charleston were made with reference to this power and in subordination to it.

All this may be admitted, but it does not meet the case of the defendant. We do not question the existence of a State power to levy taxes as claimed, nor the subordination of contracts to it, so far as it is unrestrained by constitutional limitation. But the power is not without limits, and one of its limitations is found in the clause of the Federal Constitution, that no State shall pass a law impairing the obligation of contracts. A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a State legislature. The constitutional provision against impairing contract obligations is a limitation upon the taxing power as well as upon all legislation, whatever form it may assume. Indeed, attempted State taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls for the exercise of our supervisory power. It may, then, safely be affirmed that no State, by virtue of its taxing power, can say to a debtor, "you need not pay to your creditor all of what you have promised to him. You may satisfy your duty to him by retaining a part for yourself, or for some municipality, or for the State treasury." Much less can a city say, we will tax our debt to you, and in virtue of the tax withhold a part for our own use.

What, then, is meant by the doctrine that contracts are made with reference to the taxing power resident in the State, and in subordination to it? Is it meant that when a person lends money to a State, or to a municipal division of the State having the power of taxation, there is in the contract a tacit reservation of a right in the debtor to raise contributions out of the money promised to be paid before payment? That cannot be, because if it could, the contract (in the language of Alexander Hamilton) would "involve two contradictory things: an obligation to do and a right not to do—an obligation to pay a certain sum and a right to retain it in the shape of a tax. It is against the rules both of law and of reason to admit by implication in the construction of a contract a principle which goes in destruction of it." The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.

Is, then, property which consists in the promise of a State, or of a municipality of a State, beyond the reach of taxation? We do not affirm that it is. A State may undoubtedly tax any of its creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest the debt bears, if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched. But until payment of the debt or interest has been made, as stipulated, we think no act of State sovereignty can work an exoneration from what has been promised to the creditor, namely, payment to him, without a violation of the Constitution. "The true rule of every case of property founded on contract with the government is this: It must first be reduced into possession, and then it will become subject in common with other similar property to the right of the government to raise contributions upon it. It may be said that the government may fulfill this principle by paying the interest with one hand and taking back the amount of the tax with the other. But to this the answer is, that to comply truly with the rule the tax must be upon all the money of the community, not upon the particular portion of it which is paid to the public creditors, and it ought to be so regulated as not to include a lien upon the fund. The creditor should be no otherwise acted upon than as any other possessor of moneys, and consequently the money he receives from the public can thus only be a fit subject of taxation when it is entirely separated" (from the contract) "and thrown undistinguished into the common mass."—3 Hamilton Works, 614 *et seq.* Thus only can contracts with the State be allowed to have the same meaning as all other similar contracts have.

Such limitations of the power of State taxation we have heretofore recognized. We have held property in one stage of its ownership not to be taxable and in a succeeding stage to be taxable. Those decisions are not without some analogy to the rule we have mentioned. Thus, in *Brown v. Maryland*, 12 Wheaton, 419-441, where it was held that a State tax could not be levied, by the requisition of a license, upon importers of merchandise by the bale or package, or upon other persons selling the goods imported by the bale or package, Marshall, C. J., considering both the prohibition upon States against taxing imports and their general power to tax persons and property, said: "Where the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import and has become subject to the taxing power of the State."—*Vide*, also, *Woodruff v. Parham*, 8 Wall. 122; *State Tax on Railway Gross Receipts*, 15 id. 295. A tax on income derived from contracts, if it does not prevent the receipt of the income, cannot be said to vary or lessen the debtor's obligation imposed by the contracts.

In opposition to the conclusion we have reached we are referred to the *Champaign County Bank v. Smith*, 7 Ohio State, 42, and *People v. Home Ins. Co.*, 29 Cal. 533, in which it is said the power of a State to tax its own bonds was sustained. We do not, however, regard those cases as in conflict with the opinion we now hold; and if they were they would not control our judgment when we are called upon to determine the meaning and extent of the Federal Constitution. In the former it appeared that the tax collected was in virtue

of an assessment of State bonds belonging to the bank, but deposited with the auditor of State as security for the circulating notes of the company. The tax thus assessed having been carried into the duplicate, the collector seized and appropriated the bank notes and money of the bank, and suit was brought to recover the amount so taken. In sustaining a demurrer to the petition the court held, it is true, that a State has power to tax its own bonds equally with other property, and that the exercise of such a power involves no violation of a contract. But it was not held that the State could collect the tax by withholding from the creditor any part of what the State had assumed to pay. The tax was laid, not upon the debt, but upon the creditor, and it was collected, not out of what the State owed, but out of the general property of the bank. Neither by the assessment nor in the collection was there any interference with the contract. In *The People v. The Home Insurance Company* the question was whether bonds of the State of California, belonging to a New York insurance company, but deposited and kept in the State, as required by an act to tax and regulate foreign insurance companies doing business in the State, were assessable for taxation there. It was ruled that they were. This case, no more than the former, meets the question we have before us. It certainly does not hold that a State or a city by virtue of its taxing power can convert its undertaking to pay a debt bearing six per cent interest into one bearing only four.

These are the only cases cited to us as directly sustaining the judgment we have now in view. How far short of sustaining it they are must be apparent. And we know of none that are more in point. It seems incredible that there can be any, for as we said in *State Tax v. Pennsylvania*, 15 Wall. 320, "the law which requires the treasurer of the company (indebted) to retain five per cent of the interest due to the non-resident bondholder is not * * * a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under the pretense of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for such a law * * * relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement." What was thus said, it is true, was in a case where the question was whether a tax thus imposed upon a non-resident holder of bonds issued by a company chartered by the State was warranted by the Constitution. But so far as it speaks of what constitutes impairing contract obligation it is applicable in its fullest extent to all legislation affecting contracts, no matter who may be the parties.

We do not care now to enter upon the consideration of the question whether a State can tax a debt due by one of its citizens or municipalities to a non-resident creditor, nor whether it has any jurisdiction over such a creditor or over the credit he owns. Such a discussion is not necessary, and it may be doubtful whether the question is presented to us by this record.

It is enough for the present case that we hold, as we

do, that no municipality of a State can by its own ordinances, under the guise of taxation, relieve itself from performing to the letter all that it has expressly promised to its creditors.

There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts and the duty of performing them, *as made*, are foundations of all well ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed.

The judgment of the Supreme Court of South Carolina is reversed, and the record is remitted with instructions to proceed in accordance with this opinion. Miller and Hunt, JJ., dissenting.

We are of opinion that the power of taxation found in the charter of the city of Charleston long before the contract was made which is here sued on, entered, like all other laws, into the contract and became a part of it. In other words, the contract was made subject to this power of taxation by the city of Charleston as found in her charter from 1781 to the present time.

The imposition and collection of this tax cannot, therefore, impair the obligation of a contract which was made subject to her right to exercise that power. We therefore dissent.

TRIAL OF EXTRADITED CRIMINALS FOR OFFENSES NOT NAMED IN TREATY.

KENTUCKY COURT OF APPEALS, APRIL 17, 1878.

COMMONWEALTH V. HAWES.

The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from and is measured and restricted by the provisions, express and implied, of the treaty.

A fugitive from justice was, under the provisions of the extradition treaty of 1842, between this country and Great Britain, surrendered by the Canadian authorities to be tried in Kentucky upon an indictment for forgery. Held, that he could not, while in the custody of the court, under such surrender, be tried upon an indictment for embezzlement.

APPEAL by the Commonwealth from an order of the Kenton Criminal Court directing that the defendant, Smith N. Hawes, indicted for embezzlement, be not held in custody, and that the case against him be not placed on the docket. The facts appear in the opinion.

T. E. Moss and W. W. Cleary, for appellant.

J. G. Carlisle and J. W. Stevenson, for appellee.

LINDSAY, C. J. Smith N. Hawes stood indicted in the Kenton Criminal Court for uttering forged paper, for embezzlement, and also upon four separate and distinct charges of forgery. He was found to be a resident of the town of London, in the Dominion of Canada, and in February, 1877, was demanded by the President of the United States, and surrendered by the Canadian authorities to answer three of said charges of forgery.

As to the fourth charge, the evidence of his criminality was not deemed sufficient, and that alleged offense was omitted from the warrant of extradition.

The demand and surrender were made in virtue of,

and pursuant to, the tenth article of the treaty concluded August 9th, 1842, between the Kingdom of Great Britain and the United States of America.

The attorney for the Commonwealth caused two of the indictments for forgery to be dismissed. Hawes was regularly tried under each of the remaining two, and in each case a judgment of acquittal was rendered in his favor, upon a verdict of not guilty.

After all this, however, the officers of Kenton county continued to hold him in custody, and finally, on motion of the attorney for the Commonwealth, one of the indictments for embezzlement was set down to be tried on the 6th day of July, 1877. Further action was postponed from time to time until the 21st of August, 1877, when Hawes presented his affidavit, setting out all the facts attending his surrender, and the purposes for which it was made, and moved the court to continue all the indictments then pending against him, and to surrender him to the authorities of the United States, to be by them returned or permitted to return to his domicile and asylum in the Dominion of Canada. This motion was subsequently modified to the extent that the court was asked to set aside the returns of the sheriff on the various bench warrants under which he had been arrested, and to release him from custody.

The court, in effect, sustained this modified motion, and ordered "that the cases of the *Commonwealth of Kentucky v. Smith N. Hawes*, for embezzlement, and for uttering forged instruments with intent, etc., be continued, and be not again placed on the docket for trial, and that said Hawes be not held in custody until the further order of this court."

From said order the Commonwealth has prosecuted this appeal. It is not final in its nature, but under the provisions of sections 835 and 837 of the Criminal Code of Practice, it may nevertheless be reviewed by this court.

It was the opinion of the learned judge (Jackson) who presided in the court below, that the tenth article of the treaty of 1842 impliedly prohibited the government of the United States and the Commonwealth of Kentucky from proceeding to try Hawes for any other offense than one of those for which he had been extradited, without first affording him an opportunity to return to Canada, and that he could not be lawfully held in custody to answer a charge for which he could not be put upon trial.

The correctness of this opinion depends on the true construction of the tenth article of the treaty, and also on the solution of the question as to how far the judicial tribunals of the Federal and State governments are required to take cognizance of, and in proper cases to give effect to, treaty stipulations between our own and foreign governments.

Section 2, article 6 of the Federal Constitution, declares that: "This Constitution, and the laws of the United States, made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges of every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."

It will thus be seen that with us a public treaty is not merely a compact or bargain to be carried out by the executive and legislative departments of the general government, but a living law, operating upon and binding the judicial tribunals, State and Federal, and these tribunals are under the same obligation to notice and give it effect, as they are to notice and enforce the

Constitution, and the laws of Congress made in pursuance thereof.

"A treaty is in its nature a compact between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its object is infra-territorial, but is carried into execution by the sovereign powers of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in the courts of justice as equivalent to an act of the Legislature whenever it operates of itself, without the aid of any legislative provision." *Foster v. Nelson*, 2 Peters, 253, per Chief Justice Marshall.

When it is provided, by treaty, that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override these limitations, or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

A different rule seems to have been intimated in the case of *Caldwell* (8 Blackford, C. C. Reports, 131), but the real decision rendered in that, as in the subsequent case of *Lawrence* (13 Blackford, C. C. Reports, 236), decided by the same judge, was, that extradition proceedings had pursuant to the treaty under consideration, do not by their nature secure to the person surrendered, immunity from prosecution for offenses other than the one upon which the surrender is made, and the intimation in *Caldwell's* case, that the judiciary may leave it to the executive department to interfere to preserve and protect the good faith of the government in a case like this, is at the most but a *dictum*. The tenth article of the treaty of 1842 is as follows:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons, who, being charged with the crime of murder or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: *Provided*, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive."

It will be seen that the trial and punishment of the surrendered fugitive for crimes other than those

mentioned in the treaty is not prohibited in terms, and that fact is regarded as of controlling importance by those who hold to the view that Hawes was not entitled to the immunity awarded him by the court below. But if the prohibition can be fairly implied from the language and general scope of the treaty, considered in connection with the purposes the contracting parties had in view, and the nature of the subject about which they were treating, it is entitled to like respect, and will be as sacredly observed as though it was expressed in clear and unambiguous terms.

Public treaties are to be fairly interpreted, and the intention of the contracting parties to be ascertained by the application of the same rules of construction, and the same course of reasoning which we apply to the interpretation of private contracts.

By the enumeration of seven well-defined crimes for which extradition may be had, the parties plainly excluded the idea that demand might be made as matter of right for the surrender of a fugitive charged with an offense not named in the enumeration, no matter how revolting or wicked it may be.

By providing the terms and conditions upon which a warrant for the arrest of the alleged fugitive may be issued, and confining the duty of making the surrender to cases in which the evidence of criminality is sufficient, according to the laws of the place where such fugitive is found, to justify his commitment for trial, the right of the demanding government to decide finally as to the propriety of the demand, and as to the evidences of guilt, is as plainly excluded as if that right had been denied by express language.

It would scarcely be regarded an abuse of the rules of construction, from these manifest restrictions, unaided by extraneous considerations, to deduce the conclusion that it was not contemplated by the contracting parties that an extradited prisoner should, under any circumstances, be compelled to defend himself against a charge other than the one upon which he is surrendered, much less against one for which his extradition could not be demanded.

The consequences to which the opposite view may lead, though by no means conclusive against it, are nevertheless to receive due and proper weight.

It would present a remarkable state of case to have one government saying in substance to the other: "You cannot demand the surrender of a person charged with embezzlement. My judges or other magistrates have no right or authority, upon such a demand, either to apprehend the person so accused, or to inquire into the evidences of his criminality; and if they should assume to do so, and should find the evidence sufficient to sustain the charge, the proper executive authority could not lawfully issue the warrant for his surrender. But you may obviate this defect in the treaty by resting your demand upon the charge of forgery, and if you can make out a *prima facie* case against the fugitive, you may take him into custody, and then, without a breach of faith, and without violating either the letter or spirit of our treaty, compel him to go to trial upon the indictment for the non-extraditable offense of embezzlement."

And if this indirect mode of securing the surrender of persons guilty of other than extraditable offenses may be resorted to, or if the demand, when made in the utmost good faith, to secure the custody of a criminal within the provisions of the treaty, can be

made available to bring him to justice for an offense for which he would not have been surrendered, then we do not very well see how either government could complain if a lawfully extradited fugitive should be tried and convicted of a political offense. Prosecutions for the crime of treason are no more provided against by the treaty than prosecutions for the crime of embezzlement, or the offense of bribing a public officer.

Mr. Fish, in his letter of May 22, 1876, to Mr. Hoffman, in reference to the extradition of Winslow, attempts to meet this difficulty by saying that "neither the extradition clause in the treaty of 1794, nor in that of 1842, contains any reference to immunity for political offenses, or to the protection of asylum for religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain it was not supposed on either side that guarantees were required of each other against a thing inherently impossible, any more than by the laws of Solon was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation."

But President Tyler, under whose administration the treaty of 1842 was concluded, evidently thought that the guarantees of immunity to political refugees were to be implied from the treaty itself, and not left to rest alone on the public sentiment of the two countries. In communicating the draft of the treaty to the Senate for its ratification, speaking of the subject of extradition, he said:

"The article on the subject, in the proposed treaty, is carefully confined to such offenses as all mankind agree to regard as heinous and destructive of the security of life and property. In this careful and specific enumeration of crimes, the object has been to exclude all political offenses, or criminal charges arising from wars or intestine commotions. Treason, misprison of treason, libels, desertion from military service, and other offenses of similar character, are excluded."

This interpretation was cotemporaneous with the treaty itself, and deserves the higher consideration, from the fact that it was contained in a paper prepared by the then Secretary of State, Mr. Webster, who represented the government of the United States in the negotiations from which it resulted.

It seems, also, that the extradition article of the treaty was understood in the same way by the British Parliament in 1843. The act of Parliament of that year, passed for the purpose of carrying it into effect, directed that such persons as should thereafter be extradited to the United States should be delivered "to such person or persons as shall be authorized, in the name of the United States, to receive the person so committed, and to convey him to the United States, to be tried for the crime of which such person shall be accused."

The precise purpose for which the fugitive is to be surrendered is set out in exact and apt language, and the act negatives, by necessary implication, the right here claimed, that the person surrendered may be tried for an offense different from that for which he was extradited, and one for which his surrender could not have been demanded.

The American Executive in 1842, and the British Parliament in 1843, seem to have been impressed with the conviction that the treaty secured to persons surrendered under its provisions an immunity from trial

for political offenses far more stable and effectual than the public sentiment of the two countries. Experience had taught them that in times of intestine strife and civil commotions, the most enlightened public sentiment may become warped and perverted, just as it has taught that man is sometimes capable of committing the unnatural crime of parricide, although such a crime seemed impossible to the great Athenian law-giver.

And this view was adhered to by Congress in 1848, when the general law providing for the surrender of persons charged with crime to the various governments with which we had treaty stipulations on that subject, was passed. After setting out the necessary preliminary steps, it was provided by the 3d section of that act, "That it shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be accused."

This, like the act of Parliament, declares the purpose of the surrender to be that the alleged offender may "be tried for the crime of which such person shall be accused."

The maxim, *expressio unius est exclusio alterius*, may with propriety be applied to each of these acts, and read in the light of that maxim, they are persuasive at least of the construction which, up to 1843, the two contracting parties had placed on the tenth article of the treaty.

The act of Congress is, in one view, more important than the British act of 1843. It does not rest alone on the proper interpretation of a particular treaty, and may be regarded as a legislative declaration of the American idea of the fundamental or underlying principles of the international practice of extradition.

The ancient doctrine that a sovereign State is bound by the law of nations to deliver up persons charged with, or convicted of, crimes committed in another country, upon the demand of the State whose laws they have violated, never did permanently obtain in the United States. It was supported by jurists of distinction, like Kent and Story, but the doctrine has long prevailed with us that a foreign government has no right to demand the surrender of a violator of its laws unless we are under obligations to make the surrender, in obedience to the stipulations of an existing treaty. (Lawrence's *Wheaton's on International Law*, page 233, and authorities cited.)

As said by Mr. Cushing, in the matter of Hamilton, a fugitive from the justice of the State of Indiana, "It is the established rule of the United States neither to grant nor to ask for extradition of criminals as between us and any foreign government, unless in cases for which stipulation is made by express convention." (Opinions of Attorney-Generals, volume 6, page 431.)

From the treatise of Mr. Clark on the subject of extradition, we feel authorized to infer that this is the English theory, but whether it is or not, that government certainly would not, in the absence of treaty stipulations, surrender fugitives to a government which, like ours, would refuse to reciprocate its acts of comity in that respect.

The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted

by, the provisions, express and implied, of the treaty. The fugitive Hawes, by becoming an inhabitant of the Dominion of Canada, placed himself under the protection of British laws, and we could demand his surrender only in virtue of our treaty with that government, and we held him in custody for the purposes contemplated by that treaty, and for no other.

He was surrendered to the authorities of Kentucky, to be tried upon three several indictments for forgery. The Canadian authorities were of opinion that the evidences of his criminality were sufficient to justify his commitment for trial on said three charges. One of the charges the Commonwealth voluntarily abandoned. He was tried upon the remaining two, and found not guilty in each case by the jury, and now stands acquitted of the crimes for which he was extradited.

It is true he was in court, and in the actual custody of the officers of the law when it was demanded that he should be compelled to plead to the indictment for embezzlement. But the specific purposes for which the protection of the British laws had been withdrawn from him had been fully accomplished, and he claimed that, in view of that fact, the period of his extradition had been determined; that his further detention was not only unauthorized, but in violation of the stipulations of the treaty under which he was surrendered, and that the Commonwealth could not take advantage of the custody in which he was then wrongfully held, to try and punish him for a non-extraditable offense.

To all this, it was answered that "an offender against the justice of his country can acquire no rights by defrauding that justice." That "between him and the justice he has offended, no rights accrue to the offender by flight. He remains at all times, and everywhere, liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm." Such is the doctrine of the cases of Caldwell and Lawrence (8th and 13th Blatchford's Reports), and of the case of Lagrave (59th New York). And if the cases of Caldwell and Lawrence could be freed from the complications arising out of the residence of the prisoners within the territorial limits of the British crown, and the fact that we received them from the authorities of the British government in virtue of, and pursuant to, treaty stipulations, it would be sound doctrine and indisputable law.

But did Caldwell or Lawrence come within the reach of the arms of our laws? They were surrendered to us by a foreign sovereign to be tried for specified crimes, and were forcibly brought for the purposes of those trials within the jurisdiction of our courts, and the point in issue was not whether the prisoners had secured immunity by flight, but whether the court could proceed to try them without disregarding the good faith of the government, and violating the "supreme law?"

The legal right of a judicial tribunal to exercise jurisdiction in a given case must, from the nature of things, be open to question at some stage of the proceeding, and we find it difficult to conceive of a person charged with crime being so situated as not to be permitted to challenge the power of the court assuming the right to try and punish him.

The doctrine of the cases of Caldwell and Lawrence has been sanctioned by several prominent British officials and lawyers, and has seemingly been acted upon by some of the Canadian courts, and in one instance (that of Heilbronn) by an English court. We say

seemingly, for the reason that in Great Britain treaties are regarded as international compacts, with which in general the courts have no concern. They are to be carried into effect by the Executive, and the proceedings in the courts are subject to executive control to the extent necessary to enable it to prevent a breach of treaty stipulation in cases of this kind. Hence, when a party charged with crime claims immunity from trial on account of the provisions of the treaty under which he has been extradited, he must apply to the Executive to interfere, through the law officers of the Crown, to stay the action of the court; otherwise it will not, at his instance, stop to inquire as to the form of his arrest, nor as to the means by which he was taken into custody.

But a different rule prevails with us, because our government is differently organized. Neither the Federal nor State Executive could interfere to prevent or suspend the trial of Hawes. Neither the Commonwealth's Attorney nor the court was to any extent whatever subject to the direction or control either of the President of the United States or the Governor of this Commonwealth.

But the treaty under which the alleged immunity was asserted being part of the supreme law, the court had the power, and it was its duty, if the claim was well founded, to secure to him its full benefit.

The question we have under consideration has not been passed on by the Supreme Court of the United States, and it therefore so far remains an open one that we feel free to decide it in accordance with the results of our own investigations and reflections.

Mr. William Beach Lawrence, in the 14th volume of the ALBANY LAW JOURNAL, at page 96, on the authority of numerous European writers, said:

"All the right which a power asking an extradition can possibly derive from the surrender must be what is expressed in the treaty, and all rules of interpretation require the treaty to be strictly construed; and, consequently, when the treaty prescribes the offenses for which extradition can be made, and the particular testimony to be required, the sufficiency of which must be certified to the executive authority of the extraditing country, the State receiving the fugitive has no jurisdiction whatever over him, except for the specified crime to which the testimony applies."

This is the philosophy of the rule prevailing in France. The French Minister of Justice, in his circular of April 15, 1841, said: "The extradition declares the offense which leads to it, and this offense alone ought to be inquired into."

The rule, as stated by the German author Heffter, is, that "The individual whose extradition has been granted cannot be prosecuted nor tried for any crime except that for which the extradition has been obtained. To act in any other way, and to cause him to be tried for other crimes or misdemeanors, would be to violate the mutual principle of asylum, and the silent clause contained by implication in every extradition."

And when President Tyler expressed the opinion that the treaty of 1842 could not be used to secure the trial and punishment of persons charged with treason, libels, desertion from military service, and other like offenses, and when the British Parliament and the American Congress assumed to provide that the persons extradited by their respective governments should be surrendered "*to be tried for the crime of which such person shall be so accused,*" this dominant principle of

modern extradition was both recognized and acted upon.

This construction of the tenth article of the treaty is consistent with its language and provisions, and is not only in harmony with the opinions and modern practice of the most enlightened nations of Europe, and just and proper in its application, but necessary to render it absolutely certain that the treaty cannot be converted into an instrument by which to obtain the custody and secure the punishment of political offenders.

Hawes placed himself under the guardianship of the British laws, by becoming an inhabitant of Canada. We took him from the protection of those laws under a special agreement, and for certain named and designated purposes. To continue him in custody after the accomplishment of those purposes, and with the object of extending the criminal jurisdiction of our courts beyond the terms of the special agreement, would be a plain violation of the faith of the transaction, and a manifest disregard of the conditions of the extradition.

He is not entitled to personal immunity in consequence of his flight. We may yet try him under each and all of the indictments for embezzlement, and for uttering forged paper, if he comes voluntarily within the jurisdiction of our laws, or if we can reach him through the extradition clause of the Federal Constitution, or through the comity of a foreign government.

But we had no right to add to, or enlarge the conditions and lawful consequences of his extradition, nor to extend our special and limited right to hold him in custody to answer the three charges of forgery, for the purpose of trying him for offenses other than those for which he was extradited.

We conclude that the court below correctly refused to try Hawes for any of the offenses for which he stood indicted, except for the three charges of forgery mentioned in the warrant of extradition, and that it properly discharged him from custody.

The order appealed from is approved and affirmed.

STATUS OF THE PRODUCT OF EXEMPT PROPERTY.

SUPREME COURT OF NORTH CAROLINA, JANUARY TERM, 1878.

CITIZENS' NATIONAL BANK V. GREEN.

A homestead in land to the maximum value allowed by law had been allotted to G., who was insolvent. From the proceeds of a crop grown on the land he loaned his wife \$300, with which she purchased other land, taking the deed in her own name. Held, that the money advanced to the wife was still the husband's money and the land purchased therewith his, and that such land was not exempt from his debts.

The circumstance that property is the product of or increase from exempt property does not render it exempt.

CIVIL action tried at Wake Supreme Court. The facts appear in the opinion.

BYNUM, J. A homestead in land, to the maximum value allowed by law, had been duly allotted to the defendant, L. M. Green. A crop of cotton was then growing upon it, which, when matured and gathered, he sold, and of the proceeds undertook to lend \$300 to his wife, who, with that sum and \$200 more, which she procured from her sister, purchased the land in question, with the privity of her husband, and had the deed executed to herself. Is this land, or any part of

it, exempt from the debts of the husband? The husband and wife, both, were insolvent. The husband could not by law make the contract of loan to his wife; so the money advanced to the wife was still his money, and the case stands as if he himself had directly put that much cash into the purchase of the land; and so, also, a court of equity will treat the transaction, to the extent of his advances, as if the deed had been made directly to the husband.

It is not material to inquire whether the crop growing upon the homestead, at the time it was assigned, was valued as a part of the homestead; that does not distinctly appear, and we assume that it was not, and could not be, so estimated. Nor is it material to inquire whether a crop grown upon the homestead, after it has assumed the character of personal property, is exempt from the debts of the owner as to the excess above the exemption allowed by law. It is certain that the debtor is always entitled to the maximum of his personal exemption, and that by so much of this exemption as may be contained in producing a crop, by that much, may be reimbursed out of the crop produced, so as to maintain the exemption to the maximum standard fixed by law. In respect to the homestead it has been held in other States, having similar laws, that if it should depreciate in value below \$1,000 by the burning of the building upon it, a fall of prices, or other casualty, the owner would be entitled to a re-allotment out of any subsequently acquired land so as to bring the homestead up to the maximum. So, on the other hand, if the homestead should appreciate in value, by a rise in prices, the erection of costly buildings, or other improvements, the creditors would be entitled to a re-assignment and re-allotment, so as to reach the excess over the value fixed by law. It was so held in Illinois in the case of *Haworth v. Travis et al.*, 87 Ill. 301, and in *Stubblefield v. Graves et al.*, 50 id. 103, where the court put this case: "Suppose nine years ago a tract of land containing ten acres, part of a large tract near the city limits of Chicago, had been valued and set off as a homestead, it being then of the value of \$1,000, and on the land the resident head of the family had erected costly buildings and improvements, by means of which, and the rise of property in that locality, its value should now greatly exceed \$1,000, by what principle of law or justice could the claimant insist upon holding the land as a homestead when one-tenth of the tract would fully satisfy the homestead right?" * * * "A debtor, being unable to pay his debts, has no right to a homestead of greater value than \$1,000. By securing one to him of that value, his rights are satisfied and the requirements of the law fulfilled." To the same effect is 37 Cal. 175.

These authorities are cited to show what has been the construction of the courts upon similar homestead provisions in other States, and not as an expression of the opinion of this court upon a grave question which is not fully presented by the facts of this case.

The single proposition before us is, what is the status of the additional tract of land purchased by the husband, who already has a homestead of the maximum value allotted and set apart, by metes and bounds. The question must be determined by our own legislation; for, if it is exempt from the debts of the owner, it must be either by some constitutional or some statutory provision. We look in vain for either.

By art. 10, sec. 2, of the Constitution, it is provided: "That every homestead and the dwelling and buildings used therewith, not exceeding in value one thousand

dollars, * * * shall be exempt from sale under execution or other final process." By ch. 44, Bat. Rev., it is made the duty of the sheriff, having an execution in his hands, to levy upon all the property of the debtor, real and personal, except the homestead and personal exemption, as provided in the Constitution and statutes. And by ch. 55, Bat. Rev., it is provided, that whenever the real estate of any resident of the State shall be levied on by virtue of an execution or other final process obtained on any debt, the sheriff shall cause the homestead to be appraised and set apart, by *metes and bounds*, not exceeding in value one thousand dollars, and then to levy upon the *excess*. The language of the law is so plain, that there is no room for construction, and that is, that all the real estate of the debtor, except that which is specifically set apart as the homestead, is the subject of seizure and sale under an execution or other final process. No provision of the Constitution, or of the statutes supplementary thereto, furnishes the ground of a doubt; on the contrary, their legal effect is simply to protect the occupant in the enjoyment of the land set apart as a homestead, unmolested by his creditors. They make no provision and contemplate none for the owner, from the homestead, or any other source of income, to acquire additional lands and estates, which shall be protected from his debts, just as his homestead is secured. The courts cannot, by judicial legislation even, do so bold a thing as to confer new rights and exemptions, in the face of plain legislation by the law-making power.

It is urged in argument that a homestead having been secured to the debtor by law, all income derived from its user is merely an incident which follows their principal and belongs absolutely to him, and may be used either in improving the property, or in other investments; and that, unless this be so, the law rather discourages than invites improvements and enterprise, by cutting off all inducement to industry, the legitimate reward of which, when in excess of the exemption, would be seized and sold by the creditor. Such an argument should not be addressed to a court which cannot make, but only construe and administer the law as it is written. If worthy of consideration, it should be directed to the Legislature, as a reason for changing the law.

There is some misconception as to the nature of the homestead law. The homestead is not the creature of any new estate, vesting in the owner new rights of property. His dominion and power of disposition over it are precisely the same as before the assignment of homestead. The law is aimed at the creditor only, and it is upon him that all the restrictions are imposed, and the extent of these restrictions is the measure of the privilege secured to the debtor. And these restrictions imposed on the creditor are, that in seeking satisfaction of his debt he shall leave to the debtor, untouched, \$500 of his personal, and \$1,000 of his real estate. With his limitation upon the rights of the creditor it is manifest that all the obligations of the debtor to pay his debts, and all his rights to acquire and dispose of property, are the same after as before the assignment of homestead. The homestead has been called a determinable fee, but as we have seen that no new estate has been conferred upon the owner, and no limitation upon his old estate imposed, it is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from payment of his debts in respect to the particular prop-

erty allotted to him. By the recent act of the Legislature (Laws of 1876-'7, ch. 253), this determinable exemption has been extended into a fee simple, and the homestead is now forever exempted from all liability for the debts of the owner, contracted after the ratification of the act, if the act be constitutional. In the face of this, it is still insisted, that all after-acquired property derived from the income of the homestead, is exempt from the debts of the owner. Suppose A has had assigned to him his homestead and personal exemption, and by good management, he has acquired other lands of the value of \$5,000. It is asked, why should not these acquisitions belong to him, as the natural fruit and product of the exempted property? The answer is, they do, undoubtedly. No one disputes that proposition; on the contrary, it is the very proposition we affirm. All such property does belong to him, absolutely; and with it he may buy and furnish fine houses, have his carriage and horses and supply his table with the costliest luxuries. But when he refuses to pay his butcher, the latter might well exclaim,

"Upon what meat doth this, our Caesar, feed,
That he has grown so great?"

As in respect to land so as to the personal exemption. Suppose B has had assigned to him, as a part thereof, stock, cattle, or brood mares, it is again asked do not the increase belong to the owner of the dam? Undoubtedly. *Partus sequitur ventrem*, and he may increase the stock, by continued production and reproduction, to an unlimited extent and value, and it would still be all his, absolutely. But the question is, what sanctity distinguishes and protects this new wealth, which is not equally vouchsafed to the same kind of property belonging to other men?

Again. Suppose "A," having accumulated out of the homestead, other land of the value of \$10,000, dies, leaving a child. Under the law of 1876-'77 this land would descend as homestead, and all the additions made to it by the heir would also be homestead, and so *ad infinitum*, exempt from the debts of all the proprietors.

If the construction of the law should be, that all acquisitions of property are exempt from execution, it would be the interest of all men at once to take the benefit of the homestead, as well the rich as the poor, for thereby all income derived from it could be capitalized and recapitalized from that one nucleus to the building up of colossal fortunes, in defiance of debts, past or future. And what a door would be open to frauds and perjuries, as each owner of a homestead would be tempted to allege and establish that all his estate, no difference how acquired, was but the increase of his own or the homestead of some remote ancestor. It would be a fruitless endeavor in the creditor to investigate and sift out, and separate the homestead from the non-homestead property thus confused and confounded. In the progress of time, of course, such intricate and perplexing investigations must pass from the hands of creditors and attorneys to those of the antiquarian, until all credit perished.

Such a construction would come in direct conflict with the law, for by it only past debts are discharged, while by the homestead law both past and future debts would be practically discharged. The bankrupt's future acquisitions are liable for future debts, while those of the owner of the homestead would not be; and one result of the anomaly would be to transfer the collection of all foreign claims from State to Federal

courts, where a law so plainly impairing the obligations of contracts would not be recognized. Such, however, is not the proper construction of the homestead law in this State or any other of our sister States. It is a mistake to suppose the exemption laws are something new in North Carolina, or that their construction has not long been settled. The present law differs in no material respect from that enacted as early as 1773, except that it is more enlarged and extends to lands as well as personal property. By that law, amended and enlarged in its operations from time to time, as finally embodied in Rev. Code, ch. 45, §§ 7, 8 and 9, certain property was exempted from sale under execution, such as a limited quantity of provisions, household articles, cow and calf, etc. It was never held, that we are aware, that the increase derived from these exemptions, as, for example, a stock of cattle raised from the cow and calf, was exempt from execution. And in order that the allotment might be perpetuated for the protection of both debtor and creditor, commissioners were appointed to lay off and assign to the debtor such property as he was entitled to under the act, and a list thereof was required to be made out and filed among the records of the County Court. Such proceedings are substantially required under the present homestead laws, yet no one supposed that under the old law the debtor was entitled to any thing more than was thus set apart. The rule of law then was, and we think now is, that all of a man's property was and is held subject to the payment of his debts except in so far and to the extent only that it has been specifically exempted. The practical working of this law is not always without its difficulties; as, for instance, where the value of the homestead and personal exemptions may have been increased by buildings, the rise of value, or successful crops, or have been diminished in value by opposite causes. Our case is not one of that kind, and demands of us no opinion of what would be the rule of adjustment and liability in such cases, and we give none. Cases of the kind will not be frequent where the excess over the maximum allowance will be so clear and palpable as to provoke litigation on the part of the creditor; and where such cases do occur, they must be adjusted by the good sense of the parties, or, like all other irreconcilable differences, by the arbitrament of the law. It is not from a construction of the law, at once just to the creditor and debtor, that the latter has cause of apprehension. His danger is in another direction,—the frail and evanescent tenure of the homestead itself. Though bestowed it is not preserved to him. The benevolent purpose of its creation was to save the improvident and their families from the consequences of their improvidence. It is manifest that this purpose fails, and that there is an incongruity between the object and end, so long as the debtor is allowed, first to incur and next to part with what was intended as a provision for himself and family. It cannot be disputed that real and chattel mortgages, liens and incumbrances of all kinds, to an unparalleled extent, now cover a large portion of the real and personal property of the State, and that they are generally confined to that class of our population which is theoretically supposed to be enjoying the benefit of the homestead laws. It is not so much the excess over the legal exemptions that needs protection, for there is but little of it, but it is the homestead itself that needs protection. Exemption laws, without diminishing the need of credit, have naturally made it

more precarious and insecure, and as a result have proportionately increased the premium which must be paid for it, so that at few periods of our history, has interest been higher, or borrowed money less remunerative than now, and at no former period has the debtor class been more under the dominion of the merchant, grocer, and capitalist. From the conditions of things, as society is organized, the poor, the needy, and the improvident, will borrow if they can, and will not hesitate to sell or incumber their homestead upon ruinous terms, and the beneficent intentions of the law, for their benefit, are thus defeated. Whether this result has proceeded from insufficient or misguided legislation, from the habits of the people, or from a combination of all these causes, will admit of different opinions, as men view the situation from a moral or political standpoint.

In respect to the case before us, it remains for the court to declare its opinion to be that by the unambiguous words of the Constitution and laws pursuant thereto, the defendant, L. M. Green, is entitled to no other land exempt from his debts, than the homestead which has been appraised and set apart to him. And in the language of a great judge upon the construction of the statutes: "It is the duty of all courts to confine themselves to the words of the Legislature, nothing adding thereto, nothing diminishing." The consequences if evil can only be avoided by a change of the law itself, and not by judicial action. Sedgwick on Stat. and Const. Law, 205 to 220.

The exceptions to the evidence excluded, taken by the defendant, are untenable, and the rulings of the court below are sustained. There is no error.

Judgment affirmed.

Rodman, J., dissented.

RECENT AMERICAN DECISIONS.

SUPREME COURT OF WISCONSIN,* APRIL, 1878.

CONTRACT.

Security given upon compounding crime void: compounding offenses against revenue law.—The Federal statute which authorizes the commissioner of internal revenue, with consent of the secretary of the treasury, to compromise any civil or criminal case under the internal revenue laws, instead of commencing suit thereon, and, with like consent, under the recommendation of the attorney-general, to compromise any such case after suit commenced thereon (R. S. of U. S., § 3229) being, in the judgment of this court, essentially immoral, so far as it authorizes a compounding of crimes, any collateral contract, looking toward, in aid of, or subordinate to, such an agreement to compound a crime, under that statute, will not be enforced in the courts of this State. *Wright v. Rindskopf*.

CORPORATION.

1. *Act of, in excess of powers: ratification.*—Where a loan by a corporation can only be regularly authorized by a vote of the directors at an official meeting, a loan made without such vote may be *ratified* by the corporation; an action by the corporation upon the securities given for the loan is a ratification; and an averment in such action that the loan was made by

* From O. M. Conover, Esq., State Reporter. To appear in 43 Wisconsin Reports.

plaintiff "through its proper officers" is sufficient. *Germanstown Farmers' Mut. Ins. Co. v. Dheim*.

2. *Securities for loan by corporation given in name of directors.*—Where securities given for a loan made by a corporation run to persons named, as its directors, and their successors in office, the corporation may sue thereon, as owner and holder, without reformation of the instruments, and without formal assignment to it. (*Supervisors v. Hall*, 42 Wis. 59.) Ib.

3. *When contract in excess of powers valid.*—While contracts of corporations which they have no authority to make may be void, contracts which are within the general scope of their powers, but which are in excess of those powers in some particulars, are valid, unless, by reason of such excess, they are against public policy. *Rock River Bank v. Sherwood*, 10 Wis. 230, approved and followed. Thus, the plaintiff corporation having exceeded its power in loaning money for two years, instead of one, and taking a note and mortgage therefor instead of a bond and mortgage (P. & L. Laws of 1857, chap. 331, § 3); and the contract not being immoral, and not against public policy, no penalty being attached to it, plaintiff may maintain an action upon the securities. Ib.

CRIMINAL LAW.

1. *Jury trial of indictment cannot be waived.*—Upon a plea of "not guilty" to an information or indictment for crime, whether felony or misdemeanor, the right of the accused to a trial by jury cannot be waived; and a trial by the court alone will not support either a judgment or a report to this court (under the statute) of questions of law arising in the case. *State v. Lockwood*.

2. *Patent notes: statute relating to, invalid.*—Chapter 140, of 1872, requires every person taking a promissory note or other written obligation, any part of the consideration of which is a patent right, etc., etc., to cause to be inserted in the body thereof the words "given for a patent right," and punishes a violation of the act as a misdemeanor. It seems that this court would be disposed to hold, if the question were properly before it, that the act is void as an invasion of Federal authority. Ib.

FIRE INSURANCE.

1. *Wisconsin statutes relating to valuation: valuation stated in policy conclusive.*—Chapter 347, of 1874, provides that where real property, in this State, insured against fire, shall be totally destroyed by fire without criminal fault of the assured, the amount of insurance written in the policy "shall be taken and deemed to be the true value of the property at the time of such loss, and the amount of the loss sustained," and as the measure of damages. Held, that, in an action upon a policy issued since the statute took effect, in a case coming within its terms, the amount of insurance written in the policy is conclusive as to the amount of the damages (if any) for which the insurer is liable by reason of the loss. *Reilly v. Franklin Ins. Co. of St. Louis*.

2. *Effect of statute not avoided by stipulation.*—As the statute rests upon grounds of public policy, the conclusive effect of the amount of insurance written in the policy upon the measure of damages is not altered by a stipulation in the same instrument that the damage should be established "according to the true and actual cash marketable value" of the property when the loss happened. Ib.

RECENT BANKRUPTCY DECISIONS.

ADJUDICATION.

1. *Who may oppose: attachment creditor.*—A creditor who, prior to the filing of the petition, has obtained a lien upon the property of the alleged bankrupt by process of means attachment, is entitled to intervene and oppose an adjudication. U. S. Dist. Ct., New York. *In re Burton & Watson*, 17 Nat. Bankr. Reg. 212.

2. *Non-resident of United States.*—The court has no power, in involuntary proceedings, to adjudicate any person a bankrupt who was not a resident of the United States at the time of the filing of the petition, although such person may have carried on business within the district for the requisite period. Ib.

3. *Involuntary proceedings were commenced against B. and W., who were doing business in New York. B. was a resident of Canada. Held, that an adjudication could be granted against W. alone. Ib.*

COMPOSITION.

What creditors may not vote as to.—Creditors are not entitled to vote upon proposals for composition without having first proved their debts. U. S. Dist. Ct., N. D. Indiana. *In re Mathers & Moffit*, 17 Nat. Bankr. Reg. 226.

CREDITOR.

Secured creditor, when not counted under § 39.—So long as a creditor holds ample security on property of the debtor, and does not waive or release the same, he is not to be counted as a creditor having a provable debt within the meaning of section 39 as amended. R. S., § 5021. A secured creditor may, at any time, release his security as to the whole or a part of the debt, and if he does so seasonably, before the hearing and decision as to the quorum of creditors and debts, he is entitled to be ranked as a creditor having a provable debt and admitted as such in determining whether the requisite number and amount have joined in the petition. U. S. Dist. Ct., W. D. Michigan. *In re Crossette & Graves*, 17 Nat. Bankr. Reg. 208.

STATE INSOLVENT LAWS.

Bankrupt law has not superseded: compulsory proceedings under.—The Bankrupt Act has not entirely superseded the State insolvent laws. Where an insolvent debtor refuses to file a voluntary petition, and has committed no act of bankruptcy, and it does not appear that the requisite number of creditors are ready to join in a petition against him, compulsory proceedings by a creditor under a State insolvent law are not prohibited by the Bankrupt Act. Court of Errors, Connecticut. *Geery's Appeal*, 17 Nat. Bankr. Reg. 196.

MISTAKE.

Clerical error: omission of creditors.—A mere clerical mistake occurring in the proceedings in bankruptcy, though resulting in a failure to specially notify a creditor, will not destroy the effect of the proceedings as regards such creditor. In the absence of fraud, the general advertisement, as provided by section 11, is sufficient to include all creditors. Sup. Ct., Missouri. *Thornton v. Hogan*, 17 Nat. Bankr. Reg. 277.

MORTGAGE.

Creditors holding and selling at auction: when not entitled to vote for assignee.—After the adjudication, a creditor, who held a mortgage for fifteen thousand

dollars on the bankrupt's real estate, had it sold at public auction and purchased it himself for one hundred and forty-two dollars and fifty cents. He then proved for the residue of the mortgage as an unsecured claim at the first meeting of the creditors. The register allowed the proof against objections and permitted him to vote for assignee, whereby a majority in value of the creditors was obtained. *Held*, that no such mode of ascertaining the value of mortgage security is recognized by the Bankrupt Act; that the register had no authority to admit the proof and allow the vote against objection, and that the choice of the assignee under such circumstances was irregular. U. S. Dist. Ct., New Jersey. *In re Hunt*, 17 Nat. Bankr. Reg. 205.

COURT OF APPEALS ABSTRACT.

ATTORNEY AND CLIENT.

Action against attorney for negligence: what will not sustain.—In an action against his attorneys for alleged misconduct and negligence in the management of a suit brought by them for plaintiff against one W. in failing, before judgment, to secure a lien upon the property of W., there was no allegation or proof that they could have either filed a *lis pendens*, or procured an attachment, or that there was ground for an order of arrest, attachment or a *lis pendens*. *Held*, that plaintiff was not entitled to sustain his action, that a nonsuit would have been proper, and that a verdict for defendants could not be set aside. Judgment below affirmed. *Jaquins v. Hagner*. Opinion by Earl, J. [Decided February 5, 1878.]

CONSTITUTIONAL LAW.

General Drainage Act of 1869, constitutional.—The General Drainage Act of 1869 (chap. 888) is not open to the constitutional objection that it does not provide for a public purpose, for the purpose mentioned namely, the public health is one, nor to the objection that it takes private property without due process of law, for it provides for proper and sufficient proceedings for the taking of property. Orders below affirmed. *In re Ryers*. Opinion by Folger, J. Church, C. J., dissented. [Decided January 15, 1878. Reported below, 10 Hun, 93.]

CORPORATION.

Liability of stockholders: enforcement of: form of action.—Under a statute of New Jersey it is provided that, "when the whole capital of a corporation shall not be paid in, and the capital paid shall not be sufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay, on each share held by him, the sum necessary to complete the amount of such share as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company." This is similar to the statute of this State. 1 R. S. 600, § 5. *Held*, that under this statute there could not be a recovery by a single creditor against a single stockholder, but the action must, to charge the stockholder who had not fully paid up, be in equity, bringing in the other stockholders in like predicament with him. Judgment below affirmed. *Griffith v. Mangam*. Opinion by Folger, J. [Decided April 16, 1878. Reported below, 42 N. Y. Superior, 369.]

CRIMINAL LAW.

1. *Burglary: ownership of premises entered: description of, in indictment.*—In an indictment for burglary, in the first degree, in breaking into and entering in the night time the dwelling-house of another, etc., the ownership of the dwelling-house may be laid to be in the members of a copartnership, when the facts of the case warrant it. When the members of a firm held and occupied the building into which the burglarious entry was made, using the lower story for the purposes of their business, and in the upper rooms one, only, of the partners, and some other persons lived, and were present the night of the burglary. *Held*, that it was proper, in the indictment, to lay the ownership of the building in the members of the firm. Judgment below affirmed. *Quinn, plaintiff in error. v. People*. Opinion by Folger, J. Rapallo and Andrews, JJ., dissented.

2. *What constitutes a dwelling-house: store with unconnected rooms used for living purposes in upper story of same building.*—The burglary was into one of the lower rooms of the building which were used for a store. The upper part of the building used for living purposes, and where people slept had no internal communication with the store below, but to go from one part to the other, one must go out doors. *Held*, that the room broken into was part of a dwelling-house, within the definition of burglary, in the first degree, in 2 R. S. 608, § 10, subd. 1, and § 16. *Ib.* [Decided January 15, 1878. Reported below, 11 Hun, 836.]

EVIDENCE.

Evidence to contradict: what competent.—A witness for the plaintiff had testified that defendant had said, in reference to a piano which was in controversy, that he had given it to plaintiff, for a present. The witness testified that she thought that one A. was present at the conversation. A., being sworn for defendant, said he was never present at any such conversation. He was then asked, on cross-examination, if, and denied that he had told one D. that defendant had told him that he had given the piano to plaintiff. D. was then called, for plaintiff, and testified that A. had told him that defendant had told him that he had given the piano to plaintiff. *Held*, that the testimony of the latter witness was admissible to contradict A. Judgment below affirmed. *Sparrowhawk v. Sparrowhawk*. Opinion by Miller, J. Allen, Folger and Earl, JJ., dissented. [Decided March 19, 1878. Reported below, 11 Hun, 528.]

JURISDICTION.

Judicial officer interested in result of proceeding: when competent to act.—Where a judicial officer has not so direct an interest in the cause or matter that the result must necessarily affect him to his personal or pecuniary loss or gain, or where his personal or pecuniary interest is minute and he has so exclusive jurisdiction of the matter by constitution or by statute, that his refusal to act will prevent any proceeding in it, there he may act so far as that there may not be a failure of remedy or a failure of justice. Accordingly where the county judge who is exclusively designated under the General Drainage Act to appoint commissioners, whose duty it is to determine what lands are to be taken for a proposed drain, and what property benefited, and the amount of the assessment upon the lands of each owner, was the owner of some of the lands to be affect-

ed. *Held*, that he had jurisdiction to issue an order appointing the commissioners. Orders below affirmed. *In re Ryers*. Opinion by Folger, J. Church, C. J., dissented.

[Decided January 15, 1878. Reported below, 10 Hun, 93.]

PARTNERSHIP.

Attachment and execution against one partner on firm debt does not hold firm property.—In an action against a firm upon a firm debt where both partners were brought into court, but one only was liable from his personal situation to the issue of an attachment against his [property, *held*, that an attachment issued would reach only his property, and not the property of the firm, and that an assignment of the firm for the benefit of creditors after the attachment, would convey the firm property, and a sale thereafter, under execution, of the interest of the partner named, would only convey his interest after the settlement of the estate, and the execution purchaser could not hold title to the property attached and sold against the assignee. Judgment below affirmed. *Staats v. Bristol*. Opinion by Folger, J.

[Decided April 9, 1878.]

RAILROAD AID BONDS.

Town bonds not issued in compliance with statute invalid.—The consent of a majority of the tax payers of the town of Thompson was obtained for the issuing of town bonds in aid of a railway. The consent stated on its face that it was given in accordance with the provisions of the act of 1868 (chapter 553, amended by Laws 1869, chapter 96), and authorized commissioners appointed thereunder for said town to borrow upon the faith and credit of the town \$148,000, and to do and perform other things necessary to carry into effect the provisions of the said act. *Held*, to authorize the commissioners to proceed only according to the provisions of the act of 1868, that is, to borrow money by disposing of the bonds at not less than par, and invest the money so raised in the stock of a railroad company, and not to authorize the commissioners to issue bonds in exchange for the stock of any company, and bonds issued in the latter manner would be invalid. *Held*, also, that where bonds payable to bearer were issued in the latter way, and recited on their face that they were issued under the act of 1848, and were given "for value received in the stock of the Monticello and Port Jervis Railroad Co.," it would appear on their face that they were issued in violation of the act, and would be void in the hands of any holder. Judgment below reversed. *Horton v. Town of Thompson*. Opinion by Rapallo, J. Andrews, Miller and Earl, JJ., dissent.

2. *Constitutional law: statute validating invalid bonds void.*—When bonds were issued in the manner mentioned, *held* that an act of the legislature declaring the bonds valid (Laws 1871, chap. 809) would not render them so, it being beyond the limits of legislative power to render the bonds binding upon the town without its consent.

[Decided January 15, 1878.]

TITLE.

To property manufactured under contract: when it vests: lien of workman for price.—Where plaintiff contracted to make and deliver to defendant a tent, and defendant requested him to send it from New York to Lewistown, Me., but plaintiff did not contract to deliver it at Lewistown, *held*, that plaintiff had com-

pleted his contract when he had shipped the tent by the usual route to Lewistown, and the title passed and defendant would be liable for the purchase-price, even though the tent should be destroyed, without plaintiff's negligence, *in transitu*, and this would not be affected by the fact that plaintiff retained his lien for the purchase-price until the tent was delivered at Lewistown. Judgment affirmed. *Higgins v. Murray*. Opinion by Church, C. J.

[Decided April 9, 1878.]

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW: POWER OF CONGRESS AS TO CRIMES IN STATES: POWER AS TO MAILS.—Congress has no power to make criminal the using of means to procure abortions in the several States. That power belongs to the respective States. But Congress has plenary power over the mails and the postal service, and may declare what shall and what shall not be mailable matter, and punish violations of its criminal enactments in this regard. U. S. Dist. Ct., E. D. Mo., March 30, 1878. *United States v. Whittier* (Ch. Leg. News.)

CORPORATION: JURISDICTION OF FOREIGN.—A resolution of a foreign corporation, filed pursuant to a State statute, authorizing its agent "to acknowledge service of process for and in behalf of such company, and consenting that service of process upon any agent shall be taken and held to be as valid as if served upon the company or association," amounts to an agreement for a constructive presence within such State; and a Federal court may obtain jurisdiction over such corporation by service upon its agent. U. S. Circ. Ct., E. D. Mich., April 1, 1878. *Fonda v. Brit. Am. Assur. Co.* (Cent. L. J.)

DEFENSE: BREACH OF AGREEMENT TO FURNISH INFORMATION.—A defendant who had agreed to furnish information as to the credit of others, and whose negligence had caused loss to the plaintiffs, cannot set up as a defense that the communications were merely verbal, and that they are required by statute to be in writing, in order to sustain his liability. Such a statute is intended to protect honest and careful men, and cannot be used to shield one who has been guilty of negligence or misfeasance. Ct. Common Pleas, Philadelphia, April 6, 1878. *Sprague v. Dun* (Leg. Intel.)

ESTOPPEL: STATEMENTS BY MAKER OF PROMISSORY NOTE TO INTENDING PURCHASER.—Where the maker of a promissory note, payable to a certain person or bearer, on being inquired of by a third person, to whom the payee had offered, after its dishonor, to sell it, answered that it was all right, and that he would pay it, and thereupon the purchase was made and the price paid, the maker is estopped from setting up failure or want of consideration, or any other equity existing between himself and the payee, to an action brought upon the note by the purchaser or his privies. Sup. Ct., Ga., March 16, 1878. *Reedy v. Brunner*.

FRAUD: SALE BY ONE PARTNER OF INSOLVENT FIRM TO ANOTHER.—A sale for a valuable consideration by one partner to another, when the firm is insolvent, does not of itself constitute fraud, either actual or constructive. U. S. Dist. Ct., W. D. Mich., March 15, 1878. *Russell v. McCord* (Ch. Leg. N.).

PRACTICE IN U. S. COURTS: LIEN OR JUDGMENT.

1. In the United States courts where a State is divided into several districts, a judgment obtained in one district is a lien upon defendant's real estate in all parts of the State. The right of lien depends upon the right of execution; and by section 985, Revised Statutes, all writs of execution may "run and be executed in all parts of the State." 2. Plaintiff has a right to concurrent execution all over the State. 3. The direction of the writ to one marshal is merely formal and of no consequence. U. S. Circ. Ct., E. D. Penn., March, 1878. *Prevost v. Gorrell* (Pittsb. L. J.).

REPEAL OF GENERAL LAW UNDER WHICH CORPORATION IS FORMED.—The repeal of an act under which a corporation is incorporated does not repeal its charter. Only express legislation can take that away. New Jersey Ct. Chancery, Feb. 1878. *Freehold Mut. Loan Assoc. v. Brown* (N. J. L. Jour.).

COURT OF APPEALS DECISIONS.

THE following decisions were passed down Tuesday, April 23, 1878:

Per curiam, opinion for denial of motion, with \$10 costs—Madison Ave. Baptist Church v. Baptist Church in Oliver street. — Per curiam, opinion for granting motion to discontinue appeal, on payment of costs of the appeal, and \$10 costs of motion—MacKay v. Lewis. — Agree to deny motion, with \$10 costs, no opinion—Faber v. Hovey. — Agree to grant motion for leave to perfect the appeal by giving an undertaking with sureties, who shall justify within 20 days, and it is ordered that the appellant shall, within 20 days, cause the return to [the appeal to be filed with the clerk of this court, and three printed copies thereof to be served on the attorneys for the respondents within 10 days thereafter, and that the appeal be put upon the present calendar for hearing as a preferred cause, with liberty to either party to move it on for argument on a notice of two days, and if the appellants fail to give such security, or cause the return to be filed, or to serve copies thereof as above required, the appeal to be dismissed with costs; no opinion—Scofield v. Adams. — Cal. 47, Rapallo, J., reads opinion for reversal of final judgment and new trial—Sturgis v. Vanderbilt. — Cal. 79, Andrews, J., reads opinion for affirmance order and judgment absolute for respondent—People ex rel. Morris v. Board of Supervisors of Richmond county. — Cal. 152, Church, Ch. J., reads opinion for reversal of judgment and order setting aside verdict, and dismissing complaint, and judgment ordered on verdict—Connecticut Fire Insurance Co. v. Erie Railway. — Cal. 203, Miller, J., reads opinion for reversal and new trial—People's Bank of New York v. Mitchell. — Cal. 338, Earl, J., reads opinion for reversal order and denial of motion—People ex rel. Morris v. Randall. — Cal. 205, Andrews, J., reads opinion for affirmance. — Welsh v. German American Bank. — Cal. 206, Miller, J., reads opinion for affirmance. — Schroeder v. Gurney. — Cal. 207, Earl, J., reads for affirmance of order, and judgment absolute for plaintiffs on stipulation—Lawrence v. Gallagher. — Cal. 204, agree to affirm on opinion of Special Term—Hunt v. Church. — Cal. 57, Folger, J., reads opinion for affirmance—McCullough v. Hoffman. — Cal. 23, Earl, J., reads opinion for affirmance—Townsend v. O'Conner. — Cal. 304, Allen, J., reads for reversal of judgment and affirmance of proceedings of defendants.

—People ex rel. Royal v. Board of Fire Commissioners of city of New York. — Cal. 305, same as last above — People ex rel. Simms v. Same defendants. — Cal. 300, Folger, J., reads opinion for affirmance order—People ex rel. Freer v. Canal Appraisers.

NEW BOOKS AND NEW EDITIONS.**HERMAN ON CHATTEL MORTGAGES.**

Treatise on Chattel Mortgages. By Henry M. Herman, author of the law of Executors, etc. New York: Cockcroft & Co.

THIS is a valuable book upon a subject of great and growing importance to the profession and the business community. The law on the subject has heretofore been in a chaotic condition, and a thoroughly comprehensive work was very much needed. There were, indeed, a vast number of decisions, but they were scattered and contradictory, and those of the profession who had occasion to consult them were very liable to be misled. The author seems to have deduced from the various authorities the underlying principles which govern the subject treated, and we are confident the bench and bar will welcome his book as being a safe guide to the understanding of these principles. The work is divided into three books, each book being subdivided into chapters. The first book treats of the origin and nature of chattels and mortgages, of the form of a chattel mortgage, of the description of the property, of the consideration, and of delivery. Book second is devoted to a consideration of the validity of chattel mortgages, of their registration, recording or filing, of the possession of mortgaged chattels, of fraudulent and void mortgages, of the effect of the bankrupt law, of priority, and of mortgages on ships. Book third considers the rights of the various parties to a mortgage, and others affected by it, of payment and of satisfaction, of transfer of the interest of the mortgagor, and of the remedies of the mortgagee after default or breach of condition. It will thus be seen that the law on the subject is presented in a systematic manner, and that every part is considered. The work is well indexed and excellently printed and bound.

NEW YORK SUPERIOR COURT REPORTS, VOLUME XLII.

Reports of cases argued and determined in the Superior Court of the city of New York. By Samuel Jones and James C. Spencer, reporters of the Court. New York Superior Court Reports, Volume XLII. Jones & Spencer's Volume X. New York: Ward & Peloubet, successors to Dossy & Co., 1878.

There are a number of valuable cases in this volume, both upon general questions of law and upon those of interest only in this State. Among such cases we will notice these: *Brown v. Torrey*, p. 1. A stockholder claiming to be liable for the debts of a corporation and who, himself, as an officer, signed a note issued by the corporation, is estopped from setting up a want of power in the corporation to make the note. *Maguire v. Dinamore*, p. 17. A concealment by a shipper of the true value of the goods shipped, or his silence alone, discharges the carrier from liability for ordinary negligence. *Wiel v. Fischer*, p. 32. A representation by a mortgagor, to one about to purchase the mortgage, that the same was given for value, accompanied by a certificate that the mortgagor "knew of no offset or defense, legal or equitable, thereto," held to estop the mortgagor from setting up the defense of usury. *National*

Trust Co. v. Roberts, p. 100. A conviction for an infamous crime in another State, or foreign country, would not render a witness incompetent here, under the law as it stood previous to the new Code. *Dumphy v. Erie Railway Co.*, p. 128. Rules of a railway company, limiting the right of a passenger on a ticket from New York to Rochester, as to stopping over at intermediate stations, held reasonable and valid. *Einstein v. Chapman*, p. 144. The change of possession required by 2 R. S. 136, in order to make a sale of property valid, must be not only actual, but continued, or the sale will be presumed fraudulent. *Madens v. Shepard*, p. 353. Persons receiving bills of lading from a carrier are conclusively presumed to know the terms upon which the property is to be carried, and to have assented thereto. *O'Hagan v. Dillon*, p. 456. Intoxication will not constitute contributory negligence, unless it disqualifies the individual from the exercise of ordinary care and prudence. *Welsh v. German Am. Bank*, p. 462. Where a bank paid a check drawn to order upon a forged indorsement of the name of the payee, and returned the check to the depositor, who kept it two years before discovering the forgery, held, that this did not constitute payment of the check, nor was the keeping two years ratification. *Eneas v. Hoops*, p. 517. An alteration materially affecting a contract guaranteed, will discharge the guarantor, though the variation may be to his advantage. *Ritterband v. Baggett*, p. 556. Restrictions upon the sale of shares of membership, in a corporation, do not destroy the character as property, which such shares or right would otherwise have. There are a number of decisions in the volume, construing the meaning of sections of the old and new Code. In *Hatzel v. Hatzel*, p. 561, §§ 968, 969, 970, 1009, 1013 of the new Code are explained. The reporting is excellently done, and the mechanical execution of the volume is all that could be desired.

NOTES.

A NEW law periodical has appeared on the Pacific Coast. It is entitled the *California Legal Record*, and is issued weekly in San Francisco by Messrs. Scofield & Palmer. The first two numbers have reached us, and, judging from them, we should say that the *Legal Record* is a publication that ought to receive the support of the profession in California and the adjoining States. The numbers received by us contain a number of current decisions of the Supreme Court of California, legal notes upon events of interest to the legal profession, digests of decisions in other States, and other useful matter. We trust our new contemporary will succeed. It certainly deserves to.

The following order was entered in the United States Supreme Court on the 22d inst.: There having been an Associate Justice of this court appointed since the commencement of this Term, it is ordered that the following allotment be made of Chief Justice and Associate Justices of said court among Circuits, agreeably to act of Congress in such case made and provided, and that such allotment be entered on record, viz.: For the First Circuit Court, Nathan Clifford, Associate Justice; for the Second Circuit Court, Ward Hunt, Associate Justice; for the Third Circuit Court, William Strong, Associate Justice; for the Fourth Circuit, Morrison R. Waite, Chief Justice; for the Fifth Circuit, Joseph P. Bradley, Associate Justice;

for the Sixth Circuit, Noah H. Swayne, Associate Justice; for the Seventh Circuit, John M. Harlan, Associate Justice; for the Eighth Circuit, Samuel F. Miller, Associate Justice; for the Ninth Circuit, Stephen J. Field, Associate Justice.

The *Chicago Legal News* thus discourses concerning the Bankrupt Law, skillfully uniting sentiment and business: "This law is evidently in its death struggle. A few more days, and in all human probability it will have passed away. We have no tears to shed over its decease. We never spoke a kindly word of it while living, we shall not praise it now. We feel like saying,

"Behold, an aged sinner goes,
Laden with guilt and heavy woes,
Down to the regions of the dead,
With endless curses on his head;"

and, in this connection, we would say that we have the most complete line of Bankruptcy Blanks in the United States, which we shall be most happy to furnish to the mourners until after the funeral."

In the case of *Bowery Nat. Bank v. Duryee*, decided by the General Term of the Supreme Court for the First Department on the 23d inst., an important point of practice was passed upon. At Special Term, Lawrence, J., held that under the new Code the plaintiff must state in his complaint in every case where the defendant is subject to arrest not only the cause of action but the cause of arrest, even where such cause of arrest is extrinsic to the cause of action, so that the jury on the trial might pass not only on the question of defendant's liability in money, but also on the matters affecting his liberty. Judge Lawrence held in this respect the New Code had effected a desirable improvement on the old practice of passing upon the question of a man's liberty upon affidavits, while the less important question of his money liability was passed upon after hearing the oral testimony of witnesses. The General Term reversed this decision upon the authority of the case of *Sloane v. Livermore*, decided at the same time. The latter case involved the construction of section 558 of the New Code, which says: "But at any time after filing or service of the complaint, the order of arrest must be vacated on motion if the complaint shows that the case is not one of those mentioned in section 549 or 550 of this act." Judge Ingalls, who gave the opinion, holds that to entitle the defendant to his release the complaint must actually negative the right to arrest; and where the cause of arrest is distinct from the cause of action, the complaint in the action need not state the cause of arrest, and not negating it, the arrest may be upheld on affidavits.

The statistics of divorce actions in Vermont are thus stated in a local paper: "During the year 1876 one hundred and sixty-eight divorces were granted in the State—three less than in 1875—being one divorce to every sixteen marriages. In one hundred and twenty-three cases the wife was the petitioner, and in forty-five the husband. Sixty-six were granted for 'intolerable severity,' eleven for 'refusal to support,' twenty-four for 'adultery,' fifteen for 'desertion.'

A suit brought by the city of St. Louis for the possession of the property of the St. Louis Gas Company, was decided by the Court of Appeals on the 16th inst. in favor of the plaintiff. About \$2,000,000 is involved.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, MAY 4, 1878.

CURRENT TOPICS.

THE Supreme Court of the United States in the case of *Edwards v. Kearney*, just decided, and appearing in our present issue, pass upon the important constitutional question of the validity as to existing debts of exemption laws passed by State legislatures. The court hold that the remedy subsisting in a State when and where a contract is made, and is to be performed, is a part of its obligation, and any subsequent law of the State, which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the Federal Constitution and is therefore void. In the case in question, the court hold that a statute of North Carolina exempting the personal property of a debtor to the extent of five hundred dollars and a homestead of the value of one thousand dollars, is unconstitutional so far as debts in existence at the time of its passage are concerned. The position of the court upon this subject will satisfy every one except those who desire to defraud their creditors. The decision comes at an opportune moment, and will do much to check a growing disposition in State legislatures to relieve debtors from the performance of their obligations by the passage of exemption and stay laws.

The action of Congress in reference to the bankrupt law has called attention to the laws formerly in force in the various States, regulating insolvency, but which have since the enactment of the Federal statute to a great extent been dormant. The repeal of this statute will revive the State laws and many of these will be found not suited to the needs of the present time. In one State, Rhode Island, the situation has been anticipated, a special session of the legislature having been held to consider bills for modifying the insolvent laws. Only two days were spent in the work, but a law was passed wherein preferences to creditors are forbidden, and an equal distribution of the property of failing debtors among their creditors provided for. The insolvent law of our own State is probably as good a one as could be contrived except as to the matter of preferences, and even as to this there is a great

difference of opinion, many believing it would be no improvement to adopt the provisions of the Federal law and forbid every preference. There is a difference in the character of debts which men in their private transactions everywhere recognize. Payment in full to one creditor even at the expense of a failure to pay others, may not be unjust though the allowance of preferences in assignments opens a door to fraud and tends to render favored persons less vigilant. The question is one of difficulty, and it is probable that the statutes of the various States will continue to differ in respect thereto.

Among the acts contained in the Supplement accompanying this number is one repealing section 830 of the Code of Civil Procedure. That section excluded from the witness-stand the husband or wife of one who was excluded by section 829. We pointed out some time ago the folly of the section and are pleased to see it stricken out. It would have been better had section 829 been included in the repeal, but that will come in time. Among the other acts in the Supplement is an act in relation to infections and contagious diseases of animals, which confers upon the governor plenary power in relation thereto when occasion requires; an act amending chapter 465 of the Laws of 1875, which requires fire insurance companies to contribute to the support of fire departments in villages and cities, and a lengthy act amending the law regarding the assessment and collection of taxes.

The Bankrupt Law dies hard. After the bill for its unconditional repeal had passed the Senate by a vote of 87 to 6, and the House of Representatives by an equally overwhelming majority, notwithstanding the most vigorous efforts to either postpone action upon it or to so change it by amendments so that it would not accomplish the object sought, it has been, during the past week, the subject of considerable debate in the Senate. The amendments made in the House did not change the tenor of the bill passed by the Senate, they only made it more certain and more effective. The bill was discussed on Tuesday and Wednesday. On the latter day the amendment of the House mentioning the date of the acts to be repealed, and designating their place in the Revised Statutes, was agreed to. An amendment fixing the time when the repeal should take effect at January 1, 1879, was then proposed by Mr. Matthews, and after a vigorous debate adopted, and the bill referred to the judiciary committee that the saving clause might be perfected. The principal argument advanced for a continuance of the law until the date mentioned was that there are many insolvent persons who would be turned out of house and

home unless they are given the remainder of the year to commence proceedings to obtain a discharge. The necessities of unfortunate debtors furnish the excuse for a continuance of the law, but we imagine that the most of these persons would willingly take their chances of relief under the laws of their own States. The real cause of the delay in this matter of repeal will be found in the efforts made by those who derive profit from bankruptcy proceedings, either in the way of official fees or otherwise. We trust, however, that their opposition will prove ineffectual and that before another week the bill may become a law.

The term of office of the Commissioners to revise the statutes expired on Tuesday last. On that day the Commissioners submitted to the Legislature a considerable portion of "part four," relating to crimes and criminal procedure. The whole of the Part is drafted and ready for the press, but there was not sufficient time to print it. The Commissioners say that in drafting the Part they have made use of the "Code of Criminal Procedure" reported in 1860, and of the "Penal Code" reported in 1865, but have adopted or followed neither exclusively, as their work had a different scope. They, however, express their "high opinion of the ability with which the latter (the Penal Code) was drawn and of its value"—an opinion which will be indorsed by all familiar with the work. Beside this part four and the unadopted chapters of the Code there is now before the Legislature part two, relating to property and other matters connected with private rights.

The Court of Appeals of this State took a recess on the 26th ult., until the 20th of this month, when it will re-convene and proceed with the present calendar.

The Court of Appeals in *First National Bank of Chittenango v. Morgan*, an abstract of which is given in our present number, refuse to extend the doctrine of *Risley v. Brown*, 67 N. Y. 160, and *Getty v. Binns*, 49 id. 385, that upon the death of one of the makers of a joint promissory note, who signed simply as surety, his estate is discharged from the payment thereof, both in law and equity, to a case where a firm in business makes its note for the accommodation of the indorsers, who transfer the note for value, to a *bona fide* purchaser without notice. The rule in the two cases mentioned is a severe one and often operates unjustly. Section 758 of the Code of Civil Procedure abrogates it so far as this State is concerned, but it prevails elsewhere. It should not be extended beyond the cases to which it has heretofore been applied.

NOTES OF CASES.

IN *Welsh v. German American Bank*, 42 N. Y. Super. 462, the plaintiff was a depositor in the bank mentioned. Checks upon the bank, payable to the order of one W. N. Johnson, were signed by the plaintiff, at the solicitation of his clerk, who represented that amounts for which they were given were due to Johnson, who had dealings with the firm. The clerk, after obtaining such checks, forged the name of Johnson and sent them, through other parties, to the bank for payment, and they were paid. The checks were charged to plaintiff's account and were returned to him with his pass-book, and kept by him for nearly two years, when he discovered the forgery of Johnson's indorsement, and then first made a claim against the bank for the amount which had been paid on the checks. The bank, as a defense to an action brought for such amount, claimed that it had fulfilled its agreement with plaintiff in paying money upon checks signed by him, and, second, that plaintiff, by keeping the checks two years without claiming any thing wrong, had ratified the payment. The court decided that both these defenses were unsustainable, holding that the payment made was not one to the written order of the depositor, and that the failure of the plaintiff to make a claim for the sums paid on the forged checks until two years thereafter, he not having discovered the forgery until that time, did not constitute a ratification of the payment. See *Weisser v. Denison*, 10 N. Y. 69, which, in some respects, very much resembles the case at bar. Here checks forged by the confidential clerk of a depositor were paid by a bank, charged to the depositor in his pass-book, the book balanced, and with the forged checks among others returned to the clerk who examined the account at the request of his principal, the depositor, and reported it correct, and the depositor did not discover the forgeries until several months afterward, when he immediately made them known to the bank, and it was held in an action to recover the amount of the deposit that the bank could not retain the amount of the forged checks. See also *Hall v. Huse*, 10 Mass. 40; *Salem Bank v. Gloucester Bank*, 17 id. 1; *Ward v. Evans*, 2 Salk. 442.

In *Beard v. Connecticut and Passumpsic Riv. R. R. Co.*, 48 Vt. 101, plaintiff was rightfully at defendant's railroad station in the evening for the purpose of taking passage on defendant's cars. There was a platform which extended from the east side of the station to the railroad track, over which passengers passed to and from the cars. A passage led through the center of the station to the street which was several feet lower than the track, and there were also

stairs at either end of the station leading from the platform to the street. The stairs at the north end of the station were open at the top, as if they might be used. These stairs and a platform at the bottom of them about four feet from the ground were constructed by an express company for its sole use, but they were on defendant's premises. Plaintiff in attempting to pass down these stairs in the dark from the upper platform to the street, without fault on her part, fell from the lower platform to the ground, striking beyond the limit of defendant's premises and was injured. The court held defendant liable for damages from such injury. The decision is an application of the general rule that railway companies are bound to keep in a safe condition, all portions of their platforms and approaches thereto, to which the public do, or would naturally resort, and all portions of their station grounds reasonably near to the platforms where passengers or those who have purchased tickets with a view to take passage in the cars would naturally or ordinarily be likely to go. See *McDonald v. Chi. & N. W. Ry. Co.*, 26 Iowa, 124; *Shepherd v. Midland Ry. Co.*, 20 W. R. 705; *Barnes v. Ware*, 2 Car. & K. 661; *Morsey Docks & H. Board v. Penhallon*, L. R., 1 H. L. 93; *Metcalfe v. Hetherington*, 5 H. & N. 719. Also *Tobin v. Portland S. & P. R. R. Co.*, 59 Me. 183; 8 Am. Rep. 415, where a railroad company was held liable for injury to a hackman who was carrying a passenger to its depot, caused by a cavity in its platform into which the hackman without fault on his part stepped. See further, a note to last-named case, 8 Am. Rep. 417; *Caswell v. Bost. & Worcester R. R. Co.*, 98 Mass. 99.

The question as to the jurisdiction of State courts over offenses by officers of National banks, is an important one, and one also on which the text writers—notably Bishop—are unusually obscure. See 2 Bishop's Crim. L. (6th ed.) 382; 1 Whart. Crim. L. 182. Mr. Bishop, after citing one case from Connecticut and two from Massachusetts, says: "It is not proposed to inquire here how far the doctrines of this section are sound," and then—after his manner—he refers to some other parts of his work where there is nothing or next to nothing on the subject. The first case in which the question was considered was *State v. Tuller*, 34 Conn. 280, wherein it was held that while a State court had no jurisdiction of the offense of embezzlement by an officer of a National bank of the property of a bank, it has jurisdiction of the larceny or purloining by such officer of the property of others left with the bank for safe-keeping. This conclusion was based upon the argument that the exclusive Federal jurisdiction was

limited to offenses arising out of the internal working of such banks—to offenses arising out of the relation between the officers, clerks and agents of the bank, and the bank itself; but that as to the offenses arising out of the business relations between the bank or its officers and agents and its customers, the State court had jurisdiction. Thus the court said: "It is theft by our law to steal from a National bank; it is burglary to break into one for the purpose of stealing; and it is cheating to obtain money from one by false pretenses. As a corporate being, located in the State, its property and interests and business are protected by State laws and subject to State legislation, and so it is competent for the legislature to protect its customers, the citizens of the State, in their *business dealings* with it, whatever they may be, whether constituting the relation of borrower and lender or special or general depositor and bailee; and they may be controlled and protected by penal enactments, without interference with the laws of Congress." In *Commonwealth v. Tenney*, 97 Mass. 50, the Supreme Judicial Court of Massachusetts held that a State court had jurisdiction of an indictment against an officer of a National bank for fraudulently converting to his own use the property of an individual deposited in the bank, under a State statute making such fraudulent conversion "larceny." This was on the ground that the offense charged had not been made punishable by act of Congress, as the 55th section of the National Banking Act only applied to embezzlement of the *property of National banks*. Again, in *Commonwealth v. Felton*, 101 Mass. 204, the same court held that a State court had no jurisdiction of the crime of embezzlement by an officer of a National bank of the funds of the bank, since such offense is exactly covered by the act of Congress, and also that as Congress had made such offense a misdemeanor, only, an accessory could not be punished under a State statute making the offense a felony. In *Commonwealth v. Barry*, 116 Mass. 1, it was held in accordance with these decisions, that while a State court has not jurisdiction of the offense of embezzlement of the property of the bank by an officer thereof, it has jurisdiction of the offense of larceny of the property of the bank by such officer. The case turned on the distinction between "embezzlement" and "larceny." Had the teller appropriated to his own use the property of the bank while it was intrusted to him during the day, the offense would have been embezzlement, and not punishable in the State courts; but having purloined such property after it had been withdrawn from his possession and custody, and placed beyond his lawful reach, his offense was larceny.

BONDS OF BANK OFFICERS.

THERE is no especial difference between the bonds of bank officers and the bonds of other officers so far as relates to the general rules of law, but by reason of the fact that bank officers come more nearly home to the business and bosoms of the community, these rules have usually been more rigidly applied to them than to others. We propose briefly to state some of the rules that have been held as to them.

It may be stated as a general rule that the bond of a cashier or other officer is an undertaking, not only for honesty but for capacity, for reasonable skill and diligence in the discharge of his duties, and if he fails in either regard, and in consequence the bank suffers, he and his sureties are liable to make good the injury. *Minor v. Bank of Alexandria*, 1 Peters, 46; *Commercial Bank v. Ten Eyck*, 48 N. Y. 305; *American Bank v. Adams*, 12 Pick. 303.

Another general rule is that perfect good faith be adhered to between obligees and sureties, and that whenever there is any misrepresentation or even concealment by the obligee from the surety as to any material fact which, had he been aware of, he might not have entered into the contract of suretyship, he will be discharged. *Rees v. Berrington*, 2 White & Tudor's Lead. Cas. 1871.

This rule was somewhat rigorously applied in *Groves v. The Lebanon National Bank*, 10 Bush, 23, wherein the Court of Appeals of Kentucky held the sureties on a cashier's bond discharged because when the bond was executed the cashier was a defaulter, of which fact the directors might, and the court held should, have become cognizant, had they used due care; but instead of which they had issued a statement as the law required, wherein the affairs of the bank appeared to be well managed. This statement it was thought might have induced the sureties to become such, and it being a misrepresentation they were discharged.

On the other hand, in *Tupley v. Martin*, 116 Mass. 275, the Supreme Court of Massachusetts held that sureties on a cashier's bond were not discharged, although the directors had been negligent in not discovering frauds existing when the bond was given; in other words, it was held that "unless the defendant (the surety) proved actual knowledge, by the officers, of previous frauds, the sureties would not be discharged; that negligence in failing to examine, however gross, would not discharge the sureties."

In *Atlas Bank v. Brownell*, 9 R. I. 168; S. C., 11 Am. Rep. 281, it was held in a suit on a cashier's bond, that it was no defense that the directors had been negligent in examining his accounts. There the alleged negligence occurred after the bond was executed. The defendants offered further to prove that prior to the execution of the bond the cashier

had lost money by gambling; that the directors knew it and in consequence concluded to increase the bond; that thereafter the defendants became surety on the bond, and that the directors did not communicate to the defendants the fact of the gambling. The court held that the evidence was properly excluded on the ground that the information withheld related, not to the business which was the subject of the suretyship, and not to the conduct of the cashier as cashier, but to his general character.

The court said, "Ordinarily, the concealment, to make void a contract, must amount to the suppression of facts which one party is bound in conscience and duty to disclose to the other, and in respect to which he cannot innocently be silent." Story's Eq. Jur., § 204. But Judge Story lays down further, that, in the case of a surety, concealment of facts which go to increase his risk amounts to a fraud on the surety; and the omission to disclose is equivalent to an affirmation that the facts do not exist. Story's Eq. Jur., §§ 114, 215, 324, 338. But we think this doctrine of the text-books is stated much more strongly than the decided cases warrant. In *Railton v. Matthews*, 10 Cl. & F. 934, plaintiffs appointed an agent and took bond, they knowing the agent had misapplied moneys in a former agency, and not communicating it. It was contended that, to discharge the surety, the concealment must be willful, and with a view to the advantage of the obligee. Lord Campbell, in delivering judgment in the House of Lords, said it would do to make the liability depend on the *motive* of concealment; it was enough that the plaintiffs knew facts material for the surety to know and did not disclose them; the motive might have been kindness to the agent; the effect would be the same; the fact that he was in arrear, and had been guilty of fraudulent conduct, and was a defaulter, were facts material for the surety to know. In a later case (*Hamilton v. Watson*, 12 Cl. & F. 109), Lord Campbell, in delivering the judgment of the House of Lords, said that it would put an end to the Scotch practice of giving security for cash loans, if it was necessary for the creditor to disclose every thing material for the surety to know; and laid down this as the criterion whether the disclosure should be voluntarily made by the creditor; 'whether there is any thing that might not naturally be expected to take place in the transaction, i. e., whether there be a contract between the debtor and creditor, to the effect that his position shall be different from that which the surety might naturally expect,' but that if there be nothing of this sort, then the surety, if he would protect himself, must inquire.'

"In *North Brit. Ins. Co. v. Lloyd*, 10 Exch. 523, B, who was surety for a loan upon stock for A, applied to the plaintiffs, before the loan became due, to be released on procuring other surety, and plain-

tiffs consented. A applied to the defendant to become surety, and represented that his stock would otherwise be sacrificed, but did not communicate the fact that the former surety was to be released. The defendant testified, that if he had known that, he would not have become surety, but, on cross-examination, admitted 'that he relied on the solvency of Sir T. Branche,' the principal. In the course of a desultory running argument between the court and counsel, the judges criticised the decision in *Railton v. Matthews*, as going too far, and say that the point decided by Lords Campbell and Cottenham in that case was, in effect, that it was not necessary to render a concealment fraudulent, that it should be made with a view to the advantage of the person concealing. The court hold that the non-disclosure of the change of security would not vitiate the guaranty, unless fraudulently kept back, and that there was no ground in this case to impute fraud; that the former surety might well wish to be released for other reasons than doubt of Sir T. Branche's solvency.

"In the *Franklin Bank v. Cooper*, 36 Me. 179, the directors knew of the cashier's default, and took bond from him to account for all property heretofore intrusted to him, etc. Held, that the surety had a right to presume that the transaction was in the ordinary course of business; that the bank was bound to communicate facts increasing the risks, and which would have an important influence on the decision of the surety.

"In the case of *Bank of the United States v. Ething*, 11 Wheat. 59, the United States Supreme Court, being equally divided in opinion, the question was not decided.

"We think that it is going too far to say that the creditor is, in all cases, and without being inquired of, bound to communicate every thing that it is important for the surety to know, and that would increase his risk. Under such a rule no one would ever know when he could rely on a bond, and it would lead to a good deal of litigation. "We think the safe rule is that, to avoid the bond, there must be, on the part of the creditor, a fraudulent concealment, or withholding of something material for the surety to know. Would the fact which the defendant offered to prove, if proved, have amounted to a fraudulent concealment or withholding? It is not alleged here that the directors withheld any information inquired for, or said or did any thing which could have a tendency to mislead the surety, or made any, the least effort to induce the defendant to become surety. If there had been an actual default, and an attempt by the directors to cover it up, or reimburse themselves at the expense of the surety, the case would be different.

"Moreover, the cases which we have referred to are cases in which the information withheld or not disclosed related in some way to the business which

was the subject of the suretyship. In this case, the undisclosed information related, not to the business which was the subject of the suretyship, and not to the conduct of the cashier, as cashier, but to his general character. It did not follow that because he gambled he would fail in his duty as cashier, and the exceptions do not show that his actual delinquency had any connection with his gambling. The directors may have deemed it advisable to demand an increase of his bond because of his gambling; and so they might have deemed if they had learned he was keeping a fast horse, or speculating in the stocks. But would it have been their duty, unless inquired of, to impart their knowledge to the sureties? We think not, in the absence of a more confidential relation than that which is implied in the mere giving and accepting of the surety-bond. If, when there is no such confidential relation, the sureties wish to have the obligees affected with a duty to give such information, they should inquire for it. Otherwise, it may be supposed that they are content with what they themselves know, or with inquiries which they have made elsewhere."

In *Owen v. Homan*, 8 Mac. & G. 378, the creditor or obligee was held to be bound to make a full, fair and honest communication to the surety of all circumstances connected with the transaction to which the suretyship is to be applied, which are calculated to influence the discretion of the surety in entering into the required obligation. See that case on appeal, 4 H. L. Cas. 997. Matters unconnected with the transaction of the suretyship need not be disclosed to the surety unless he inquire concerning them. *Wythes v. Labenchere*, 3 DeG. & J. 593.

Mere negligence of a bank in detecting dishonest practices of a cashier will not discharge his sureties. There must be such negligence as in law amounts to a fraud on the sureties to accomplish that result. The distinction between mere negligence and fraud on the part of obligees as to the liability of sureties was clearly stated in *United States v. Kirkpatrick*, 9 Wheat. 720. That was an action on an official bond taken by the government. The defense was neglect on the part of the collecting officer of the government to sue within the time prescribed by law. The court, Story, J., delivering the opinion, said: "It is admitted that mere laches, unaccompanied with fraud, forms no discharge of a contract of this nature between private individuals; such is the clear result of the authorities." The same distinction was applied to cashier's bonds in *State Bank v. Oletwood*, 3 Halst. 1, and in *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 555; *Morris Canal Co. v. Van Voorst*, 1 Zabr. 100.

So, in *Minor v. Bank of Alexandria*, 1 Pet. 61, it was held that a usage of the board of directors to permit the cashier to misapply the funds of the bank would not exonerate his sureties. Story, J.,

who delivered the opinion of the court, said: "The question then comes to this, whether any act or vote of the board of directors, in violation of their own duties and in fraud of the rights and interests of the stockholders of the bank, could amount to a justification of the cashier, who was a *particeps criminis*. We are of opinion that it could not. However broad and general the powers of the direction may be for the government and management of the concerns of the bank, by the general language of the charter and by-laws, those powers are not unlimited, but must receive a rational exposition. It cannot be pretended that the board could, by a vote, authorize the cashier to plunder the funds of the bank, or to cheat the stockholders of their interest therein. No vote could authorize the directors to divide among themselves the capital stock, or justify the officers of the bank in an avowed embezzlement of its funds. The cases put are strong, but they demonstrate the principle only in a more forcible manner. Every act of fraud, every known departure from duty by the board in connivance with the cashier, for the plain purpose of sacrificing the interests of the stockholders, though less responsible in morals or less pernicious in its effects than the cases supposed, would still be an excess of power, from its illegality, and, as such, void as an authority to protect the cashier in his wrongful compliance. Now, the very form of these pleas sets up the wrong, and connivance cannot for a moment be admitted as an excuse for the misapplication of the funds of the bank by the cashier." The same rule was held in *Amherst Bank v. Root*, 2 Metc. 522; *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 565, and in *Sparks v. Farmers' Bank*, 9 Am. Law Reg. 365. So in *Atlantic and Pacific Telegraph Co. v. Barnes*, 64 N. Y. 385; S. C., 21 Am. Rep. 621, in an action upon a bond given by an employee to his employer conditioned that the former would faithfully account for all moneys and property coming to his hands, it was held that the sureties were not discharged from subsequent liability by an omission of the employer to notify them of a default by the employee which was known to the employer and a continuance of the employment after such default where it did not appear that such default arose through the fraud or dishonesty of the employee. The court expressed the opinion that had the default arisen through the dishonesty of the servant, a withholding of the fact from the sureties and the continuance of him in the service would have discharged the sureties.

This was held in *Phillips v. Foxall*, L. R., 7 Q. B. 666, where on a continuing guaranty of the honesty of a servant it was held if the master discovered that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant he chooses to continue him in his employ without the knowledge and consent of the sureties,

he cannot afterward have recourse to the surety to make good any loss arising from the dishonesty of the servant during the subsequent service. The same principle was held in *Sanderson v. Aston*, L. R., 8 Exch. 73, and in *Burgess v. Roe*, L. R., 18 Eq. 450.

In *Black v. Ottoman Bank*, 15 Moore's P. C. 472; S. C., 8 Jur. (N. S.) 801, the surety on the bond of a bank cashier was held not to be discharged by a failure of the bank to use diligence in guarding against the cashier's dishonesty—that mere negligence would not absolve the surety; and in *Dawson v. Laues*, Kay, 280; S. C., 23 L. J. Chan. 434, it was held that to discharge a surety for the due performance of duties, there must be on the part of the obligee an act of connivance or gross negligence, amounting to willful shutting of the eyes to fraud or something approximating it. There must be something amounting to fraud to enable a surety to say that he is released from his contract on account of misrepresentations or concealments. *Pledge v. Buss*, Johns. (Eng.) 663.

A concealment by a creditor that at the time of the contract the principal debtor was already indebted to the creditor in a considerable sum, of which fact the surety was ignorant, has been held evidence to go to the jury of such fraud on the surety as would discharge him. *Lee v. Jones*, 14 C. B. (N. S.) 386. See, also, *Hamilton v. Watson*, 12 C. & F. 258; *Smith v. Bank of Scotland*, 1 Dow. 272; *Padcock v. Bishop*, 3 B. & C. 605; *Peel v. Tatlock*, 1 Bos. & P. 419; *Squire v. Whitten*, 1 H. L. Cas. 333; and the same rule would apply to sureties on cashiers' bonds as to concealments by the bank.

In *Lee v. Jones*, *supra*, *affd.* on appeal, 17 C. B. (N. S.) 482, P. had been employed by the plaintiffs in the sale of coal for them on commission, for which he at the end of each month gave them his acceptance, and by the terms of his agreement, he was to hand over to them within six days all moneys he received from customers. P. having fallen in arrear to the extent of 1,272*l.*, the plaintiffs required him to find security to the amount of 800*l.*, and at his request the defendant consented to guarantee 100*l.* The agreement of guaranty recited the terms of dealing between the plaintiffs and P.; but the fact that P. was already indebted to the plaintiffs in the large sum above mentioned was concealed from the sureties. In an action against the defendant upon the agreement, he pleaded that he was induced to make it by the fraudulent concealment by the plaintiffs of a material fact: *Held*, that the non-communication by the plaintiffs to the defendant of the fact that P. was at the time indebted to them was evidence for the jury in support of the plea.

Farmington v. Stanley, 60 Me. 472, cited in the principal case, held that the failure of selectmen to examine the accounts of a town treasurer as by statute directed, or to detect an error in his accounts,

would not discharge a surety on his bond. This decision was put upon the ground that the selectmen were only agents of the town with limited powers; that they had no authority directly to discharge the sureties on the treasurer's bond and could not therefore do it indirectly.

In the *Board of Supervisors v. Otis*, 62 N. Y. 88, it was held that neither negligence nor malfeasance of a board of supervisors in their transactions with a county treasurer would discharge the sureties on the bond of such treasurer.

A cashier's bond (and the bonds of other bank officers are governed by the same rules) covers all duties annexed to the office from time to time, either by law or by the directors, and the sureties are liable for any default in such duties. *Minor v. Bank of Alexandria*, 1 Pet. 46; *Morris Canal Co. v. Van Vorst*, 1 Zab. 100.

The failure of a cashier to be sworn when that is required does not vitiate his bond but is rather a breach of it. *State Bank v. Chetwood*, 3 Halst. 1. But it is no forfeiture of a bond conditioned for the faithful service of a cashier that a loss has occurred by mere accident or mistake. *Morris Canal Co. v. Van Vorst*, 1 Zab. 100. So it is a breach of a cashier's bond for him to change, without authority, the securities of the bank. *Barrington v. Bank of Washington*, 14 Serg. & R. 405. It is a violation of duty for a cashier to allow an overdraft. *Bank of St. Mary v. Calder*, 3 Strobb. (S. C.) 408; or to certify a check without funds; or that a deposit has been made when in fact none has been made, or to change without authority the securities of the bank. *Barrington v. Bank of Washington*, 14 Serg. & R. (Penn.) 405; to omit some duty required of him by law, as to make a report to the Comptroller of the Currency, whereby the bank has been subjected to a fine or otherwise injured. *Bank of Washington v. Barrington*, 2 Penn. 27. To violate any valid by-law the corporation may prescribe. *Bank of Carlisle v. Hopkins*, 1 Min. (Ky.) 245. And in each case the sureties to the cashier's bond are liable.

LIABILITY OF NATIONAL BANKS FOR DEPOSITS FOR SAFE-KEEPING.

IN *Wiley v. First National Bank of Brattleborough*, 47 Vermont, 548, it was held that the taking of special deposits, to keep merely for the accommodation of the depositor, is not within the authorized business of National banks; and that the cashiers of such banks have no power to bind them on any express contract accompanying, or any implied contract arising out of, such taking. The doctrine of that case has been approved in several subsequent cases, but in none of them was the question directly presented. Thus, in *First National Bank v. Ocean National Bank*, 60 N. Y. 278, the case was expressly approved by Allen, J., who delivered the opinion of the court; but his remarks thereon were clearly obiter. There the defendant was held not to be liable for special deposits for safe-keeping, and the opinion took the ground that

cashiers of such banks, in the absence of special authority from the directors, or of proof of a custom so to do, had no authority to take such deposits; but as only two of the judges concurred in the opinion, it cannot be said whether the case was decided because of lack of authority in the cashier to take the deposits, or because there was no proof of gross negligence for which only the defendant, being a gratuitous bailee, would be liable.

Both the case of *Wiley v. First National Bank*, and *First National Bank v. Ocean National Bank*, were approved in *Third National Bank v. Boyd*, 44 Md. 47; S. C., 22 Am. Rep. 35, but the point was not in issue there. In that case the bank had taken bonds as collateral security for a debt and they were stolen while yet in the possession of the bank, although after the debt was paid. The court held that the bank was not a gratuitous bailee, and that it was liable if it had failed to exercise ordinary care. See, also, *Weckler v. First National Bank*, 42 Md. 581; S. C., 20 Am. Rep. 95; and *Second National Bank v. Ocean National Bank*, 11 Blatchf. 362.

In *Chattahoochee National Bank v. Schley*, 58 Ga. 369, the Supreme Court of Georgia remarked that a National bank which habitually receives special deposits for safe-keeping, as matter of accommodation, is bound by the act of the cashier in receiving such deposits and liable for a loss thereof occasioned by its gross negligence. The question was not, however, before the court.

In *Lancaster National Bank v. Smith*, 62 Penn. St. 48; and *Scott v. National Bank of Chester Valley*, 72 id. 471, the Supreme Court of Pennsylvania passed upon the liability of National banks for deposits for safe-keeping, but in neither case was the question raised as to the power of such banks to take such deposits. These cases turned on the question of negligence. In *First National Bank v. Graham*, 79 Penn. St. 106, the same court held that while the mere voluntary act of the cashier of a National bank in receiving special deposits for safe-keeping would not subject the bank to liability, yet if the deposit was known to the directors and its retention acquiesced in by them, or if there was a custom for the bank to receive such deposits, the bank would be bound. This decision is in accordance with *Foster v. Essex Bank*, 17 Mass. 479, which is the leading case on the subject.

In *De Haven v. Kensington National Bank*, 81 Penn. St. 95, it was held that whether or not National banks have the power to take special deposits for safe-keeping they are not liable for a loss of them unless they have been guilty of gross negligence. See, also, *Leach v. Hall*, 31 Iowa, 69; *First National Bank v. Pierson*, 16 Alb. Law Jour. 319.

In *Smith v. First National Bank*, 99 Mass. 605, the action was to recover the value of a special deposit for safe-keeping, but the question of the power of National banks to take such deposits was not raised. The court held the defendants liable only for want of ordinary care. This rule of liability is sustained by the decisions. *Ray v. Bank of Kentucky*, 10 Bush, 344; *Dearborn v. Union National Bank*, 58 Me. 273; S. C., 61 id. 369, and cases cited in *Scott v. National Bank*, 72 Penn. St. 471; *First National Bank v. Graham*, 79 id. 106. A bank is bound to take only ordinary care of bonds pledged with it, as collateral security. *Jenkins v. National Village Bank*, 58 Me. 275; *Dearborn v. Union National Bank*, 61 id. 369.

TAXATION OF NATIONAL BANKS.

COURT OF APPEALS, NEW YORK.

PEOPLE *ex rel.* TRADESMEN NATIONAL BANK v. COMMISSIONERS OF TAXES AND ASSESSMENTS.

Rate of, how determined in New York—Deduction for real estate.

In assessing shares of stock in National banks in New York, the assessors must determine the actual value of the shares—taking into consideration all the capital of the bank, whether surplus or in real estate or otherwise, and then deduct from such value, such sum as represents the proportion which the assessed value of the real estate bears to the assessed value of the entire capital.

Thus, the capital of a National bank was \$1,000,000, and was represented by 25,000 shares of \$40 each. The assessors assessed the shares at \$56 each, making in the aggregate \$1,400,000, and the real estate at \$200,000. *Held*, that they should deduct from the assessed value of each share \$8, being one-seventh, or the proportion which the real estate bore to the aggregate assessed value of the shares.

APPPEAL from the order of the General Term of the Supreme Court modifying an assessment. The case was reported below in 9 Hun, 650.

Hugh L. Cole, for appellant.

Horace Barnard, for respondents.

MILLER, J. The relator claims relief upon the ground that the commissioners of taxes and assessments did not obey the mandate of the statute in making the proper deduction from the value of each share of the capital stock of the bank as the law required. The capital of the bank was \$1,000,000, and was represented by 25,000 shares at \$40 a share. The commissioners valued the shares at \$56 each, and assessed the real estate at \$200,000, making the total value of the capital stock, including the real estate, \$1,400,000. They deducted from the value of each share \$8, being the one-seventh, or the proportion which the real estate bore to the whole amount of the capital stock, including the real estate, making the entire assessment upon the shares \$1,200,000. It is urged that this deduction was erroneous, and that instead thereof one-fifth of the value of each share, \$11.20, should have been deducted, thus reducing the value of each share to \$44.80 in the place of \$48, the amount of the actual assessment, and making a difference of \$80,000 in total amount of the taxable property assessed.

The statute under which the commissioners acted (chap. 761, Laws of 1866, § 1) declares, that the stockholders of any bank "shall be assessed and taxed on the value of their shares of the stock therein" * * * "but not at a greater rate than is assessed on other moneyed capital in the hands of individuals in this State. And in making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank * * * to the whole amount of the capital stock of the said bank," etc.

The evident object and purpose of the act from which the foregoing provision is cited, was to provide a system of taxation of the stockholders of National banks by which they should be assessed for their shares in the same method and bear the same burthens as are assessed upon other property, and thus be compelled to pay their fair and just proportion of taxes to be levied. The clause in the section cited, to the effect that they were not to be assessed at a greater rate than other moneyed capital, clearly meant that they should be assessed as much and to the same extent and not a less rate than assessments are imposed upon individual

owners of such capital according to law. They were to be assessed, as the act provides, on the value of their shares, meaning the market value or the price which such shares would bring without regard to the value of the real estate which was to be assessed separately. When the assessors had fixed upon the value of such shares then the deduction was to be made from the value of the shares of the real estate, and here the real point of the controversy is presented as to what that deduction shall be. It is to be proportionate and as the assessed value of the real estate is to the capital stock. The phraseology last employed must be considered in the connection with the "value of the shares" which have previously been inserted in the statute, and when the statute speaks of the "whole amount of the capital stock," it is reasonable to suppose that it had reference to its fair value and not to the nominal amount of the capital. It certainly includes the value as that constitutes the actual amount, and the important element which was to be taken into consideration in the assessment of the shares. The words last cited, as expressed in the section cited, include evidently every part of the assets of the bank from which income is derived and from which the dividends earned are to be paid. This clearly comprehends the surplus on hand as well as any other investment which constitutes a portion of the capital. These sources of income represent the capital and form a material part of it, which is liable to be assessed as the act directs. The assessors are to consider every thing which gives value to the shares in fixing the basis of assessment. *The People ex rel. Gallatin Bank v. Commissioners, etc.*, 67 N. Y. 516. Such being the principle upon which the assessment is based it is not apparent in what manner a deduction can be made from the value of the shares in proportion to the nominal capital instead of the real capital according to its value. The word "nominal" is not used, and while the amount of the capital may be nominal it may also, when it has increased in value by profits earned, be far beyond that. And when it has thus become actually more valuable than the nominal amount, there is no valid ground for holding that the latter sum should be the criterion. In fact the language cited would seem to indicate that it was intended by the Legislature to exclude any such construction.

In support of the construction placed upon the statute in question it may be observed that it tends to carry out the apparent intention of the law-makers to fix a fair and just valuation upon property of this description, while a contrary rule would operate unjustly and render a uniformity of assessment almost out of the question. No rule appears to be more equitable, rational and fair, than to assess the shares of bank stocks at their value, and then make the deduction in proportion to the real capital, as we think the statute authorizes. If it were otherwise, banking institutions which had been prosperous and successful and whose shares had been raised far above the par value might escape taxation upon a large portion of the amount of their capital, while those which had been unfortunate and reduced in value might be taxed upon a far greater amount than their entire capital, upon entirely a fictitious basis of value, and upon property which in fact had no existence. This clearly never was intended, and the rule applicable to the construction of statutes does not require such a strict interpretation of the law as will frustrate its design and completely pervert the object of the law-makers.

It may also be remarked that the basis of taxation adopted by the commissioners in this case appears to have been followed and approved in the case of *The People ex rel. Gallatin Bank v. The Commissioners, etc.*, *supra*, recently decided by this court.

The General Term were in error in its decision and the judgment should be reversed and the writ of *certiorari* quashed.

Judgment reversed.

UNITED STATES CIRCUIT COURT, SIXTH CIRCUIT.

MERCHANTS' NATIONAL BANK OF TOLEDO V. CUMMING.

Unjust discrimination—Restraining collection of tax at suit of bank.

The shares of stock of a National bank were taxed at their full value, while other property was assessed at from thirty to forty per cent of its real value. *Held*, that the discrimination was illegal and unjust, and that the bank was a proper party to maintain a bill to restrain the collection of the tax beyond the proportion assessed on other property.

ACTION by the Merchants' National Bank of Toledo against Cumming, collector of taxes, to restrain him from collecting a tax assessed for the year 1876 on the shares of stock of plaintiff's bank. The late Judge Emmons of the same circuit, before his death, granted a preliminary injunction.

Judge Raney and Wager Swayne, of Toledo, for plaintiffs.

Judge Griswold and F. K. Hamlin, for respondent.

BAXTER, Circuit Judge, made the following memorandum: *

There were several points presented and urged in the argument of this case, on hearing which, in the view I have taken of it, need not be discussed here. Suffice it to say that, from the pleadings and proofs, it very satisfactorily appears that complainant's capital stock was assessed for the year 1876 at its full value, while all other property was assessed at from thirty to forty per cent only of its real value, and that, by reason of this unequal assessment, complainant's capital stock was in the hands of its shareholders operated with an undue proportion of the public taxes. It is not important to inquire into the methods leading to such a result. Whether from inadvertence or design, the consequences are the same to the complainant. It is an injustice that contravenes the Constitution of Ohio, as well as the provisions of the National Banking Law, and a wrong which the courts may, when their powers are properly invoked, take cognizance of to redress. But the defendant insists that the wrong complained of is a wrong to complainant's shareholders, against whom the tax was assessed, and not against the complainant. This objection seemed, on first impression, to have been well taken, but further reflection induces the belief that it involves the rights of complainant as well as the rights of its corporators. Between the two there is an intimate connection; the legal entity—the corporation—is distinct from the shareholders, but the former is a trustee for the latter, and custodian of corporate funds; and if it shall pay the taxes so assessed, and assume to deduct the same from dividends declared, or to be hereafter declared in favor of its shareholders, it may, and the averment is that it will, subject itself to a multiplicity of suits with its own

shareholders; whereas, if it refuses to pay these taxes, it will impair its credit, embarrass its business, and expose itself to vexatious and expensive suits, and entail upon itself irremediable injuries in resisting the illegal exactions made upon it.

Hence, in view of the probable consequences, I have reached the conclusion that the complainant, in its corporate capacity, is entitled to a standing in this court, and to relief, and I shall, therefore, authorize a decree permitting complainant to pay to the defendant, or into the registry of the court, forty per cent of the amount of the tax assessed against its shareholders, in accordance with its tender heretofore made, and, on this being done, an injunction be issued perpetually enjoining the collection thereof. The costs will be decreed against defendant, to be paid out of the money to be realized under decree hereinbefore authorized.

USURY BY NATIONAL BANKS.

SUPREME COURT OF PENNSYLVANIA, 1878.

CAKE V. THE FIRST NATIONAL BANK OF LEBANON.

Renewal notes—acceptance of—set-off for usury.

Whether other notes have been accepted by a bank in renewal of notes sued on is a question for the jury. Where there has been a series of renewal notes given for the continuation of the same original loan, a taint of usury in the first transaction follows down through the whole, and in an action by a National bank on the last of the series, the borrower is entitled to credit for all the interest he has paid from the beginning.

ACTION against the defendant as an accommodation indorser of a draft and a note, discounted by the plaintiff, a National bank, for the maker, Stine.

Sharp & Alleman, for plaintiff in error.

A. L. Smith, for defendant in error.

SHARSWOOD, J. We think the first, third, fourth and fifth assignments of errors must be sustained, but not the second.

The defendant below was accommodation indorser for Stine on two notes, which had been discounted by the bank, and being unpaid at maturity were duly protested. Stine procured Cake to indorse renewal notes, and sent them to the bank, who retained them until at least one of them had fallen due, and then informed Stine that they had not accepted them. No notice of non-payment was given Cake on these notes. This suit was instituted on the first notes. It is the very case of *Hart v. Boller*, 15 S. & R. 162, in which this court held that it was error to take from the jury the question whether the renewal notes were accepted in payment.

We think, too, that *Overholt v. The National Bank of Mt. Pleasant*, 1 Norris, 490, is directly in point on the question raised as to the usurious interest received by the bank. It was there decided that where there has been a series of renewal notes given for the continuation of the same original loan, the taint of usury in the first transaction follows down the descent through the whole line, and when therefore a National bank sues to recover its debt on the last of the series of renewal notes, the borrower is entitled to credit for all interest he has paid from the beginning on the loan, and not merely to the excess above the lawful rate.

Judgment reversed, and venire facta de novo awarded.

* The clerk of the court, in a letter to the Editor, under date of April 15, 1878, says: "There was no written opinion in the case other than the memorandum herewith inclosed."

CONSTITUTIONALITY OF EXEMPTION LAWS.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

EDWARDS, Plaintiff in error, v. KEARZY.

The remedy subsisting in a State when and where a contract is made, and is to be performed, is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void.

Accordingly a law of North Carolina exempting personal property and a homestead of a debtor from sale under execution, held invalid as to debts contracted before its enactment.

IN error to the Supreme Court of the State of North Carolina. The facts appear in the opinion.

Mr. Justice SWAYNE delivered the opinion of the court.

The Constitution of North Carolina of 1868 took effect on the 24th of April in that year. Sections 1 and 2 of article X declare that personal property of any resident of the State, of the value of five hundred dollars, to be selected by such resident, shall be exempt from sale under execution or other final process issued for the collection of any debt; and that every homestead and the buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner, or in lieu thereof, at the option of the owner, any lot in a city, town, or village, with the buildings used thereon, owned and occupied by any resident of the State, and not exceeding in value one thousand dollars, shall be exempt in like manner from sale for the collection of any debt under final process.

On the 22d of August, 1868, the Legislature passed an act which prescribed the mode of laying off the homestead and setting off the personal property so exempted by the Constitution. On the 7th of April, 1869, another act was passed, which repealed the prior act and prescribed a different mode of doing what the prior act provided for. This latter act has not been repealed or modified.

Three several judgments were recovered against the defendant in error—one on the 15th of December, 1868, upon a bond dated the 25th of September, 1865; another on the 10th of October, 1868, upon a bond dated February 27, 1866; and the third on the 7th of January, 1868, for a debt due prior to that time. Two of these judgments were docketed and became liens upon the premises in controversy on the 16th of December, 1868. The other one was docketed and became such lien on the 18th of January, 1869. When the debts were contracted for which the judgments were rendered the exemption laws in force were the acts of January 1, 1864, and of February 16, 1859. The first-named act exempted certain enumerated articles of inconsiderable value and "such other property as the freeholders appointed for that purpose might deem necessary for the comfort and support of the debtor's family, not exceeding in value fifty dollars at cash valuation." By the act of 1859 the exemption was extended to fifty acres of land in the county or two acres in a town, of not greater value than five hundred dollars.

On the 22d of January, 1869, the premises in controversy were duly set off to the defendant in error as a homestead. He had no other real estate, and the premises did not exceed a thousand dollars in value. On the 6th of March, 1869, the sheriff, under executions

issued on the judgments, sold the premises to the plaintiff in error, and thereafter executed to him a deed in due form. The regularity of the sale is not contested.

The act of August 23, 1868, was then in force. The acts of 1864 and 1859 had been repealed. *Wilson v. Sparks*, 72 N. C. 211. No point is made upon these acts by the counsel upon either side. We shall, therefore, pass them by without further remark.

The plaintiff in error brought this action in the Superior Court of Granville county to recover possession of the premises so sold and conveyed to him. That court adjudged that the exemption created by the Constitution and the act of 1868 protected the property from liability under the judgments, and that the sale and conveyance by the sheriff were, therefore, void. Judgment was given accordingly. The Supreme Court of the State affirmed the judgment. The plaintiff in error thereupon brought the case here for review. The only Federal question presented by the record is, whether the exemption was valid as regards contracts made before the adoption of the Constitution of 1868.

The counsel for the plaintiff in error insists upon the negative of this proposition. The counsel upon the other side, frankly conceding several minor points, maintains the affirmative views. Our remarks will be confined to this subject.

The Constitution of the United States declares that "no State shall pass any * * * law impairing the obligation of contracts."

A contract is the agreement of minds, upon a sufficient consideration, that something specified shall be done, or shall not be done.

The lexical definition of *impaired* is "to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power; to weaken; to enfeeble; to deteriorate."—Webster's Dict.

Obligation is defined to be "the act of obliging or binding; that which obligates; the binding power of a vow, promise, oath, or contract," etc.—Idem.

"The word is derived from the Latin word *obligatio*, tying up; and that from the verb *obligo*, to bind or tie up; to engage by the ties of a promise or oath or form of law; and *obligo* is compounded of the verb *ligo*, to tie or bind fast, and the preposition *ob*, which is prefixed to increase its meaning." *Blair v. Williams and Lapsley v. Brashears*, 4 Littell, 65.

The obligation of a contract includes every thing within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it the contract, as such, in the view of the law, ceases to be and falls into the class of those "imperfect obligations," as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. "Want of right and want of remedy are the same thing." 1 Bac. Abr., tit. Actions in General, letter B.

In *Von Hoffman v. Quinoy*, 4 Wall. 552, it was said: "A statute of frauds embracing pre-existing parol contracts not before required to be in writing would affect its validity. A statute declaring that the word *ton* should, in prior as well as subsequent contracts, be held to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedness may be extinguished by a process of bankruptcy, would involve its discharge, and a statute forbidding the sale

of any of the debtor's property, under a judgment upon such a contract, would relate to the remedy."

It cannot be doubted, either upon principle or authority, that each of such laws would violate the obligation of the contract, and the last not less than the first. These propositions seem to us too clear to require discussion. It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement. *Von Hoffman v. Quincy, supra*; *McCracken v. Hayward*, 2 How. 612.

In *Greene v. Biddle*, 8 Wheat. 92, this court said, touching the point here under consideration: "It is no answer that the acts of Kentucky now in question are regulations of the remedy and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests."

"One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force." *Planters' Bank v. Sharp et al.*, 6 How. 327.

It is to be understood that the encroachment thus denounced must be material. If it be not material it will be regarded as of no account.

These rules are axioms in the jurisprudence of this court. We think they rest upon a solid foundation. Do they not cover this case? and are they not decisive of the question before us?

We will, however, further examine the subject.

It is the established law of North Carolina that stay laws are void, because they are in conflict with the National Constitution. *Jacobs v. Smallwood*, 63 N. C. 112; *Jones v. Crittenden*, 1 Car. Law, 385; *Barnes v. Barnes*, 8 Jones, 366. This ruling is clearly correct. Such laws change a term of the contract by postponing the time of payment. This impairs its obligation by making it less valuable to the creditor. But it does this solely by operating on the remedy. The contract is not otherwise touched by the offending law. Let us suppose a case. A party recovers two judgments—one against A, the other against B—each for the sum of fifteen hundred dollars upon a promissory note. Each debtor has property worth the amount of the judgment and no more. The Legislature thereafter passes a law declaring that all past and future judgments shall be collected "in four equal annual installments." At the same time another law is passed which exempts from execution the debtor's property to the amount of fifteen hundred dollars. The court holds the former law void and the latter valid. Is not such a result a legal solecism? Can the two judgments be reconciled? One law postpones the remedy, the other destroys it—except in the contingency that the debtor shall acquire more property—a thing that may not occur, and that cannot occur if he die before the acquisition is made. Both laws involve the same principle and rest on the same basis. They must stand or fall together. The concession that the former is invalid cuts away the foundation from under the latter. If a State may stay the remedy for one fixed

period, however short, it may for another, however long. And if it may exempt property to the amount here in question, it may do so to any amount. This, as regards the mode of impairment we are considering, would annul the inhibition of the Constitution, and set at naught the salutary restriction it was intended to impose.

The power to tax involves the power to destroy *McCulloch v. Maryland*, 4 Wheat. 430. The power to modify at discretion the remedial part of a contract is the same thing.

But it is said that imprisonment for debt may be abolished in all cases, and that the time prescribed by a statute of limitations may be abridged.

Imprisonment for debt is a relic of ancient barbarism. Cooper's Justinian, 658; 12 Tables, Tab. 3. It has descended with the stream of time. It is punishment, rather than a remedy. It is right for fraud, but wrong for misfortune. It breaks the spirit of the honest debtor, destroys his credit, which is a form of capital, and dooms him, while it lasts, to helpless idleness. Where there is no fraud it is the opposite of a remedy. Every right-minded man must rejoice when such a blot is removed from the statute book.

(But upon the power of a State, even in this class of cases, see the strong dissenting opinion of Washington, J., in *Mason v. Hale*, 12 Wheat. 370.)

Statutes of limitation are statutes of repose. They are necessary to the welfare of society. The lapse of time constantly carries with it the means of proof. The public as well as individuals are interested in the principle upon which they proceed. They do not impair the remedy, but only require its application within the time specified. If the period limited be unreasonably short and designed to defeat the remedy upon pre-existing contracts, which was part of their obligation, we should pronounce the statute void. Otherwise we should abdicate the performance of one of our most important duties. The obligation of a contract cannot be substantially impaired in any way by a State law. This restriction is beneficial to those whom it restrains, as well as to others. No community can have any higher public interest than in the faithful performance of contracts and the honest administration of justice. The inhibition of the Constitution is wholly prospective. The States may legislate as to contracts thereafter made as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect.

In *Bronson v. Kenzie*, 1 How. 311, the subject of exemptions was touched upon, but not discussed. There a mortgage had been executed in Illinois. Subsequently the Legislature passed a law giving the mortgagor a year to redeem, after sale under a decree, and requiring the land to be appraised, and not to be sold for less than two-thirds of the appraised value. The law was held to be void in both particulars as to pre-existing contracts. What is said as to exemptions is entirely *obiter*, but coming from so high a source, it is entitled to the most respectful consideration. The court, speaking through Chief Justice Taney, said: A State "may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be executed or not by every sovereignty, according to its

own views of policy and humanity." He quotes with approbation the passage which we have quoted from *Greene v. Biddle*. To guard against possible misconstruction, he is careful to say further: "Whatever belongs merely to the remedy may be altered according to the will of the State, *provided the alteration does not impair the obligation of the contract*. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. *In either case it is prohibited by the Constitution*."

The learned Chief Justice seems to have had in his mind the maxim "*de minimis*," etc. Upon no other ground can any exemption be justified. "Polley and humanity" are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it.

Where the facts are undisputed, it is always the duty of the court to pronounce the legal result. *Merchants' Bank v. The State Bank*, 10 Wall. 604. Here there is no question of legislative discretion involved. With the constitutional prohibition, even as expounded by the late Chief Justice, before us on one hand, and on the other the State Constitution of 1868, and the laws passed to carry out its provisions, we cannot hesitate to hold that both the latter do seriously impair the obligation of the several contracts here in question. We say, as was said in *Gunn v. Barry*, 15 Wall. 622, that no one can cast his eyes upon the new exemptions thus created without being at once struck with their excessive character and hence their fatal magnitude. The claim for the retrospective efficacy of the Constitution or the laws cannot be supported. Their validity as to contracts subsequently made admits of no doubt. *Bronson v. Kenzie*, *supra*.

The history of the National Constitution throws a strong light upon this subject. Between the close of the war of the revolution and the adoption of that instrument, unprecedented pecuniary distress existed throughout the country.

"The discontents and uneasiness, arising in a great measure from the embarrassment in which a great number of individuals were involved, continued to become more extensive.

"At length two great parties were formed in every State, which were distinctly marked, and which pursued distinct objects with systematic arrangement. 5 Marshall's Life of Washington, 75. One party sought to maintain the inviolability of contracts, the other to impair or destroy them.

"The emission of paper money, the delay of legal proceedings, and the suspension of the collection of taxes, were the fruits of the rule of the latter wherever they were completely dominant." Ib.

"The system called justice was, in some of the States, iniquity reduced to elementary principles." * * * "In some of the States creditors were treated as outlaws. Bankrupts were armed with legal authority to be persecutors, and by the shock of all confidence society was shaken to its foundations." Fisher Ames' Works (ed. of 1859), p. 120.

"Evidences of acknowledged claims on the public would not command in the market more than one-fifth of their nominal value. The bonds of solvent men, payable at no very distant day, could not be negotiated but at a discount of thirty, forty, or fifty per cent per annum. Landed property would rarely command

any price; and sales of the most common articles for ready money could only be made at enormous and ruinous depreciation.

"State Legislatures, in too many instances, yielded to the necessities of their constituents and passed laws by which creditors were compelled to wait for the payment of their just demands on the tender of security or to take property at a valuation, or paper money falsely purporting to be the representative of specie." Ramsey's Hist. U. S. 877.

"The effects of these laws interfering between debtors and creditors were extensive. They destroyed public credit and confidence between man and man, injured the morals of the people, and in many instances insured and aggravated the ruin of the unfortunate debtors, for whose temporary relief they were brought forward." 2 Ramsey's Hist. S. C. 429.

Besides the large issue of continental money, nearly all the States issued their own bills of credit. In many instances the amount was very large. 2 Phillips' Hist. Amer. Paper Money, 29. The depreciation of both became enormous. Only one per cent of the "continental money" was assumed by the new government. Nothing more was ever paid upon it. Act of August 4, 1790, § 4, 1 Stat. 140; 2 Phillips' Hist. American Paper Currency, 194. It is needless to trace the history of the emissions by the States.

The treaty of peace with Great Britain declared that "the creditors on either side shall meet with no lawful impediment to the recovery of the full amount in sterling money of all *bona fide* debts heretofore contracted." The British minister complained earnestly to the American Secretary of State of violations of this guaranty. Twenty-two instances of laws in conflict with it in different States were specifically named. 1 Amer. State Papers, 195, 196, 199, and 237. In South Carolina "laws were passed in which property of every kind was made a legal tender in payment of debts, although payable according to contract in gold and silver. Other laws installed the debt, so that of sums already due only a third, and afterward only a fifth, was securable in law." 2 Ramsey's Hist. S. C., Ib. Many other States passed laws of a similar character. The obligation of the contract was as often invaded after judgment as before. The attacks were quite as common and effective in one way as in the other. To meet these evils in their various phases the National Constitution declared that "no State should emit bills of credit, make any thing but gold and silver coin a legal tender in payment of debts, or pass any law * * impairing the obligation of contracts." All these provisions grew out of previous abuses. 2 Curtis' Hist. of the Const. 366. See, also, the Federalist, Nos. 7 and 44. In the number last mentioned Mr. Madison said that such laws were not only forbidden by the Constitution, but were "contrary to the first principles of the social compact and to every principle of sound legislation."

The treatment of the malady was severe, but the cure was complete.

"No sooner did the new government begin its auspicious course than order seemed to arise out of confusion. Commerce and industry awoke and were cheerful at their labors, for credit and confidence awoke with them. Everywhere was the appearance of prosperity, and the only fear was that its progress was too rapid to consist with the purity and simplicity of ancient manners."—Ames' Sup. 122.

"Public credit was reanimated. The owners of

property and holders of money freely parted with both, well knowing that no future law could impair the obligation of the contract."—2 Ramsey, *supra*, 433.

Chief Justice Taney, in *Bronson v. Kenzie*, *supra*, 218, speaking of the protection of the remedy, said: "It is this protection which the clause of the Constitution now in question mainly intended to secure."

The point decided in *The Dartmouth College v. Woodward*, 4 Wheat. 518, had not, it is believed, when the Constitution was adopted, occurred to any one. There is no trace of it in the *Federalist* nor in any other contemporaneous publication. It was first made and judicially decided under the Constitution in that case. Its novelty was admitted by Chief Justice Marshall, but it was met and conclusively answered in his opinion.

We think the views we have expressed carry out the intent of contracts and the intent of the Constitution. The obligation of the former is placed under the safeguard of the latter. No State can invade it and Congress is incompetent to authorize such invasion. Its position is impregnable, and will be so while the organic law of the Nation remains as it is. The trust touching the subject with which this court is charged is one of magnitude and delicacy. We must always be careful to see that there is neither nonfeasance nor misfeasance on our part.

The importance of the point involved in this controversy induces us to re-state succinctly the conclusions at which we have arrived and which will be the ground of our judgment.

The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is, therefore, void.

The judgment of the Supreme Court of North Carolina is reversed, and the cause will be remanded with directions to proceed in conformity to this opinion.

LIABILITY OF SHIP-OWNERS.

LEVINSON V. THE OCEANIC STEAM NAVIGATION COMPANY.

NEW YORK, 24th April, 1878.

To the Editor of the Albany Law Journal:

SIR—Under this head, your issue of the 13th instant contains the opinion of Judge Shipman, and the note of E. P. Wheeler, Esq., one of the counsel, in this very interesting case, which is of so much importance as to justify a further reference to it if permitted by the state of your columns.

Levinson was a passenger by the "Atlantic;" he paid his passage money in the foreign port of Liverpool on board of this foreign ship, owned by a foreign corporation, which transported him and his baggage till it cast him upon a foreign shore at Mar's Head, where his baggage was lost and himself severely injured in person. The action was brought to recover for these damages.

The ship-owners fished out of the wreck certain articles of cargo and sold them in Halifax; they also brought some to this city, delivered them to the consignees, and collected a small amount of freight thereon. The two sums thus received by them amounted to \$8,422; when, having been sued here by various parties, they filed a libel in the United States

District Court for the Southern District of New York, offering to bring this sum into court, and praying that it might be distributed among all complainants, and they relieved from further liability. Neither the ship, the cargo, nor proceeds of either, nor the freight money had been libeled.

The act of Congress of March 8d, 1851, limiting the liability of ship-owners, had never been, by a judicial decision, extended to allens, nor to foreign bottoms, nor to foreign waters, and not to domestic vessels or waters unless the ship or cargo was libeled in the district. No assignment of the owners' interest to a trustee for the benefit of all claimants, as authorized by the act, was made; and it was claimed that bringing this \$8,000 here was illegal, as under the British law, the salvaged cargo ought to have been returned to Liverpool. On the trial it was shown that the British "Merchants' Shipping Acts" of 1854 and 1862, limited steamship owners' liability, in cases of personal injury, to £15 per ton gross tonnage, without deduction for engine room, which would have made the fund in this case \$800,000, instead of \$8,422; that in each of the cases where the British courts had entertained the limitation of the ship-owners' liability the ship had been libeled *in rem*, was in British waters, or the owners of a British ship came in voluntarily and paid in the statutory sum per ton. *The Normandy*, L. R., 3 Ad. & Ecc. 152; *The Amalia*, 32 L. J. (N. S.) Admiralty, 191; *The Northumbria*, L. R., 3 Ad. & Ecc. 24; *Genl. Iron Screw Collier Co.*, 1 Jo. & H. 180; *The Rajah*, L. R., 3 Ad. & Ecc. 539.

It was further shown that there was no comity of decisions by British courts in favor of American ships, which should lead our courts to strain a single point in favor of British ships: that British courts had refused to extend over American ships the benefit of their Merchants' Shipping Acts, in the case of collision between two American ships on the high seas (*Cope v. Doherty*, 2 De Gex & J. 614); that in a collision between a British and foreign ship on the high seas, where the foreign ship was at fault, the latter could not have the benefit of the limitation of those acts (*The Wild Ranger*, 1 Jo. & H. 180); that the courts of Nova Scotia had jurisdiction of this steamship and had exercised it; that the New York courts had given a construction to the act of Congress to the effect that it did not apply to this case by decisions at Circuit like that which on other points has now been passed upon by the General Term of the Supreme Court in *Markwald v. The Oceanic Co.*, 11 Hun, 462; that the Court of Appeals had held that the jurisdiction of the United States District Court could be attacked collaterally (*Tracy v. Corse*, 58 N. Y. 143); that the United States courts had held the same doctrine (*Thompson v. Tolmie*, 2 Pet. 157; *Elliott v. Peirson*, 1 id. 328); that the District Court itself in the similar case of *Markwald* (another passenger by the same boat), held that the owners' libel did not foreclose him, and that, through the master, the owners, being a corporation, were privy to the loss and injury.

Formerly, it would have been thought that the plaintiff had made out his case. The Circuit Court found that he had, so far as fixing the responsibility of the injury upon the owners, through the master's negligence: on this point agreeing with the State courts. But the Circuit Court then held, substantially, that it could apply the U. S. Statute, being the same as the maritime law, to the protection of these alien owners of a foreign bottom, in foreign waters, where the mari-

time law does not prevail, and would remit the plaintiff to his share of the value of that portion of the wreck which had been turned into money, and offered by the owners to be and had been in the District Court already distributed to other claimants, and which, as he had not previously received it, he must go without entirely, and that it was sufficient defense to show that the ship-owners had filed a libel in the District Court, on which a decree had been obtained without opposition, although no libel had been filed against the ship or cargo.

The court, also, held that the service of a monition in the admiralty proceedings upon a person who was attorney for the party in another jurisdiction, another court, and another matter, was good service upon the party.

From this summary, you will see the exceeding length and breadth of this important decision by Judge Shipman. It is law. It is excellent for foreign ship-owners. I am not prepared to say that it is not every way fortunate that this is the law, because individual interests must yield to the general interests, and a liberal course of exemption and protection to commerce, both on sea and land, is undoubtedly for the general interests. This decision, if sufficiently made known abroad, ought largely to increase the admiralty business of this country. Englishmen, especially, will be found escaping from the limitation, or rather imposition, of liability at the rate of £15 per ton, as prescribed by their Imperial law, and protecting themselves under this Republican decision.

Those who may wish further to trace this question of maritime law may be interested to refer to "*The Niagara*," 21 How. (U. S.) 26; *Moore v. Transportation Co.*, 24 How. 1; *Norwich Co. v. Wright*, 13 Wall. 104; *Allen v. Mackay*, 1 Sprague, 219; the "*Lottawana*," 21 Wall. 558; the "*Epsilon*," 6 Ben. 378.

Like the decision of the U. S. Supreme Court, doing away with the necessity of the assessment of a tax as a prerequisite to its collection, this case is an illustration of the easy way in which the United States courts sweep away pre-existent views of the law, technicalities, that observance of forms which may be called the mechanics of the law, and literal construction, as cobwebs, before a broad principle which they feel bound to follow.

Very respectfully yours,

ELLIOTT F. SHEPARD.

RECENT ENGLISH DECISIONS.

BANKS AND BANKING.

1. *Canceling signature of makers of dishonored note: effect of.*—The mere fact of canceling the signature of the makers of a dishonored promissory note and writing "paid" on the note, corrected before the note is sent back to the plaintiffs by a memorandum thereon "canceled in error," cannot be effectual to charge a bank with the receipt of the money. (*Warwick v. Rogers*, 5 M. & G. 340, approved.) *Prince v. Oriental Bank Association*, L. R., 3 Ap. Cas., P. C., 325.

2. *When bank will not be charged with receipt of money.*—Where a promissory note is returned dishonored to the plaintiffs, the amount thereof having been transmitted by transfer drafts and entries in the bank's books, from the branch where the same was made payable to the branch where the plaintiffs paid the same in, such transfer and entries not being communicated

to the plaintiffs, held, that the bank could not be charged with the receipt of the money. *Ib.*

3. *Branch bank: position of.*—The position of branch banks is, that in principle and in fact they are agencies of one principal banking corporation or firm, notwithstanding that they may be regarded as distinct for special purposes, *e. g.*, that of estimating the time at which notice of dishonor should be given; or of entitling a banker to refuse payment of a customer's check except at that branch where he keeps his account. *Ib.*

BILL OF EXCHANGE.

Acceptance: 1 & 2 Geo. 4, c. 78, s. 2: 19 & 20 Vict., c. 97, s. 6.—Since the passing of the statute 19 & 20 Vict., c. 97, s. 6, simply writing the name of the drawee across the face of a bill of exchange does not constitute a valid acceptance; there must also be upon the face of the bill some word or words indicating an intention on the part of the drawee to be bound by it as acceptor. *Hindhaugh v. Blakey*, L. R., 3 C. P. D. 136.

CARRIER.

Conditions limiting liability: willful misconduct: alternative rates.—The plaintiff, under a contract in writing signed by his agent, delivered to the defendants certain cheeses to be carried from L. to S. at "owner's risk." As the plaintiff knew, the defendants had two rates of carriage: a higher rate, when they took the ordinary liability of carriers, and a lower, when they were relieved of all liability, except that arising from the willful misconduct of their servants. In using the words "owner's risk" the plaintiff intended that the cheeses should be carried at the lower rate, and subject to the conditions restricting the defendants' liability. The defendants' servants packed the cheeses in such a manner that during their transit upon the defendants' railway they were damaged, but the defendants' servants did not know that damage would result from the mode in which the cheeses were packed. Held, that as the defendants carried at alternative rates, the condition excepting them from liability when carrying at the lower rate was just and reasonable; and that the injury to the cheeses had not arisen from the willful misconduct of their servants. *Lewis v. The Great Western Railway Company*, L. R., 3 (C. A.) Q. B. D. 195.

EASEMENT.

Light, prescriptive right to: quantum of enjoyment: right not to be measured by purpose for which light actually used: damages.—In an action for the obstruction of ancient lights, the judge directed the jury that they were to consider whether there had been a sensible diminution of light, so as to make the plaintiff's premises less available for the purposes of occupation or business, to which they were then, or might thereafter, be made applicable, and that the damages were to be estimated according to the diminution of value of the premises for such purposes. Held, a right direction, on the ground that the purposes for which the premises had actually been used while the light had been enjoyed, were not the proper measure of the right. (*Martin v. Goble* 1 Campbell, 320, dissented from.) *Moore v. Hall*, L. R., 3 Q. B. D. 178.

MARINE INSURANCE.

Right of underwriters to maintain action for damage to thing insured.—There is no independent right in underwriters to maintain in their own name, and without reference to the person insured, an action for

damage to the thing insured. Although the underwriters have paid for a total loss, and are entitled to all the rights in the injured ship which belong to its owner, yet if that owner cannot assert a right for damages against the wrong-doer, neither can the underwriters. Two ships, the property of the same owner, collided; the underwriters paid the insurance effected on the lost ship, and then claimed to rank *pari passu*, with the owners of cargo destroyed, in the distribution of the fund lodged in court by the owner as proprietor of the ship which did the damage. *Held* (reversing the decision of the court below), that the underwriters had no such right under the circumstances of the case. *Per* The Lord Chancellor (Lord Cairns):—The underwriters' right must be asserted in the name of the person insured, but if he be the person who has caused the damage, the right cannot be maintained against himself. *Per* Lord Penzance:—The underwriters of the lost ship have no right of action against the owner of the ship that did the mischief, as he himself had no such right, inasmuch as, being the owner of both vessels, any right of action he had must be a right of action against himself, which is an absurdity, and a thing unknown to the law. *Simpson & Co. v. Thomson*, L. R., 3 Ap. Cas., H. L. (Sc.) 279.

NEGLIGENCE.

Ship: liability of "managing owner" for negligence of captain trading independently and rendering a share of profits to owner: Merchant Shipping Act, 1875 (38 & 39 Vict., c. 88, s. 4, sub-s. 55).—A sloop was navigated under a verbal agreement between A, the "managing owner," registered according to the Merchant Shipping Act, 1875, and B, the captain, by which, on condition that A should have one-third of the net profits, accounts of which were to be rendered to him by B from time to time, B was at liberty to go to any port, and take or refuse any cargo he chose, and was also to hire and pay the crew and supply the stores, A having no control over the vessel. While discharging cargo under a charter made by B "for and on behalf of the owner," the vessel, through the negligence of B, broke loose from her moorings and damaged the wharf of the plaintiff, who brought an action against A and B. *Held*, that the agreement did not amount to a demise of the vessel, and whatever was the precise relationship thereby created between the defendants *inter se*, A was responsible to the public for the negligence of B, and, therefore, both were liable in the action. *Steel v. Lester and Lide*, L. R., 3 C. P. D. 121.

RECENT BANKRUPTCY DECISIONS.

CHATEL MORTGAGE.

Title to surplus after payment of debt.—The bankrupts having made default in the payment of a chattel mortgage, the mortgagees, pursuant to the terms thereof, took possession of the mortgaged property. Before the sale a creditor issued execution to the sheriff. One hour thereafter the petition was filed. There was a surplus on the sale of the property. *Held*, that at the time the execution was issued the bankrupts had no leviable interest in the property, and that the creditor had no lien on the surplus to the exclusion of the assignee. U. S. Dist. Ct., S. D. New York. *In re Wrisley*, 17 Nat. Bankr. Reg. 259.

CONTRACT.

For future delivery of personal property: illegal contract.—A contract for the future delivery of personal

property, which the seller has not got when the contract is made, nor any means of getting it, is not void for illegality. The secret intention of one of the parties, uncommunicated to the other, not to fulfill his contract, is not enough to make the transaction illegal. The intent that it should be a mere betting on the market, without any expectation of actual performance, must be mutual and constitute an integral part in the real contract, in order to vitiate it. If the contracts were valid in their inception, and not tainted with any gambling intent or device, a subsequent mutual settlement by the parties, which took the place of actual performance, cannot have the retroactive effect of making them void for illegality. U. S. Dist. Ct., W. D. Wisconsin. *Clark, Assignee, etc., v. Foss*, 17 Nat. Bankr. Reg. 261.

DISCHARGE.

Does not impair right of creditor as to bond given on attachment.—Where a creditor had commenced a suit against the bankrupt in a State court more than four months before the commencement of proceedings in bankruptcy, and had garnished credits in the hands of a third person, and the garnishment had been released by giving a bond to pay the judgment, *held*, that the plaintiff had a right to prosecute the suit so far as to fix the liability of the sureties upon the bond, notwithstanding the discharge. A discharge of the bankrupt does not impair the remedy of a creditor against the sureties upon a bond given to dissolve an attachment issued more than four months before the commencement of proceedings in bankruptcy. U. S. Dist. Ct., E. D. Mich. *In re Albrecht*, 17 Nat. Bankr. Reg. 267.

JURISDICTION.

1. *Of Circuit Court: of State court.*—The Circuit Courts having concurrent jurisdiction with the District Courts of all actions by an assignee against persons claiming an adverse interest in the estate of a bankrupt, no suit by an assignee for a sum exceeding five hundred dollars can be prosecuted in a State court. U. S. Circ. Ct., Colorado. *Hallack v. Tritch*, 17 Nat. Bankr. Reg. 268.

2. *Practice: objection: declaration.*—Objection that there was no direction from the Bankrupt Court to bring the suit cannot be first raised in the appellate court. In an action brought by an assignee to set aside a sale or transfer of goods, as having been made in violation of the Bankrupt Act (§ 5123), the declaration must set out the facts of the illegal transaction. *Id.*

3. *Chattel mortgage: possession: fraud.*—As between the parties to a chattel mortgage, the circumstance that the mortgagees allowed the mortgagor to retain possession of the mortgaged property, after condition broken, will not affect the validity of the mortgage. When a secured creditor takes goods in fair exchange for the security, the transaction is not in fraud of the Bankrupt Act. *Id.*

SALE.

Purchaser of estate takes subject to equities.—A purchaser at a sale by an assignee takes the estate of the bankrupt subject to all equities against it, and it is immaterial whether he knows of them or not. Sup. Ct., North Carolina. *Steadman v. Taylor*, 17 Nat. Bankr. Reg. 263.

SURETYSHIP.

Bankrupt surety discharged by extension of time of payment of principal debt.—The bankrupts made a certain note for six thousand dollars, for the accommo-

dation of one H., who indorsed and procured its discount at the bank. Before it came due the bank had knowledge of the purpose for which it was given. The bank then discounted H.'s note at ninety days for five thousand dollars, and took his check for the six thousand dollars. The last note not being indorsed, the bank held the old note and sought to prove it against the estate of the bankrupts. *Held*, that the bankrupts were sureties and that they were discharged by the extension of time to H., the actual principal, without their assent. U. S. Dist. Ct., E. D. Missouri. *Valley National Bank v. Meyers*, 17 Nat. Bankr. Reg. 267.

UNITED STATES SUPREME COURT ABSTRACT, OCTOBER TERM, 1877.

CONFISCATION.

Sale of land before passage of act by one in rebellion to government gives good title.—In May, 1862, C, who was a member of the Confederate Congress, and engaged in armed hostility to the United States within the Confederate lines, conveyed to plaintiff, his son, also within the Confederate lines and engaged in hostility to the United States, certain real estate situate in the city of New Orleans, then within the Federal lines. Subsequently, and under authority of the Act of Congress of July 17, 1862, the property was confiscated in proceedings against C, and sold by the United States marshal. *Held*, (1) that the Confiscation Act mentioned did not authorize proceedings for acts committed before its passage. (2) That transfers of property between those in hostility to the government before its passage were not invalid. (3) That the proceedings could only affect the interest of C in the property at the time the act was passed, and that the proceedings did not invalidate the title of plaintiff to the property acquired by transfer from C in May, 1862. Judgment of U. S. Cir. Ct., Louisiana, reversed. *Conrad, plaintiff in error, v. Waples*. Opinion by Field, J.

MORTGAGE.

1. *What constitutes: conveyance with power of sale.*—A conveyance of land to secure the payment of a sum of money with power of sale, whether made to the creditor or a third person, is in equity a mortgage, if there be left a right to redeem on payment of the debt thereby secured. Decree of U. S. Cir. Ct., E. D. New York, reversed. *Shillaber, appellant, v. Robinson*. Opinion by Miller, J.

2. *Sale under power: statute must be followed strictly.*—A sale under the power in such an instrument must be made in strict conformity to the directions therein prescribed, or to such as may be prescribed by statute, or the sale will be absolutely void. *Ib.*

3. *When sale void.*—A sale made on six weeks' notice, though followed by conveyance, when the mortgage and the statute of the State require twelve, is void, and does not divest the equity of the party who had the right of redemption. *Ib.*

4. *Accounting by vendor to innocent purchasers.*—A person holding the strict legal title, with no other right than a lien for a given sum, who sells the land to innocent purchasers, must account to the holder of the equity for all he receives beyond his lien. *Ib.*

STATUTE OF LIMITATION.

1. *Action to recover possession of land: when statute not applicable.*—The statute of limitation for the action to recover possession of land is not applicable to the lien of a judgment creditor on the land, though the judg-

ment debtor may sell and convey the land with possession to the party setting up the statute. The statute does not begin to run in such case until the land has been sold under the judgment, and the purchaser becomes entitled to a deed, because until then there is no right of entry or right of action against the defendant, in any one. Judgment of U. S. Cir. Ct., N. D. Illinois, reversed. *Pratt v. Pratt*. Opinion by Miller, J. Clifford, J., dissented.

2. *When it begins to run: Statute of Illinois.*—But as soon as the judgment creditor places himself, by a sale and purchase of the land, in a condition that he can bring suit for the possession, the statute begins to run against him. These propositions are applicable to the Illinois act of 1835, limiting actions for the recovery of land to seven years. *Ib.*

COURT OF APPEALS ABSTRACT.

APPEAL.

Discontinuance of appeal upon application of party appealing.—Where a party has appealed to this court from an order of the General Term granting a new trial, under a mistake as to the effect of the appeal, and before a decision of the appeal by the court asks permission to withdraw the appeal, the court, if satisfied that the proceeding has been in good faith, ordinarily grants leave to dismiss the appeal on payment of costs. Leave to discontinue appeal granted. *Mackay v. Lewis*. Opinion per Curiam. [Decided April 23, 1878.]

CORPORATION.

1. *Action pending against, terminates by dissolution from expiration of charter.*—In an action against defendants to compel them to apply certain moneys received by them as stockholders of a New Jersey corporation out of its assets to the payment of a judgment against the corporation, *held*, that when a corporation is dissolved by reason of the expiration of the term of its charter, this terminates actions against it then pending, and it is not necessary that the dissolution be judicially declared. Judgment below reversed. *Sturgis v. Vanderbilt*. Opinion by Rapallo, J.

2. *Estoppel: director of corporation who has sold stock and no longer acts, when not estopped by action of.*—V. was a director and stockholder in a corporation in 1864, having been elected director for one year. In that year he sold his stock and took no part in the affairs of the corporation thereafter. In 1869 the charter of the corporation expired. In 1871 plaintiff commenced an action against the corporation in its corporate name, which was defended by those in charge of the corporation, they using the corporate name in such defense. *Held*, that the action of V. in selling his stock and neglecting to take part in the affairs of the corporation amounted to a resignation of his office, and that he was not estopped from setting up that a judgment obtained against the corporation after its dissolution was invalid. *Ib.*

[Decided April 23, 1878. Reported below, 11 Hun, 186.]

EVIDENCE.

1. *General objection to, when sufficient and when insufficient.*—A general objection may be sufficient upon which to base a good exception when it is palpable to the appellate court, and must have been to the trial court, what that objection was, and that it could not have been obviated at the time if it had been precisely

stated, but it is otherwise if it does not necessarily point out the particular defect in the testimony offered upon which the objection is founded. Accordingly where an objection was raised to the admission of parol testimony of the contents of the letter, *held*, that the point could not be taken on appeal, that it was not sworn that the letter spoken of was genuine. Judgment below affirmed. *McCulloch v. Hoffman*. Opinion by Folger, J.

2. *Party may contradict his own witness.*—While a party cannot impeach his own witness he may show by other witnesses that what the witness testifies to is untrue. *Id.*

[Decided April 23, 1878. Reported below, 10 Hun, 133.]

FIRE INSURANCE.

Subrogation to interest of mortgagee: when contract for, valid.—By a mortgage held by plaintiff upon real estate belonging to S., the owner was required to procure an insurance for the benefit of the mortgagee. A policy was issued to S., the loss payable to plaintiff. The policy was conditioned against other insurance which would render it void. By a contract made some years previously between plaintiff and the insurance company, it was provided that in case any policy should be issued by it for the benefit of plaintiff as mortgagee, which might be avoided by the acts of the owner of the property, it should not be void as to plaintiff, but the company, in case it was avoided as to the owner, should be subrogated to plaintiff's rights under the mortgage. S. procured other insurance and avoided the policy as to her. The property was burned and the company paid the loss to plaintiff. *Held*, that the contract for subrogation was valid, and that the insurance company was entitled to hold plaintiff's rights under the mortgage. Order below reversed. *Ulster County Savings Institution v. Decker*. Opinion by Church, C. J.

[Decided March 26, 1878. Reported below, 11 Hun, 515.]

MANDAMUS.

Rule as to, when party entitled to: application for mandamus to compel return to appeal.—In an application for a mandamus, when the act, the doing of which is sought to be compelled, is the final thing, and if done, gives to the relator all that he seeks proximately or ultimately, then the question, whether he is entitled to have that act done, may be inquired into by the officer or person against whom the mandamus is sought, and is also to be considered by the tribunal which is moved to grant the mandamus. But where the act to be done is but a step toward the final result, and is but the means of setting in motion a tribunal which is to decide upon the right to the final relief claimed, then the superior officer or tribunal may not inquire whether there exists the right to that final relief, and can only ask whether the relator shows a right to have the act done which is sought from him or it. Accordingly, where a party was entitled to an appeal from the decision of the canal board, upon serving certain notices, and a return was necessary to bring the case before the appellate board, *held*, that in an application for mandamus to the canal board, to compel it to make the return, the question whether relator was entitled to succeed on appeal could not be examined. Order below affirmed. *People ex rel. Freer v. Canal Appraisers*. Opinion by Folger, J.

[Decided April 23, 1878.]

PROMISSORY NOTE.

1. *Acceptance of new note in payment of old: when old note not canceled.*—Plaintiff, who held a note made by the firm of P. & Co., of which M. was a member, to the order of the firm of B. & A., commenced action thereon. In settlement of this action a new note was taken, made by P. & Co. to the order of B. & A. and indorsed by them. At the time the new note was taken M. was dead, but plaintiff did not know the fact. Thereafter plaintiff sued the new note and obtained judgment thereon against P., survivor of P. & Co. *Held*, that the acceptance of the new note did not cancel the old note, but that remained valid against the makers, and the estate of M. was liable thereupon. Order affirmed. *First National Bank of Chittenango v. Morgan*. Opinion by Folger, J.

2. *Suretyship: rule as to death of surety not applicable to partnership paper.*—It was claimed that the note was given as an accommodation note of P. & Co., and that it was for the benefit of B. & A., and that P. & Co. merely signed as sureties for them, and that M. having died no action could lie against his estate. *Held*, that the doctrine of *Houck v. Craighead*, 87 N. Y. 432; *Risley v. Brown*, id. 160, etc., did not apply. This is a case of commercial paper, and the circumstance that P. & Co. were, as between themselves and the payees, sureties, would not affect third parties, but they would be bound as principals. *Id.*

[Decided March 26, 1878.]

NOTES OF RECENT DECISIONS.

JUDGMENT: RENDERED IN ANOTHER STATE: IMPEACHMENT OF RECORD OF SERVICE OF SUMMONS.—In an action in the nature of ejectment, it was shown that the plaintiff's title was founded upon a sheriff's deed made in pursuance of a sheriff's sale on an execution issued by the clerk of the District Court on a transcript of a judgment of a justice of the peace filed in said clerk's office, which judgment was rendered on default against Jane Hicks Brown, the then owner of the land in controversy, on a constable's return of service of summons, which was in the following words, to wit: "Executed on the 15th December, 1860, by leaving a certified copy at the usual place of residence of the within named defendant, Jane Hicks Brown. H. H. Sawyer, Const." The court below permitted the defendant to impeach said deed, judgment and constable's return by showing that the said return was false, that the said Jane Hicks Brown was not at the time a resident of Kansas, that she had no residence in Kansas, and was not herself in Kansas, but that at that time, and for a long time before and afterward, she resided and was herself personally in the Indian Territory. *Held*, that the court in this did not commit error. *Sup. Ct., Kansas, January, 1878. Masten v. Duncan* (Cent. L. J.).

MORTGAGE: AGREEMENT NOT TO CALL IN PRINCIPAL ON PUNCTUAL PAYMENT OF INTEREST: BREACH OF COVENANT: RECEIPTS OF INTEREST: WAIVER.—A mortgagee agreed with a mortgagor that, if he duly and punctually paid the interest, he would not call in the mortgage money for two years. Six months' interest became due, and, being unpaid, was frequently demanded. At the end of a month after it became due, the mortgagee demanded payment of the principal and interest. Three days afterwards the mortgagor sent the mortgagee the six months' interest,

which he accepted. *Held*, that the mortgagee had not thereby, nor by a subsequent unaccepted offer to accept an installment, waived his right to call in the principal. (*Langridge v. Payne*, 2 J. & H. 423; 7 L. T. Rep. [N.S.] 73, disapproved of.) Eng. High Ct. of Justice, Ch. Div., Mar. 2, 1878. *Keene v. Biscoe*, 238.

PROMISSORY NOTE: AGENCY: PAYMENT.—When a promissory note was given in payment for a sewing machine, and the note contained the following provision: "No credits allowed on this note unless indorsed on the note at the time the payment is made," and the maker of the note paid a part of it at the time to the agent of the principal, and afterward paid the residue to the agent, taking his receipt in full for the note, *held*, that by accepting the note with the credit upon it, the principal adopted the act of the agent, and the payment to him of the balance due on the note, without any notice that his agency had been terminated, was a good payment, although the agent at the time had not the note in his possession. If the stipulation in the note that no credit should be allowed unless indorsed on it, had any validity at all (which is doubtful), it could not prevent the payment of the note in any ordinary business way, which would be good against the creditor. Sup. Ct., Indiana, November, 1877. *Hove Machine Co. v. Simler*.

RECEIVER: FOREIGN ATTACHMENT: COMITY BETWEEN THE COURTS OF DIFFERENT STATES: APPOINTMENT OF RECEIVER IN ANOTHER STATE RECOGNIZED AS AGAINST ATTACHING CREDITOR WHO IS A CITIZEN OF THE SAME STATE.—In pursuance of the comity established between the different States, the courts of this State will recognize the appointment of a receiver in another State, unless his claims come in conflict with the rights of our own citizens. B. and R., citizens of Virginia, by process of foreign attachment issued in Pennsylvania, attached certain property of a railroad company located and doing business in Virginia. Shortly prior to this attachment, the railroad, by decree of a Virginia court, had passed into the hands of receivers, who claimed the fund attached as against the attaching creditors. *Held*, that the receivers were entitled to the fund, and that the equitable transfer to them of their debt in Virginia was binding upon B. and R. in Pennsylvania. Per Agnew, C. J. The attaching creditors have no right, after the appointment of a receiver by a court within their own State, binding upon them there, to attempt to avoid its effect by escaping from its jurisdiction, and coming here to ask us to infringe the comity we owe to the acts of their own courts within their jurisdiction. Instead of comity this would be unfriendliness, for they ask us to aid them in a violation of their own law. Sup. Ct., Pennsylvania, Feb. 14, 1878. *Bagley v. Atlantic & Miss., etc., R. R. Co.* (W. Not. Cas.)

USURY: WHEN INJUNCTION WILL ISSUE TO RESTRAIN COLLECTION OF.—Where a person borrowing money agrees to pay usurious interest, and thereafter he pays the principal of the loan with legal interest, and does and pays all that either law or equity would require that he should do or pay: *Held*, that equity will interfere, upon a proper application, to prevent the collection of the usurious interest. Sup. Ct., Kansas, January, 1878. *Watte v. Ballou*.

NOTES OF DECISIONS ON CRIMINAL LAW.

COMMON GAMBLER: EVIDENCE.—An indictment charged that M., on the 15th day of August, A. D. 1875, at P., in said county, did deal "faro," whereby, by force of the statute in such case made and provided, the said M. was then and there taken and held to be a "common gambler." It was proven that in one case M. dealt a game of faro which was played for money. The court refused to charge that at least three instances of gaming must be shown to prove the offense of being a common gambler, and charged that proof in one instance was sufficient. Upon a verdict of guilty, the defendant excepted on the ground that the offense was not sufficiently set forth. *Held*, that inasmuch as the statute declares that "any person who shall be guilty of dealing 'faro' when money or property is dependent upon the result, shall be taken and held as a common gambler," it is not essential that three instances should be proven. It does not mean that such an offender is in fact a common gambler, but simply that he shall rank as a common gambler in point of criminality. (*Cameron v. State*, 25 Ala. 383; *Swallow v. State*, 20 id. 30; *Torney v. State*, 13 Mo. 455.) Even if the game can be innocently dealt, the explanatory phrase makes it certain that the act charged in the indictment is the act forbidden by the statute, and excludes any assumption that the indictment may be proved and the defendant still be innocent. (*State v. Burton*, 25 Tex. 420; *Brown v. State*, 10 Ark. 607; *Warren v. State*, 18 id. 195; *Guest v. State*, 19 id. 405; *Tully v. Comm.*, 4 Metc. 357; *Comm. v. Ashley*, 2 Gray, 356; *State v. Absence*, 4 Port. 395; *State v. Plastringer*, 6 R. I. 76, 83.) *State v. Melville*, 11 R. I. 417.

PRESENCE OF PRISONER AT TRIAL.—It must affirmatively appear, from the record in a criminal case, that the prisoner was present during the trial, and at the rendition of a verdict, or the judgment against him will be reversed. *State v. Able*, 65 Mo.

ACCOMPLICE: MURDER.—A bystander does not become an accomplice by mere approval of a murder committed in his presence; and the charging of the jury that if the defendant was "present, aiding or abetting, or counseling, or inciting, or encouraging, or approving" the act, he was an accomplice, is an error, and the court must reverse and award a new trial. *State v. Cox*, 65 Mo.

ADMISSION OF ACCOMPLICE AS WITNESS.—The admission of an accomplice as a witness for the government, upon an implied promise of pardon, rests upon the judicial discretion of the court, and is not at the pleasure of the public prosecutor; an accomplice under an indictment for another offense, as a general rule, will not be admitted as a witness when such fact is known to the court; although he testify in good faith against his accomplices in the trial upon one indictment, he may be tried upon the other, and upon conviction punished. It would be a fraud upon the court and an obstruction of public justice, if the public prosecutor should enter into an agreement, unsanctioned by the court (if such sanction could be given in such a case), offering immunity or clemency to several defendants, in several indictments, upon the condition that one of them become a witness for the prosecution upon still other indictments. An accomplice as a witness cannot have an attorney, but he may act under the advice of an attorney as to whether he shall be

come a witness for the prosecution, and when he becomes such a witness, the relations between him and his attorney ceases. *Wight v. Rindskoff*, 43 Wis.

ABORTION: EVIDENCE OF ACCOMPLICE.—H. was indicted for an attempt to produce an abortion, in having advised a pregnant woman to take, and in having administered to her a certain medicine with an intent to produce an abortion. The woman appeared as witness for the State. The defendant asked the court to charge, that, "if this witness took the medicine with intent to procure an abortion, she was an accomplice, and as such, her evidence alone would not be sufficient on which to base a conviction." *Held*, that so far as she was concerned an abortion upon herself was not an indictable offense at common law; that a conviction on the uncorroborated evidence of an accomplice is not illegal. (*Atwood v. Robbins*, 1 Leach's C. C. 484; *Rez v. Durham*, id. 478; *Rez v. Wilkes*, 7 C. & P. 272; *Rez v. Jones*, 2 Camp. 181; *Reg. v. Stubbs*, 33 E. L. & Eq. 552; *Reg. v. Farler*, 8 C. & P. 106; 1 Phil. Ev. [10th Eng. ed.] ch. 6, §2, note 1; 1 Whart. Crim. Law, §783, 6th ed., note.) It is the practice in our courts to advise juries against conviction on such testimony alone, and it is unlikely that any judge in a proper case would refuse to charge the jury, as the circumstances of the case required; still should a judge refuse so to do, errors could not be assigned on such refusal, it being at his discretion. *State v. Hyer*, 39 N. J. Law.

COURT OF APPEALS DECISIONS.

THE following decisions were handed down Friday, April 26, 1878:

In re petition of N. Y. Protestant Episcopal Public School to vacate assessment, etc., No. 401, order affirmed; no opinion. — *Ridell v. N. Y. C. & H. R. R. Co.*, No. 191, affirmed; opinion by Earl, J. — *Hoe v. Hussey*, No. 209, affirmed; no opinion. — *Auburn City Nat. Bank v. Hunsiker*, motion denied, with \$10 costs; no opinion. — *Maybury v. Homer and Cortland Gas-light Co.*, No. 183, affirmed; no opinion. — In re application of Marsh, motion denied, with \$10 costs; no opinion. — *Hastings v. Westchester Fire Ins. Co.*, motion denied, with \$10 costs; no opinion.

CORRESPONDENCE.

CONVEYANCE OF LAND TO HUSBAND AND WIFE SINCE ACTS OF 1848 AND 1849.

To the Editor of the Albany Law Journal:

SIR—My attention has just been redirected to your note, Vol. XI, page 408, in which you say, that our Court of Appeals has since the passage of the act there quoted, "recognized the rule, that a conveyance to husband and wife, creates an estate by entirety." I have carefully examined the case of *Wright v. Sadler*, 20 N. Y. 320, cited by you. The conveyance which was the subject of controversy in that case, was executed before the passage of any of the "Acts for the more effectual protection of the property of married women," and the enlargement of their rights. I am not aware that the Court of Appeals has, in any case, passed upon this question. I think it has not been sharply presented in any of the reported cases in the Supreme Court, at General Term, and may be still regarded as open. See *Wright v. Wright*, 54 N. Y. 437; *More v. More*, 47 id. 467; *Müller v. Müller*, 9 Abbott (N. S.), 444-448; *Sergeant v. Steinberger*, 2 Ohio, 306.

ROCHESTER, April 16, 1878.

B.

NEW BOOKS AND NEW EDITIONS.

AMERICAN DECISIONS, VOLUME II.

The American Decisions, containing all the cases of general value and authority decided in the courts of the several States from the earliest issue of the State reports to the year 1869. Compiled and annotated by John Proffatt, LL.B. Author of "a treatise on Jury Trial. Volume II. San Francisco: A. L. Bancroft & Company.

THE present volume of this series of reports contains selections from twenty-five volumes of State Reports, embracing decisions made between 1797 and 1808 in the courts of Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Kentucky. The work of the editor is as carefully done as it was in the first volume, and the book makes accessible about all that is of general value in the volumes from which it is made up. The annotations scattered through the volume are valuable and refer to subsequent cases where the cases reported are sustained, overruled, doubted, or criticised, and also to standard text books wherein they are mentioned. We could not, within the limits of this review, mention all the cases of value contained in the volume. The New York cases given are taken from Caine's Reports and Cases, and from 3 Johnson's Cases, and are the decisions of Chancellor (then Judge) Kent and his associates. They relate very largely to marine insurance which, at the time, was a subject coming frequently before the courts. In these cases very many of the fundamental principles governing this subject were established and the cases are authority, not only here but in all countries where the reputation of the leading jurist of our State has extended. In the decisions of the Pennsylvania court reported are several valuable cases upon the same subject, which are authority to day. The single Massachusetts (1 Mass.) and the two Connecticut (1 & 2 Day) volumes furnish no cases that we need refer to. In the New York volumes, in addition to the Marine Insurance cases, we notice *Hopkins v. Beedle* (1 Cal. 347), p. 191, where it is held not to be slander to say that one is foresworn, though it is otherwise to say that he is perjured. *Hendricks v. Judah* (2 Cal. 25), p. 213. If a house has been leased for a year before an act of bankruptcy, and the bankrupt continue in possession thereof afterward, his certificate of discharge will be no bar to an action for the subsequent rent. *Seikas v. Woods* (2 Cal. 48), p. 215, where it is held that in order to maintain an action of warranty in a sale of goods there must be an express warranty or fraud on the part of the vendor. A sound price does not imply a warranty of soundness, nor does a description of goods in a bill of parcels amount to a warranty. The editor in a note refers to *Hawkins v. Pemberton*, 51 N. Y. 196; and *Dounce v. Dow*, 64 id. 411, as shaking the authority of this case. *Purson v. Post* (3 Cal. 175), p. 264. Pursuit alone gives no property in animals *fera naturæ*. In Pennsylvania we notice these cases: *McMullin v. Burch* (1 Binney, 178), p. 428. To call a clergyman a drunkard is actionable. *Desebats v. Berquur* (1 Binney, 336), p. 448. A will of personal property not executed in conformity to the law of the testator's domicile at the time of his death, will not be operative in regard to personal property in a foreign country, though executed according to the laws of that country. The binding of the present volume is excellent, we think, better than it was in the preceding volume.

NATIONAL BANK CASES.

National Bank Cases: being a collection of all cases relating to National Banks adjudicated in the several Federal and State courts from the passage of the National Banking Act to the present time, with notes and references. By Isaac Grant Thompson. Albany: John D. Parsons, Jr., 1878.

National banks are in many respects *sui generis* and subject to rules of law not applicable to other banking institutions. This volume contains the cases in which the National Banking Act has been construed and the duties and obligations of National banks have been defined. Great care and industry seem to have been used in making the collection complete, and the result is that beside the cases reported in the regular reports, there are here reported many cases from the legal periodicals, beside others not otherwise reported, the whole making a volume of a thousand pages. The subject of taxation was the earliest, as it was the most important, that engaged the attention of the courts. The courts of most of the States considered it and made adjudications more or less friendly to the banks, but the Supreme Court of the United States, so early as 1866, settled the general principles which should govern their taxation. Under the legislation and the adjudications as they stand today, the only limitation there is on the taxing power of the State over National banks is that of good faith and comity, or in other words, that there shall be no unfriendly discrimination against such banks. The subject of interest or usury was also one on which there was a variety of adjudications until the Supreme Court, in *Farmers & Mechanics' Nat. Bank v. Dearing*, decided that National banks were not subject to the State usury laws, but that the only penalties to which they were subject for taking unlawful interest were those imposed by the act of Congress. Several minor questions relating to that subject are yet the subject of doubt. Thus the Court of Appeals of New York, in *Hintermeister v. First Nat. Bank*, held that in an action to recover the penalty imposed by Congress for taking unlawful interest, the recovery is limited to twice the amount taken in excess of the legal interest; while the United States Circuit Court, in *Crocker v. First Nat. Bank*, held that the recovery should be for twice the full amount of interest paid. Then, again, the courts seem not entirely clear as to whether excessive interest exacted in other transactions can be recouped in an action by a bank on a note or loan.

The courts of Illinois and Kentucky were doubtful if actions for the penalties imposed by Congress for taking unlawful interest would lie in the State courts, on the ground that they were not bound to enforce the penalties imposed by Federal authority. (*Missouri, etc., Co. v. First National Bank*, p. 401; *Newell v. National Bank*, p. 501; but the Court of Appeals of Maryland in *Ordway v. Central National Bank*, p. 559, held, in an able and well-reasoned judgment, that the State courts had jurisdiction.

The powers of National banks to take mortgages and other security for loans and discounts, their liability for special deposits for safe-keeping, their right to purchase bills and notes, their control over their officers and servants, the liability of such officers and servants for misappropriating the funds of the bank, and the liability of sureties on the bonds of such officers, are among the subjects covered by the cases.

The Reporter has added several notes, among which we notice an elaborate one on the powers and duties

of cashiers, and one on the liability of sureties on the bonds of bank officers.

The book will be especially serviceable to bank attorneys and to the executive officers of banks.

NOTES.

MESSRS. Robert Clarke & Co., of Cincinnati, have issued a General Catalogue of Choice Books for the Library, comprising a selection of the best books by ancient and modern authors in all departments of literature, science and art, classified and priced. The book has been prepared with judgment and taste, and will be found to be serviceable by all students and book buyers.

The *Notaries' Journal* thus speaks of THE ALBANY LAW JOURNAL: "The attention of our subscribers is called to this valuable Journal, the 17th volume of which is now in course of publication. It is edited by Isaac Grant Thompson, Esq., and gives much valuable information, as well as many important cases, very desirable for bankers, banks and notaries. The weekly numbers form two volumes each year of about 500 pages each."

Dr. Martin, president of the Chinese Imperial College at Peking, has, in the past few years, translated and published in the Chinese tongue, Wheaton's Elements of International Law, De Marten's Guide Diplomatique, a considerable portion of the French code, Bluntschli's Volkerrecht, and Woolsey's Introduction to International Law. These text-books have the sanction of the Chinese Foreign Office, and are widely studied.

The *Troy Times* says: "Irving Browne has written a volume entitled 'Short Sketches of Great Lawyers,' comprising a collection of brief biographies originally appearing in the ALBANY LAW JOURNAL, of which he has long been a leading contributor. Mr. Browne has thoroughly revised and amplified the succinct sketches, and we have no hesitancy in saying that the work will be didactic, critical and readable—as the author's productions always are—and meet with a large sale and hearty reception, especially among members of the legal fraternity. The book will soon be issued from the press of Weed, Parsons & Co."

In the United States Circuit Court for the District of California, on the 29th ult., Judge Sawyer decided, in the case of a Chinaman who applied for naturalization, that a Chinaman is not a white person within the meaning of the term as used in the naturalization laws, and not entitled to become a citizen. The case will undoubtedly be appealed to the United States Supreme Court.

The constitutionality of a law of Virginia, taxing the coupons to its own bonds, was considered by the Supreme Court of Appeals of that State, in the case of *Hartman v. Gresham*, on the 26th ult. The judges were equally divided. The case will be taken to the Federal Supreme Court.

Coles Bashford, formerly delegate to Congress from Arizona, ex-Secretary of that Territory and ex-Governor of Wisconsin, died last week, at Prescott, Arizona, of heart disease. He was a native of this State and received his legal education here.

Edwin A. Doolittle, a member of the New Jersey bar, dropped dead in a Jersey City railway station, on the 29th ult., heart disease being the cause. He was sixty-five years of age, and a brother of ex-Senator Doolittle.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, MAY 11, 1878.

CURRENT TOPICS.

THE United States Circuit Court for the District of California, in the case *Matter of Ah Yup*, just decided, holds that a native of China of the Mongolian race is not entitled to become a citizen of the United States under the naturalization laws. The provisions of the statutes relating to naturalization are declared by the act of Congress of February 18, 1875, to "apply to aliens being free white persons and to aliens of African nativity and to persons of African descent." The court in this case holds that a person of the Mongolian race is not a white person within the meaning of the statute. As this is the first time the question at issue was ever raised the court was without judicial precedent to guide it in forming its opinion, but the debates in Congress furnish considerable evidence as to what was the intention of that body in framing the statutes at present in force. The old statute passed in 1802 limited the privilege of becoming citizens to free white aliens. In 1870 a statute was enacted extending it to aliens of African nativity and to persons of African descent. When the statutes were revised the word "white" was omitted, and the section in the revision conferring the privilege mentioned read: § 2165. "An alien may be admitted to become a citizen," etc., but a separate section declared (§ 2169) that "the provisions of this title shall apply to aliens of African nativity and to persons of African descent." The act of February 18, 1875, changed this by again limiting the privilege to the classes entitled to it before the revision. When the subject was discussed in the Senate at the time of the passage of the act extending the privilege to Africans it was sought to accomplish the proposed end by striking the word "white" out of the then existing law, but this was opposed on the ground that if this was done Mongolians would be entitled to citizenship, and the proposed amendment was not made. The same reasons were given in debate in 1875 for the enactment of the law of that year. As the court concludes, the law as it was framed was intended to exclude some classes, and as all white aliens and those of the African race are entitled to naturalization under the wording of

the statute it is difficult to perceive whom it could exclude unless it be the Chinese.

The rule of law giving to the holder of a mortgage the right to hold for deficiency a grantee who has taken title to the mortgaged premises by a deed wherein he assumes the payment of the mortgage is a harsh one and liable to work injustice. The ground of the rule that the grantee has been allowed in making his purchase, as part of the purchase-price, the amount of the mortgage, would be a proper one as between the parties to the conveyance, but it furnishes no reason for giving to the holder of the mortgage additional security upon his investment. The true and just rule would be where one taking title to land assumes the payment of a mortgage thereon he shall be liable to his immediate grantor, and to him only, for such sum as the grantor may be compelled to pay upon a judgment for a deficiency on a foreclosure of the mortgage. In that case the holder of the mortgage could look only to the party he had originally trusted to make good the deficiency, and could not take the benefit of a contract made with the sole intention of securing that party from loss. A memorial presented to the Legislature last week calls attention to the fact that numerous cases of hardship have recently in New York city arisen from the operation of the rule mentioned, and ask the passage of an act providing that no person shall be liable for the payment of any bond or mortgage unless he shall have signed the same, or subscribed an agreement to pay the same, and that no person shall be liable for any deficiency in the sale of mortgaged premises unless he shall have signed the mortgage under which said premises are sold, or shall have executed an agreement in writing to pay such deficiency. The law suggested would be a good one, though we think it is too late to hope for its passage this year.

The bill providing that whenever a marriage shall be dissolved for adultery, the defendant against whom a decree is rendered may, in case the complainant has remarried, be permitted by order of the court to remarry, partially removes what has always seemed to us a very foolish provision of our statutes relating to divorce. At the present time the party against whom a decree is rendered is not permitted to remarry unless he takes the trouble to leave the State, which indeed is full as easy as it is to apply to the Supreme Court for permission to marry.

The bill for the repeal of the Bankrupt Act is not yet a law, the friends of the act having mustered strength enough to delay action upon it. We have hopes, however, that a few days at most will accomplish the result that the business men of the country are anxiously awaiting for.

Mrs. Myra Clark Gaines does not seem to be content with the results of the life-long litigation which she has successfully carried on in reference to the title to real estate in New Orleans, but like the ancient Macedonian general she sighs for new worlds to conquer. She has now commenced a suit to recover possession of a considerable share of the business portion of St. Louis. She claims that the title to this property was in her father, Daniel Clark, and pretends that she has record and other evidence to sustain her claim. The chain of title is said to be very similar to that which established her ownership to property in New Orleans, and consequently she enters upon her venture with at least a possibility of ultimate success. The claim has, however, lain dormant so long a time that it is probable the Missouri statutes of limitation will prevent a recovery, though it is said that the constitutionality of these statutes will be tested.

The law in relation to the liability of a master to his servant for injuries received by him through the negligence of a fellow servant in the same line of employment is unsatisfactory to a very large part of the community both here and in England, and a strong feeling exists in that country in favor of a statutory provision rendering the master liable to those in his employ to the same degree that he is now to others. Of course the servant class favor this movement, but there are many others beside who have no personal interest to be advanced who believe that a change should be made. The decisions made in many cases have been attributed to a hostility on the part of the bench to the laboring classes, and many sympathetic persons have been influenced by their feelings to advocate measures about which they know practically very little. Every employment has its risks. The law requires the employer to protect his servant against such of those as arise from defective machinery, and it also requires him to exercise a reasonable degree of care in the selection of his servants. When he has provided safe machinery, and so far as he knows, careful servants, he has done all that can be properly asked of him so far as the personal safety of his servants are concerned. The outside public may ask him to do more, but a change in the law such as is desired by the promoters of the movement mentioned would render many kinds of business too hazardous to undertake.

NOTES OF CASES.

IN the case of *Pullman v. Upton*, just decided by the Supreme Court of the United States, it is held that an assignee of corporate stock, who has caused it to be transferred to himself on the books of the corporation, but who merely holds it as collateral security for a debt due from his assignor, is liable

for unpaid balances thereon to the company, or to the creditors of the company after it has become bankrupt. The same doctrine was held by the Court of Appeals of this State in *Matter of Empire City Bank*, 18 N. Y. 200, the court going even further than does the principal case, and holding persons to whom stock in a bank had been transferred by way of hypothecation for debts due them, and in whose names the stock stood registered at the time of the bank making default, to be stockholders, within the meaning of the banking laws of this State, and liable for the debts of the bank to an amount equal to the stock held by them. And in *Holyoke Bank v. Burnham*, 11 Cush. 183, it was decided that a transfer of stock on the books of the bank, intended merely to be held as collateral security, makes the holder liable for the bank debts. It was said that the creditor is to be considered as the absolute owner, and that his arrangement with the debtor cannot change the character of the ownership. See, also, *Roosevelt v. Brown*, 11 N. Y. 148, where a similar rule is applied to a manufacturing corporation; *Newry, etc., Railway Co. v. Moss*, 14 Beav. 64, where it was said that only those persons who appear to be shareholders in the register of the company are liable to pay calls; *Re Phoenix Life Ins. Co.*, 2 Johns. H. 229, where trustees who held stock under a marriage settlement in which they had no beneficial interest, who were registered as holding the shares as trustees, and who receipted for dividends as trustees were held liable to contribute to the extent of the liability of the stock, and not merely to the extent of the trust estate.

The Supreme Judicial Court of Maine, in the case of *Heins v. Carvill*, 67 Me. 554, holds that an alteration of a note for \$500 to one for \$400 is a material alteration, and if made without the consent of the signer or indorser, will constitute a good defense to his liability upon the note. The change to be sure is not disadvantageous to the one holden to pay the note, but the court says that it makes another and a different contract of it, and any signer or indorser has a right to say, and can say truly, that the note, in its altered form, is not his contract. See *Chadwick v. Eastman*, 53 Me. 12; *Lee v. Starbird*, 55 id. 491. See, also, upon the subject of alterations of written instruments and their effect, 16 Alb. L. J. 64 and 80.

In *Bartlett v. City of Bangor*, 67 Me. 460, it is held that a *cul de sac* may become a public way by location or dedication as well as a street that is open at both ends. This principle was laid down by Lord Kenyon in *Rugby Charity v. Merryweather*, 11 East, 376, note, he saying that otherwise such places would be traps to catch trespassers. And in *Bateman v. Black*, 14 Eng. L. & Eq. 69, the question was fully considered, and the court held that it was no objec-

tion to a highway that it was a mere *cul de sac* and not a thoroughfare. In *Holdane v. Trustees of Cold Spring*, 23 Barb. 108, two of three judges of the Supreme Court of this State held that such a street could not be a highway, basing their decision on what they supposed to be the common law. But in *People v. Kingman*, 24 N. Y. 559, the Court of Appeals condemn this decision, holding that, upon principle as well as authority, it is no objection to a highway, or public street, that it is a *cul de sac*; that public ways, with an outlet at one end only, may and often do exist; that they are quite common in some parts of the country; that in many cities and villages there are short streets leading to ravines, and to cliffs, whence there can be no outlet, and where they must necessarily stop; that the same thing is true of streets running to unnavigable waters, or to points on the sea shore, where there cannot be a harbor or landing place; that in new settlements many of the public ways extending into the wilderness have outlets at one end only. The court on the principal case says, that it cannot see why it should have ever been doubted that such roads and streets are as much public highways as roads and streets open at both ends.

The Court of Errors and Appeals of New Jersey has reversed the decision of the Court of Chancery in the case of *Williamson v. New Jersey South. R. R. Co.*, 1 Stewart, 377, wherein the question whether the rolling stock used in operating a railroad would be considered real estate, so as to render a mortgage upon the railroad whereon such rolling stock was, together with the stock which was described thereon, duly executed and recorded, a valid lien thereon against subsequent judgment creditors. The Court of Chancery held that such stock was real estate and covered by the mortgage, but the Court of Errors held that, so far as regarded that kind of property, the mortgage was a chattel one, and must be filed as required by the statute to give it validity against subsequent creditors, if the property remained in the possession of the mortgagor. The court says that actual annexation to the realty, or something appurtenant thereto, is the condition upon which property ordinarily regarded as personal becomes a fixture and part of the realty. The intention to make a chattel a part of the realty is only important upon the question whether the owner intended to make the chattel so affixed a temporary or permanent accession to the freehold. The doctrine of constructive annexation is only applicable to cases in which the chattel, by actual annexation, was once part of the realty and had been temporarily detached from the freehold without intent to sever it therefrom. Having once been part of the realty, a removal temporarily without intent to sever permanently will not reconvert the chattel into personalty and destroy its character as a fixture. The

court distinguishes the cases of *Pennock v. Coe*, 6 Am. L. Reg. 27; *Gee v. Tide Water Canal Co.*, 24 How. 257; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609; *Railroad Co. v. James*, 6 id. 750; *Scott v. C. & S. Railroad Co.*, 6 Bissell, 529; *Farmers' Loan & Trust Co. v. St. Jo., etc., Railroad Co.*, 3 Dill. 412, and numerous cases cited by counsel from the State courts, and says that where the question has been directly presented, whether the rolling stock of a railroad included in a mortgage of its road-bed and franchises is real or personal property, the great weight of authority is in favor of its being considered as personalty. See *Stevens v. B. & O. R. R. Co.*, 31 Barb. 590; *Beardley v. Ontario Bank*, id. 619; *Randall v. Elwell*, 51 N. Y. 521; *Hoyle v. Plattsburg & Mont. R. R. Co.*, 54 id. 314; *Chicago, etc., R. R. Co. v. Howard*, 21 Wis. 44; *B. C. M. Co. v. Gilmore*, 37 N. H. 410; *Coe v. Columbus, etc., R. R. Co.*, 10 Ohio St. 372; *City of Dubuque v. Ill. Cent. R. R. Co.*, 37 Iowa, 56.

The Supreme Court of Rhode Island in the case of *Williams v. Winsor*, decided on the 13th of October, 1877, decides that in that State a mortgage of personal property to be subsequently acquired creates a lien on such property when acquired, which is valid in equity against the mortgagor or his voluntary assignee. The court says that while in some States a mortgage containing a power to sell and replace has been held to be therefore void, such has not been the doctrine in Rhode Island. It is a well-settled principle of law that nothing can be mortgaged which is not in existence or which does not belong to the mortgagor at the time of the execution of the mortgage, consequently at law a mortgage of property to be acquired in *future* is void as to that property. See *Henshaw v. Bank*, 10 Gray, 571; *Bellows v. Wells*, 36 Vt. 599; *Gale v. Burnell*, L. R., 7 Q. B. 850; *Head v. Goodwin*, 37 Me. 181; *Pierce v. Emery*, 32 N. H. 484; *Otis v. Gill*, 8 Barb. 102. But courts of equity have adopted in some instances another principle which is derived from the civil law and held that whenever parties by their contract intended to create a positive lien or charge upon real or personal property, whether then owned by the one giving the lien or not, such lien attaches to the particular property as soon as the one giving it acquires a title thereto as against such person and all others asserting a claim thereto under him voluntarily or with notice. See *Winslow v. Mitchell*, 2 Story, 680; *Preble v. Boghurst*, 1 Swanst. 869; *Needham v. Smith*, 4 Russ. 318; *Metcalfe v. York*, 1 M. & C. 553; *Field v. Mayor, etc.*, 6 N. Y. 179; *Langton v. Horton*, 1 Hare, 549. Also, *Brett v. Carter*, 2 Lowell's Dec. 458, where a mortgage of future additions to a stock of goods in a particular shop was held to be a valid mortgage of such goods as fast as they were put into the shop by the mortgagor. See, also, *Yates v. Olmstead*, 56 N. Y. 682, where a clause in a chattel mortgage upon a stock of goods, some of which was to be afterward acquired, was held not to be void if there was no arrangement permitting the mortgagor to deal with the goods mortgaged or knowledge of the mortgagee that he did so deal and no intent to defraud creditors. See further, *McCaffrey v. Woodin*, 65 N. Y. 459; S. C., 22 Am. Rep. 644; *Titus v. Maybee*, 25 Ill. 257; *Walkan v. Vaughn*, 38 Conn. 577; *Wyatt v. Watkins*, 16 Alb. Law Jour. 205; and *Williams v. Briggs*, id. 387.

GUARANTIES OF PAYMENT AND OF COLLECTION.

THE very recent decision of our Court of Appeals in the unreported case of *McMurray v. Noyes*, involves an interesting distinction between guaranties of payment and guaranties of collection. The guaranty in question was upon the assignment of a mortgage, and was in the following language: "And I hereby covenant that in case of foreclosure and sale of the mortgaged premises described in said mortgage, if the proceeds of such sale shall be insufficient to satisfy the same, and the costs of foreclosure, I will pay the amount of such deficiency," etc. The assignee of the mortgage neglected to foreclose it for some fourteen months after it became due, and meantime the premises, originally an ample security, were seriously damaged by fire, and became insufficient to pay the debt. The Court of Appeals hold, reversing the decisions of the General Term and the referee, that this was a guaranty of collection and not of payment; that the creditor did not enforce his remedy with due diligence, and that in consequence the surety was released. Although the court allude to the fact of the damage accruing from the delay, yet they do not seem to lay any stress upon it as a necessary ingredient, but seem to treat the condition strictly as a condition precedent, which the creditor is bound at all hazards to pursue with reasonable diligence, without any regard to the situation of the property or probable consequences. This case was decided in the lower courts upon the authority of *Goldsmith v. Brown*, 85 Barb. 484. The covenant in that case was as follows: "Whensoever the money secured by the said mortgage shall become due and payable, and a foreclosure of the same shall be had for the non-payment of principal or interest, and upon a sale of the premises therein described, a deficiency shall occur, then, in such case, the said parties of the first part will pay unto the said parties of the second part, or his assigns, the amount of any deficiency," etc. The court in that case observe upon this guaranty: "The obligation of the defendants was to pay the deficiency upon the mortgage debt, whenever the remedy against the lands mortgaged should have been exhausted and the deficiency ascertained; not that the debt was collectible by a diligent pursuit of the remedies to recover it at the command of the holder." "The defendants were sureties for the payment of Worcester's debts to the extent of any sum or balance which the proceeds of the mortgaged premises, upon sale thereof, failed to pay; and the contingency upon which their duty and obligation arose was the entering of the decree or judgment for the deficiency upon the referee's or sheriff's report of the sale. The omission of the creditor to institute proceedings to foreclose the mortgage, for more than fourteen

months after the money secured thereby became due and payable, did not discharge the defendants from their liability to pay the deficiency." "Whenever he had exhausted his remedy against the lands mortgaged, and obtained his decree or judgment for the deficiency, his right to receive and collect the amount thereof from the defendants became consummate and complete. Such was the legal effect of their contract with the plaintiff. They undertook to pay the deficiency whenever it should occur," etc. It is not quite clear from the opinion of the Court of Appeals in the case under consideration whether they approve or disapprove of *Goldsmith v. Brown*, nor is it quite clear whether they adopted the suggestion of counsel that the cases were distinguishable on the ground of the different significance of the word "whensoever" and the phrase "in case." The court say: "The decision in that case can only be sustained by construing the covenant as waiving diligence in foreclosing, and binding the covenantor to pay the deficiency without regard to the time of the foreclosure. Nothing in the covenant now under examination has any relation to the time of the foreclosure, or can be construed as waiving the diligence required by the general rule of law in performing the condition." The decision seems to be based on the idea that the measure of liability on the guaranty being ascertainable only by a foreclosure, the ordinary rule prevails that the foreclosure must be promptly and diligently prosecuted. In a word, as we might express it, that although in phrase and form the guaranty is one of payment, yet it is pregnant with a guaranty of collection. The court say: "The respondent claims that it is an undertaking to pay any deficiency which may arise, and is, therefore, a guaranty of payment of the mortgage debt to that extent, and to be governed by the same rules as if it had been a guaranty of payment of the whole mortgage. But the fallacy of this reasoning is that it is not an unconditional guaranty that the mortgagor will pay the mortgage debt, or any part of it, but only that after the remedy against the land has been exhausted and the deficiency ascertained by foreclosure and sale, the guarantor will pay such deficiency. The only difference between this and an ordinary guaranty of collection is that in the latter case the undertaking is, that after it has been ascertained, by all such legal proceedings as the case admits of, that the demand cannot be collected, the guarantor will pay, while in the present case the only proceedings which the creditor is bound to adopt are a foreclosure of the mortgage and sale of the mortgaged lands. To that case the condition precedent exists alike in both cases, and the duty of exercising due diligence attaches, there being nothing in the instrument qualifying or dispensing with it." The question is certainly a very nice and interesting one,

and we imagine a very good argument could be made on either side.

It was formerly quite commonly understood that the rule, applicable to guaranties of payment, that the creditor was not prejudiced by a failure to proceed with diligence against the principal debtor even at the request of the surety, unless the failure resulted in damage to the surety, as for example, where the debtor meanwhile became insolvent, was applicable to guaranties of collection as well.

Whether a guaranty of collection involves the necessity of a prompt pursuit of the remedy against the principal debtor, at all hazards, and without any regard to the circumstances, is a question that has been much mooted in this State, and if settled by the court of last resort was uneasily settled in the case of *Craig v. Parkis*, 40 N. Y. 181. Before that decision, there was excellent, although not unbroken authority, for the doctrine that the insolvency of the principal debtor excused the creditor from the necessity of prompt action against him in the case of a guaranty of collection. Thus in *Gallagher v. White*, 81 Barb. 92, a case upon a guaranty of collection, the court say: "There is a very material distinction between the omission to prosecute the principal debtor altogether, and the omission to prosecute within a reasonable time and with due diligence. A reasonable time is not a definite time and must always depend upon the particular circumstances of the case presented; because if the principal debtor was hopelessly insolvent at the time of the making of the guaranty, and so continued, the guarantor could not be prejudiced by an omission to prosecute within two months, or ten months, or any other given period. If a suit instituted and prosecuted to judgment at the expiration of twelve months would be as effectual to collect the money of the principal debtor, as one instituted and prosecuted at the expiration of two months, the guarantor would have no reason to complain that he had suffered injury from the laches of the creditor. This I understood to be the doctrine of the authorities, upon the question of due diligence and reasonable time."

The most learned and exhaustive examination of this subject by the Supreme Court will be found in the case of *Cady v. Sheldon*, 88 Barb. 103, where Judge Hogeboom delivered the opinion of the General Term of the Third District. That was a case of a guaranty of collection. The court go a step further than in the case of *Gallagher v. White*, and hold that under proof of the continuous insolvency of the principal debtor, the creditor is excused from any action against him at any time. The court observe: "It is not absolutely indispensable that legal proceedings should be resorted to, to test the collectibility of the paper, if it otherwise satisfactorily appears that a resort to such proceedings

would be entirely ineffectual; and proof that the principal debtors from the period of the maturity of the debt have been uniformly insolvent and unable to pay any part of the debt, is satisfactory and sufficient evidence that legal proceedings would be unavailing to collect the debt. Legal proceedings are not, under the authorities, absolutely a condition precedent to the liability of the guarantor but equivalent evidence of the inability to collect any part of the debt will suffice." This conclusion certainly is not warranted by the authorities cited in the opinion. Without exception, we think they recognize the necessity of action at some time, although they differ in their estimate of the effect of the debtor's insolvency on the question of due diligence.

In *Vanderveer v. Wright*, 6 Barb. 547, Judge Willard says: "In general a party who suffers a term to elapse without prosecuting the maker is guilty of laches, and loses his remedy against the guarantor. The remedy, however, against the guarantor will not be impaired, if the debtor was insolvent and so continued, after the guaranty, and up to the commencement of the suit," etc. The case of *Merritt v. Lincoln*, 21 Barb. 249, cited by Judge Hogeboom as authority for his position, seems to have been upon a guaranty of payment. Indeed, it must have been so, for the same judge, Welles, who gave the opinion in that case, also gave an opinion adverse to Judge Hogeboom's views, in *Newell v. Fowler*, *infra*. The cases of *Lamourieuz v. Hewitt*, 5 Wend. 307, and *Thomas v. Woods*, 4 Cowen, 183, are authorities for the doctrine of *Gallagher v. White*. In *Wakeman v. Gowdy*, 10 Bosw. 208, the court treat the question of reasonable diligence as one depending on the circumstances of the case, and regard the fact of damage to the surety from the delay as an element to be considered, and therefore this court cannot be an authority for the doctrine of a strict condition precedent. In *Penniman v. Hudson*, 14 Barb. 579, the court held that a delay of seven months, especially where the creditor knew that the debtor was in failing circumstances, required explanation, and, in the absence of any such proof, granted a new trial.

On the other hand, in *Burt v. Horner*, 5 Barb. 506, it is said: "The question is not whether the defendants have been injured by the delay, but whether the plaintiff has performed his contract, the condition precedent to his right to call upon them."

In *Newell v. Fowler*, 23 Barb. 632, the court observe: "Nothing will excuse the party holding the guaranty from the performance of this condition but the act of the guarantor himself. It was a part of the contract, and it will not answer for the party to say it would have been of no use to prosecute. Conditions precedent must be strictly performed." "The contract imposed upon Starke and his assignees the burden of exhausting by legal proceed-

ings every remedy which the bond and mortgage gave them, before the guarantor's liability should become fixed."

Eddy v. Stanton, 21 Wend. 255, was a case of a guaranty of payment of a note, in the event that the plaintiffs could not set it off, or collect it in some other way, or in due course of law. The plaintiffs endeavored to excuse the failure to sue the principal debtor by his insolvency. On demurrer, the court held that "the insolvency of Simmons was no excuse, especially in a case like this, of set-off, and wherein the defendants had agreed to bear the expense. It will be noted that this was a case of an entire failure to sue the principal. (This case was relied on by counsel in *McMurray v. Noyes*, and certainly has some analogy to that case, presenting the same feature of a guaranty of collection pregnant.)

We now come to the case of *Craig v. Parkie*, which was our text on this subject. The guaranty was somewhat peculiar. It was upon the assignment of a mortgage, and guaranteed "the collection of the within amount as it becomes due." The court decided, five judges to three, that a delay of six months in suing the principal debtors was not excused by proof of their insolvency during all the period in question. Judge Lott, in the prevailing opinion, after laying down the rule that such a suit must be commenced within a reasonable time, proceeds: "The plaintiff had no right to determine, upon his own responsibility, whether the debt was collectible. That was a question which the defendant had made it incumbent on him to ascertain by recourse to the ordinary rules (measures?) provided by law for the collection of debts. If the debtor's insolvency is an excuse for the delay at all, there is no reason why it should not be such, so long as the insolvency continues, and thus the liability of the surety would be for an indefinite period controlled by the opinion of witnesses, as to the ability of the principal to pay the debt, and not by the standard, or means fixed by the parties themselves for ascertaining that fact." The judge makes no allusion whatever to a single one of the conflicting cases to which we have referred, nor does he intimate that the question had ever before arisen in the courts. This fact and recurrence to the peculiar form of the guaranty—"as it becomes due"—suggests the query whether the court meant to lay down a general rule, overruling so many cases to which we have alluded, or simply to lay down the rule for this particular case. However that may be, it must be confessed that, so far as the opinions show, the minority of the court gave the better reasons for their faith. Judge Mason, in delivering the dissenting opinion, shows that in Pennsylvania, Vermont, Connecticut, Massachusetts, Maine and Illinois, no suit whatever against the principal is required where clear proof of his insolvency is made—a doctrine consistent with Judge Hogeboom's views in *Cady v.*

Sheldon. Conceding, however, that a different rule prevails in this State, he adds that a still further condition is implied in such a guaranty, namely, that due diligence must be used in bringing and prosecuting such suit, and that any laches in this regard will discharge the surety. He then proceeds: "The rule, however, is not in my judgment inflexible. It is like most general rules, it has its exceptions. It cannot be maintained upon principle as the unbending rule under all conceivable circumstances. If the principal debtor is and has been from the time the right to bring suit against him has accrued, utterly and hopelessly insolvent with no property out of which any thing could be collected, then the reason of the rule, which requires the principal to be prosecuted to judgment and execution with all diligence, ceases," etc. "This must be so unless we are prepared to hold that the creditor should lose his debt for the want of due diligence in doing a vain, idle and useless thing." "The courts have said that the law imposes this duty to prosecute the principal debtor with reasonable diligence, and this is for the purpose of insuring the collection of the debt out of the principal, and that no opportunity shall be lost to do so. This is very well, and is all right, as a general rule, as we have said; but when the principal debtors are utterly and hopelessly insolvent, and have nothing out of which an execution could be collected, then the law excuses the want of diligence, as it would have been idle and useless in accomplishing any purpose whatever." To express this doctrine very tersely, we should say, diligence in prosecuting a principal debtor who has no property is not "due" to the surety, and delay under such circumstances is "reasonable."

LIABILITY OF MUNICIPALITY FOR INJURY BY SURFACE WATER FROM STREETS.

SUPREME COURT OF RHODE ISLAND, FEBRUARY 27, 1878.

WAKEFIELD v. NEWELL, Town Treasurer, etc.

No action lies against a municipal corporation for allowing the ordinary and natural flow of surface water to escape from a highway on to adjacent land. Nor will an action lie for the results of such usual changes of grade as must be presumed to have been contemplated and paid for at the lay out of the highway.

A municipal corporation has the same powers over its highways in respect to surface water as an individual has over his land. *Inman v. Tripp*, 11 R. I. 520, explained and affirmed.

TRESPASS on the case. On demurrer to the declaration.

Beach & Osfield and *Stephen A. Cooke, Jr.*, for plaintiff.

Pardon E. Tillinghast, for defendant.

DURFEE, C. J. This is an action on the case to recover damages from the town of Pawtucket, for suffering water to flow from a highway in the town upon adjoining land belonging to the plaintiff. The declaration sets forth:—

"The plaintiff was and still is the owner in his own right of certain real estate, situate in said town, on

and adjoining a certain street and public highway in said town, called Pleasant street, and which street said town were bound to keep in good and suitable repair, for traveling in and upon the same, and to keep certain gutters and sluiceways running in and along said highway, so and in such good repair that the water that usually and of right should run therein should not overflow and run out and upon the said land of the said plaintiff; but the said town, by themselves, their officers, agents, and employees, so negligently and wrongfully kept the said street and public highway, and the sluiceways thereof in such bad repair, that the water which they ought and should have carried in and along said street overflowed on and over the land of the plaintiff, so that the said land was by said water overflowing thereon greatly damaged, and the crops growing thereon were greatly injured," etc.

The defendant demurs to the declaration upon the ground that it does not properly set forth any cause of action. The plaintiff relies in support of the action upon *Inman v. Tripp*, 11 R. I. 520. In that case the plaintiff owned an estate in the city of Providence, on Public street, at the lowest point thereof, and the city so changed the grade of several streets as to allow surface water which formerly flowed in other streets, and surface water which was formerly ponded in another street at some distance from the plaintiff's estate, to run down Public street, and thence on to his estate and into his cellar and well, and the court held that the plaintiff was entitled to an action against the city for the injury. The declaration in the case at bar does not show any such case. It merely shows that water escaping from the highway upon the plaintiff's land injured it, and the crops growing upon it. It is true the declaration alleges that the water *ought* to have been kept or carried by the town in the gutters or sluiceways of the street. The question of duty, however, is a question of law, and the defendant is entitled to have the facts alleged on which the duty is predicated. For any thing that appears, the injury to the plaintiff was the result of the ordinary and natural flow of the surface water, which the defendant would be under no obligation to confine in gutters or sluiceways for the plaintiff's protection, or of such changes near at hand as are usually made, and must, therefore, be presumed to have been contemplated, and paid for in the lay out. *Flagg v. City of Worcester*, 13 Gray, 601. In *Inman v. Tripp*, 11 R. I. 520, we did not mean to decide that a town or city has any less power over its streets or highways, in respect of surface water, than an individual has over his own land, but only that it has no greater power; or, in other words, that it is liable for discharging the surface water accumulating in its streets and highways, to the same or very much the same extent, as an individual is liable for discharging such water from his own upon his neighbor's land. If this action were against an individual instead of a town, we do not think the declaration, similar in form, would be sufficient; for mere neglect by an individual to retain on his own land water which, falling there, would naturally flow on to his neighbor's land, is no cause of action, unless he first accumulates it by artificial means so as considerably to increase the volume and detrimental effect with which it would flow on his neighbor's land. *Pettigrew v. Evansville*, 26 Wis. 223, 229; *Livingston v. McDonald*, 21 Iowa, 160; *Gannon v. Hargadon*, 10 Allen, 106; *Butler v. Peck*, 16 Ohio St. 334; *Goodale v.*

Tuttle, 29 N. Y. 459, 467; *Washburn on Easements*, etc., 450 seq.

We think, therefore, that as the declaration now stands, the demurrer must be sustained.

Demurrer sustained.

FIRE INSURANCE AND ESTOPPEL.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK, APRIL, 1873.

BENNETT, ADMINISTRATOR V. MARYLAND FIRE INSURANCE CO.

Plaintiff, through an insurance broker, procured from the agent of a fire insurance company, a policy insuring his building in such company. Plaintiff paid the broker the amount of premium, but the agent gave the broker credit for such premium. The company informed the agent that it would not accept the risk on plaintiff's building, but the agent said nothing to plaintiff. Thereafter plaintiff, desiring to make some alterations in the building which would increase the risk, applied to the agent to indorse on the policies permission to do so. The agent said it would be necessary to apply to the company and he took plaintiff's policy to send to the company for such permission. The agent sent the policy, informing the company of the facts. The company kept the policy to cancel it, but gave plaintiff no notice to that effect. Subsequently the building was burned. In an action on the policy, *held*, that the company was estopped from claiming that the policy was not in force. The policy required that in case of loss, plaintiff should give notice forthwith in writing to the company. The plaintiff told the agent of the loss, who wrote to the company, which claimed not to be liable on the ground that the policy never had been in force. *Held*, that the company could not thereafter set up informality in giving notice, etc., of the loss.

A defense that plaintiff had, in violation of the terms of the policy, increased the risk, *held* not available unless set up in the answer.

MOTION for a new trial by defendant. Sufficient facts appears in the opinion.

WALLACE, J. None of the objections urged to the recovery are tenable.

First. Hamlin was the agent of the defendant, authorized to make insurance and deliver policies.

The assured paid the premiums to a broker, and Hamlin, knowing of the payment, accepted the responsibility of the broker, by an agreement with him, in lieu of the money paid by the insured. The assured subsequently, desiring to build an addition which would increase the risk, applied to Hamlin to indorse consent Hamlin informed the assured he would have to forward the policy to the company, but the consent would be given, and the assured might rely upon it, and go on with his addition.

The company knew the policy had been issued, and declined to take the risk, and so notified Hamlin. Notwithstanding this, Hamlin did not inform the assured. Sometime after this, Hamlin forwarded the policy to the company to obtain the consent of its officers to the building of the addition, at the same time informing them of the whole transaction relative to the premium. The company retained the policy, and did not notify Hamlin that consent would not be allowed, or that the policy would be deemed canceled.

It thus appears that the company knew the policy had not been recalled by Hamlin, and that the assured supposed it to be in force, and was acting in reliance upon that assumption. By silence the defendant ratified the act of its agent, in accepting the responsibility of Nichols in lieu of the money of the assured. Slight acts are sufficient to constitute ratification; and silence, when the good faith requires the principal to speak, is sufficient.

Again, the policy did not require payment of the premium in money; and when the agent of the de-

defendant accepted the promise of Nichols in lieu of the money of the assured, the premium was paid.

The agent became liable to the defendant for the premium to the same extent as though he had received the money of the assured; and the assured were protected to the same extent as though they had paid their money to Hamlin. If they had paid Hamlin the money, and he had failed to remit it to the defendant, the defendant nevertheless would have been bound by the policy. It is equally liable now. *Hotchkiss v. German Fire Insurance Co.*, 5 How. 90; *Gott v. Protection Insurance Co.*, 25 Barb. 189; *Church v. Brooklyn Fire Insurance Co.*, 19 N. Y. 305, 311; *Bodine v. Exchange Fire Insurance Co.*, 51 id. 117.

Under these circumstances the defendant could not cancel the policy without repayment of the premium to the assured. Instead of doing this, the defendant, with full knowledge of all the facts, retained the policy when it came into its possession for another purpose, without expressing any intention of repudiating the transaction.

Second. The policy required the assured, in case of loss, to give notice in writing to the company forthwith, and as soon after as possible to serve proofs of loss. As soon as the fire occurred the assured notified Hamlin, and he wrote to the company. Shortly thereafter the assured heard the defendant disclaimed liability, and one of them went to the office of the company, and was informed by its officers that the policy had been canceled and was not in force at the time of the loss. Then the assured gave written notice of the loss to the company and served proofs of loss, both of which were shortly after returned to the defendant, upon the ground that the defendant had no policy on the property and nothing to do with the loss. When Hamlin wrote to the company his act insured to the insured and satisfied the condition requiring written notice forthwith. The proofs of loss were served as soon as practicable under the circumstances, as appears by the testimony. But both of these conditions were made a part of the policy for the benefit of the defendant, and could be waived by the defendant. The defendant received notice of the loss forthwith, but not notice in writing. Notice by the assured to Hamlin, whom the defendant had held out as its agent, was, in the absence of knowledge on the part of the assured that Hamlin's agency had been revoked, notice to the defendant, and when, after this had been given, and one of the assured saw personally the officers of the defendant, and they, instead of objecting to the formality of the notice, told him that the defendant repudiated the policy, they acquiesced in the sufficiency of the notice.

No objection can be heard to the sufficiency of the service of the proofs of loss. If they had been served immediately after the interview between one of the insured and the officers of the defendant, they would have been in time, clearly. When, in that interview, the defendant repudiates all liability for the loss, the assured were absolved from making proofs of loss. The proofs, however, were forwarded, and were returned by the defendant as of no interest to it. The defendant has waived the condition in this regard. *Norwich and New York Trans. Co. v. Western Mass. Ins. Co.*, 6 Blatchf. 241, and cases there cited.

Third. After the fire the assured transferred, by an oral agreement, his right of action to the plaintiff's intestate; and the other individuals to whom the loss was payable by the policy, as their interests might ap-

pear at the time of the loss, assigned their interest to the plaintiff's intestate. This assignment by parol was sufficient to transfer the cause of action. *Kessel v. Alberts*, 56 Barb. 362. It operated as an appointment of the assignee as a trustee, within section 113, Code of Procedure, and authorized him to maintain the action.

Fourth. The defenses presented by these various objections urged to the plaintiff's right to recover are the only ones of which the plaintiff can avail itself under the pleadings in this action. The complaint does not set out the policy, but describes it sufficiently to let it be put in evidence, and alleges that the assured and the plaintiff have duly performed all of the conditions of the policy. The issue tendered by the answer is in substance a denial of the averments of the complaint. The rights of the parties are to be ascertained, not by the rules of pleading at common law, but by those adopted by the Code.

Under this issue it was incumbent on the plaintiff to prove the execution and delivery of the policy, plaintiff's interest and title to sue, the loss by fire of the property described, the amount of the loss and notice and proof of loss in due form, given to the defendant.

The defendant was at liberty to controvert all the facts which it was incumbent on the plaintiff to prove, including the performance of any condition precedent to the plaintiff's right to recover (Code, § 162; New Code, § 533), but it could not avail itself of any defense based on the breach of any other conditions of the policy, because no such defense was set up in its answer.

The defendant is therefore precluded from relying upon the breach of any condition in the policy, except of such as plaintiff was bound to show affirmatively had been complied with as a condition precedent to his right to recover. No issue is tendered by the answer to the effect that the policy became void because the risk was increased by the act of the assured, and the same may be said of the other defenses not hitherto discussed. While it is true evidence appeared on the trial from which breaches of these conditions might be inferred, the plaintiff was not required to meet that evidence because not notified by the answer that such issues were to be tried.

Judgment is ordered for the plaintiff upon the verdict.

W. L. Dally and W. F. Cogswell, for plaintiff.

E. H. Benn, for defendant.

CONTRIBUTORY NEGLIGENCE—TRAVELING IN CABOOSE CAR—WHO IS A PASSENGER.

SUPREME COURT OF PENNSYLVANIA, FEBRUARY 11, 1878.

CREED V. PENNSYLVANIA RAILROAD CO.

Plaintiff's intestate, with the consent of the employees of a railroad company, rode in a caboose car attached to the hind end of a mixed freight and passenger train. It was against the rules of the company for passengers to ride in this car, which was reserved for employees, and this was known to intestate. While so riding he was killed by an accident to the train caused by a misplaced switch. He had not yet paid any fare for his passage. *Held*, (1) that it was not in itself negligence in intestate to ride in the caboose, and (2) that he was presumably traveling as a passenger though he had not yet paid fare.

ERROR to Common Pleas, No. 1, Philadelphia. The facts appear in the opinion.

Pierce Archer, Jr., and Lewis C. Cassidy, for plaintiff in error.

Chapman Biddle, for defendant in error.

GORDON, J. From the evidence it appears that Henry Creed, the husband of the plaintiff, from the death of whom the present action has resulted, was a passenger on a mixed freight and passenger train of the defendant, running from Jersey City to Philadelphia. At the time of the accident, which resulted in his death, Creed was in a caboose, the hindmost car of the train, immediately in front of which were the passenger cars, so that there was ready and easy access from the latter to the former.

This caboose car was one set apart and especially designed for the use and occupancy of the employees engaged in running the train, and by the rules of the company no other persons were permitted to enter it.

It is quite clear from the evidence that Creed boarded this train at Jersey City, for Brannig, the freight conductor, says he saw him first on the afternoon of Nov. 5th, the day of the accident, in that city, and that he next noticed him at Newark in the lookout of the caboose; and, as this train left Jersey City in the evening, there can be but little doubt that the deceased got upon it at that point. It is also in evidence that, though Brannig had the full and entire charge of the train from the time it left Newark, yet he had no authority to receive passengers or to examine or lift the tickets of such as remained on the train after passing that station, at which point the passenger conductor, who had charge of the cars from Jersey City, left the train. Whether Creed paid his fare or not is unknown. Brannig's duties did not lead him to inquire, and the passenger conductor was not called. He may have had a ticket, or he may have been surreptitiously on the train through the connivance of the train hands, to whom he may have been known, as he formerly had a position on this road.

Presumably he was rightfully there; certainly he was there with the knowledge and acquiescence of one of the conductors, if not of both. Under this condition of affairs the learned judge of the court below charged the jury as follows:

(1) "There is no direct proof of negligence on his (Creed's) part, unless it may be considered in connection with the position which he occupied in the cars as riding in the caboose."

This point was reserved.

(2) "We have no evidence of payment of money by him; but I think there is a reasonable and fair presumption, that if a person, not connected with the company, travels by a passenger train, he is traveling as a passenger and for a consideration."

This point was also reserved. The verdict was for the plaintiff; but the court, without giving any opinion, entered judgment for the defendant, *non obstante veredicto*.

It follows, that the converse of one or both of the above propositions was finally held by the court. That is to say, first, that there was a legal presumption of negligence on the part of Creed, arising from the fact of his being in a car, when the accident happened, not intended for the use of passengers.

Second. That, although traveling by a passenger train, and not connected with the company, the legal presumption is that he was not traveling as a passenger who paid his fare, or intended, in good faith, so to do. As legal propositions these cannot be sustained. No presumption of negligence can arise, either in fact or

in law, from the fact of Creed's occupancy of the caboose, for there is no evidence that it was in any degree more unsafe than any other car in the train. It was, indeed, under all ordinary circumstances, the one that was the most safe: from collisions in front of the train it was protected by the cars which preceded it, and from dangers behind — being itself a lookout — it was guarded by the constant vigilance of the employees. That it proved to be the car first in danger, and the one most badly wrecked, argues nothing, since the carelessness of the company in introducing new switches having an action the reverse of the old ones, without notice to those in charge of its trains, could not be foreseen by any one, however prudent. Was Creed's position, under all ordinary circumstances, which a man of ordinary prudence ought to foresee and guard against, as safe as a seat in a passenger car?

If it was, and, as we have said, there is no evidence to the contrary, then negligence cannot be predicated of the fact of his being in the caboose. It is true, however, that Creed as a passenger ought not to have been in that car; not, indeed, because it was less safe than other parts of the train, but because forbidden by the rules of the company. It was a car provided for the use of the train hands and not for passengers, and from its very shape and character that fact must have been obvious to any one of common understanding and observation, much more to the deceased, who had himself been a freight conductor upon this very road. Presuming, then, the knowledge of the design of this car by the deceased — which, however, is a presumption of fact and not of law — was the company thereby released as to Creed from its duty as a common carrier?

This point was raised and determined in *O'Donnell v. The Allegheny Valley Railroad Company*, 9 P. F. Smith, 239, in which case the court below held that the baggage car was an improper place for passengers, whether the rule of the company against such use was communicated to them or not, and that one leaving his seat in the passenger coach and entering the baggage car was guilty of negligence. But this ruling was reversed. Mr. Justice Agnew, delivering the opinion of the court, observed: That whilst it is the undoubted right of a railroad company to prescribe reasonable rules for the regulation of those who travel on its cars, yet the conductor is the one who is charged with their administration, and his permission of, or acquiescence in, the use of the baggage car by a passenger exempts such passenger from all blame, and in case of accident to him, resulting from the negligence of the company, he may recover damages. In the case of the *Lackawanna & Bloomsburg Railroad Co. v. Chenoweth*, 2 P. F. Smith, 382, the plaintiff had obtained permission from the agents of the company to attach his freight car to a passenger train contrary to the rules of the company which were communicated to him, he, at the same time, agreeing "to run all risks."

Notwithstanding this it was held that the company was liable for damages resulting to the plaintiff and his car from negligence in the running of the train. And this is reasonable; for, as was said in that case, the plaintiff's car was not unlawfully upon the road, and his engagement to be responsible for all risks did not embrace such as arose from the neglect of the defendant's employees.

The test for contributory negligence is found in the affirmative of the question, does that negligence contribute in any degree to the production of the injury

complained of? If it does there can be no recovery; if it does not it is not to be considered. In this we are also supported by the case of *Carrol v. The New York & New Haven Railroad Co.*, 1 Duer, 571. Opinion per Bosworth, J.

At the time of the accident complained of, the plaintiff—a passenger—was in the post-office part of the baggage car; and though it was conceded that the position was more dangerous in case of collision than a seat in the passenger car, yet, being injured by a collision to which his position in no way contributed, it was held he was entitled to recover. So it was pertinently asked by Mr. Justice Thompson, in the case of the *Railroad Co. v. Chenewith*, above cited: "Why speculate about the supposed dangerous position assumed by the plaintiff, if no damage resulted from it?" "Was he to become an outlaw for assuming what proved to be no risk, and so forfeit his right when he was blameless?"

This doctrine applies with much force to the case in hand. Creed was in the caboose with the knowledge and assent of the freight conductor, if we may believe the testimony of that officer; hence he was not a trespasser. And suppose, knowing that this was not a proper place for passengers, he assumed all risks incident to that car by boarding it; what then? Was a carelessly located or misplaced switch an incident? Or did his position in the remotest degree contribute to the accident? If, however, it did not, why talk about the matter as though it were of importance? This doctrine is further illustrated by the case of *Washburne v. Nashville & Chattanooga Railroad Co.*, 8 Head (Tenn.), 638, wherein it was held that the fact that one is riding in the baggage car with the knowledge of the conductor, or is riding free, will not preclude him from a recovery for an injury arising from a collision, even though he might or would not have been injured had he remained in the passenger car.

A like decision was made by the Supreme Court of Minnesota, in the case of *Jacobs v. St. Paul & Chicago Railway Co.*, Min. ; 20 Am. ; holding that the fact that the passenger, at the time of the injury, was in the baggage car, contrary to a rule of the company, was not such contributory negligence as would bar his suit, and this though he may have been informed of the rule and may have persisted in remaining there in violation of it, if his position did not contribute to the accident which caused the injury. It is manifest, therefore, from reason and authority, that there was nothing in the first point for the court to reserve; but having instructed the jury that there was no evidence of contributory negligence on the part of Creed, the matter should have been allowed so to stand.

As to the second point, it was certainly correct to say "that if a person not connected with the company travels by a passenger train, presumably he is traveling as a passenger and for a consideration." In other words, he is presumed to have paid his fare or to be ready to pay it when called upon.

To presume otherwise would be to presume that such an one was a trespasser; but this is an affirmative proposition, the proof of which rests upon the one alleging it. As the doctrine above stated is expressly ruled in the case of the *Pennsylvania Railroad v. Books*, 7 P. F. Smith, per Sharswood, J., we need pursue this subject no further. The position occupied by the decedent in the caboose car may raise a question for the jury. Creed was upon a passenger train, and

as we have seen, might lawfully occupy any part of that train, whether passenger car or caboose, if the conductor, knowing his position, did not object to it.

It follows that all presumptions favorable to the occupant of a passenger car attach in like manner to him, though occupying the caboose. It cannot be said that it was no part of the duty of the passenger conductor to visit this caboose, and that hence no presumption can arise that Creed paid fare to an officer whom he did not see and who did not see him, for it is the conductor's duty to visit every part of his train where passengers may lawfully be. We must presume he did his duty.

Whilst this is so, it does not follow, from the facts developed in this case, that a presumption *de jure* arises that Creed did pay his fare, or that he may not have been a trespasser. That he did not pay his fare to Brannig, the freight conductor, counts for nothing, for he was not authorized to receive it. This fact, however, does not prove that if he paid at all it must have been at Jersey City, at Newark, or between those places, whilst the train was in charge of the passenger conductor; and as he was first noticed by Brannig at Newark in the lookout part of the caboose, and as he may have occupied that position from Jersey City, it is quite possible, or even probable, that he may not have been seen by the passenger conductor, or if seen by that officer, may have been mistaken for one of the train hands, and so have avoided the payment of fare. There being this in the case, which ought to be passed upon by a jury, we send it back for re-trial, instead of entering judgment on the verdict.

Judgment reversed, and a *venire facias de novo* awarded.

Sharswood and Mercur, JJ., dissented.

RAILROAD TICKET ENTITLES TO PASSAGE IN BUT ONE DIRECTION.

SUPREME JUDICIAL COURT OF MAINE, JANUARY 5,
1878.

KEELEY V. BOSTON & MAINE RAILROAD CO.*

A ticket with the words "Portland to Boston" on it does not entitle the holder to a ride from Boston to Portland, although the holder has been permitted to take such rides on similar tickets over the same railroad before, and a conductor on another train at another time on the same road gave his opinion to the holder that the ticket would be good for a passage either way.

ON report from the Superior Court.

Case, setting out in substance and in extended legal form and phraseology that the defendants were common carriers of passengers; that the plaintiff purchased two tickets, one of the following form: "163. Issued by Grand Trunk R. R., and Boston & Maine R. R., Portland to Boston. Valid only within seven days. First class. Form 39. J. Hickson, General Manager, 3876;" and another, similar in form, but which he is unable to describe; that he entered the defendants' cars at Portland for Boston whither he was carried; that he gave up the "similar" ticket on his passage to Boston, when the defendants promised and assured the plaintiff that the ticket "described" was good for a passage for him over the defendants' railway from Boston to Portland; that on the 26th day of January, 1876, at Boston, he entered the cars to be conveyed to Portland, and was in pursuance of said payments and

* To appear in 67 Maine Reports.

ticket (described) conveyed to South Lawrence, where he was ordered out; that he re-entered and was conveyed to Haverhill; that the defendants then ordered him to leave the cars and ejected him therefrom, and refused to carry him to Portland.

The plea was not guilty.

The case was reported to this court which is to order such judgment as the law and facts require.

J. E. Butler, for the plaintiff.

W. L. Putnam, for the defendant.

PETERS, J. This case presents this question: Does a railroad ticket, with the words "Portland to Boston" imprinted on it, purchased in Portland under no contract other than what is inferable from the ticket itself, entitle the holder to a passage, on the road of the company issuing it, from Boston to Portland? Does a ticket one way give the right to pass the other way instead? We find no case deciding that it does, nor do we assent to the proposition that the law should be considered to be so. Such is not the contract which the ticket is evidence of.

It has been held that, if a passenger purchases a ticket with a notice upon it that it is "good for one day only," in the absence of a statutory regulation to the contrary, he can travel upon such ticket only on that day. *State v. Campbell*, 32 N. J. L. 309; *Shedd v. Troy & Boston Railroad*, 40 Vt. 88; *Johnson v. Concord Railroad*, 46 N. H. 213; *Boston & Lowell R. R. Co. v. Proctor*, 1 Allen, 267; 1 Redf. on Railways, 99, and notes. It has been held also, if the words "good upon one train only" are printed upon a ticket, the holder is not entitled to change from one train to another after the passage is begun. *Cheney v. Boston & Maine R. R. Co.*, 11 Metc. 121; Redf. on Railways, *supra*. If such notices confine a passenger to a certain day and a particular train, why is there not as much reason to say in this case that the notice upon the ticket must restrict the holder of it to go in the particular direction named?

This position is not weakened by the suggestion that the company can transport the passenger as cheaply and easily one way as the other. If it were so, it would be no answer. A person who agrees to sell to another, merchandise of one kind, might find it to his profit and advantage to deliver merchandise of another kind, but he cannot be compelled to do so.

So a railroad could often, no doubt, transport a passenger as conveniently on one train as another and on one day as another; still, as before seen, there is no obligation to do so. But it does not follow that a railroad corporation can carry passengers as well for itself the one way as the other. There may be a difference arising from various considerations. There may be more travelers and more freight to be carried one way than the other. It may be more expensive. There may be more risk in the one passage than the other. The up train may go more by daylight and the down train more by night. That such considerations as these might arise in a case, whether in this instance they exist or not, helps to demonstrate that a ticket one way is a different thing from a ticket the other. Practically, the doctrine set up by the plaintiff, if allowed to prevail, would affect the defendants injuriously. It is well known that through tickets are cheaper *pro rata* than the way or local fares. This fact has led to a practice on the part of way travelers of buying through tickets and using them over a part of the route and selling them for the balance of the distance, so as to make a saving from the regular

prices charged. It is easily seen that, if a passenger is permitted to ride in either direction on a ticket, it increases the chances for carrying on this sort of speculation against the interests of the road.

It does not avail the argument for the plaintiff at all, that before this he had passed over the road upon other tickets in a direction the reverse of that advertised upon their face; nor is it of any importance that another conductor, upon another train, at another time, expressed an opinion to him that this ticket would be for either direction good. The contract is not shorn of a particular stipulation merely because it is not always enforced. Nor could such conductor in such manner bind the corporation, and it could not have been understood by the plaintiff that he undertook to do so. The conductor merely expressed an opinion about a matter which he at that time had no business with. The plaintiff had ample opportunity to purchase another ticket, and should have done so. *Wakefield v. South Boston Railroad*, 117 Mass. 544.

Plaintiff nonsuit.

APPLETON, C. J., WALTON, BARROWS, VIRGIN and LIBBEY, JJ., concurred.

KNOWLEDGE OF INSOLVENCY UNDER BANKRUPT LAW.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

GRANT, appellant, v. FIRST NATIONAL BANK OF MONMOUTH.

The provision in the Bankrupt Law making a payment or security received from the bankrupt by a creditor "having reasonable cause to believe such a person is insolvent" void, does not make them void for a mere suspicion of the debtor's insolvency, but requires for that purpose, that the creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact calculated to produce such a belief in the mind of an ordinary intelligent man.

A PPEAL from the Circuit Court of the United States for the Northern District of Illinois. The facts appear in the opinion.

Mr. Justice BRADLEY delivered the opinion of the court.

This case arises upon a bill in equity, filed by the assignee in bankruptcy of John S. Miller, to set aside a mortgage, or deed of trust, executed by him about two months prior to his bankruptcy. Miller was indebted to the First National Bank of Monmouth, Illinois, in about \$6,200, of which \$4,000 consisted of a note which had been twice renewed, and the balance was the amount which he had over-drawn his account in the bank. Wanting some cash for immediate purposes, the bank advanced him \$300 more, on his giving them the deed of trust in question, which was made for \$6,500, and was given to secure the indebtedness referred to. The question in the case is, whether, at the time of taking this security, the officers of the bank had reasonable cause to believe that Miller was insolvent. The Circuit Court came to the conclusion that they had not, and dismissed the bill. From that decree the assignee has appealed.

Some confusion exists in the case as to the meaning of the phrase "having reasonable cause to believe such a person is insolvent." Dicta are not wanting which assume that it has the same meaning as if it had read, "having reasonable cause to suspect such a person is insolvent." But the two phrases are distinct in meaning and effect. It is not enough that a creditor has

some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it; and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose.

The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know any thing of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided.

Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man.

It is on this distinction that the present case turns. It cannot be denied that the officers of the bank had become distrustful of Miller's ability to bring his affairs to a successful termination; and yet it is equally apparent, independent of their sworn statements on the subject, that they supposed there was a possibility of his doing so. After obtaining the security in question they still allowed him to check upon them for considerable amounts in advance of his deposits. They were alarmed; but they were not without hope. They felt it necessary to exact security for what he owed them; but they still granted him temporary accommodations. Had they actually supposed him to be insolvent would they have done this?

The circumstances calculated to excite their suspicion are very ably and ingeniously summed up in the brief of the appellant's counsel; but we see nothing adduced therein which is sufficient to establish any thing more than cause for suspicion. That Miller borrowed money; that he had to renew his note; that he over-drew his account; that he was addicted to some incorrect habits; that he was somewhat reckless in his manner of doing business; that he seemed to be pressed for money; were all facts well enough calculated to make

the officers of the bank cautious and distrustful; but it is not shown that any facts had come to their knowledge which were sufficient to lay any other ground than that of mere suspicion. Miller had for years been largely engaged in purchasing, fattening, and selling cattle. He had always borrowed money largely to enable him to make his purchases; for this purpose he had long been in the habit of temporarily over-drawing his account; the note which he renewed was not a regular business note, given in ordinary course, but was made to effect a loan from the bank apparently of a more permanent character than an ordinary discount; and his manner of doing business was the same as it had always been. That he was actually insolvent when the trust-deed was executed there is little doubt; but he was largely indebted in Galesburg, in a different county from that in which Monmouth is situated; and there is no evidence that the officers of the bank had any knowledge of this indebtedness.

Without going into the evidence in detail, it seems to us that it only establishes the fact that the officers of the bank had reason to be suspicious of the bankrupt's insolvency when their security was obtained; but that it falls short of establishing that they had reasonable cause to believe that he was insolvent.

The decree of the Circuit Court is affirmed.

FORFEITURE OF LIFE POLICY BY NON-PAYMENT OF PREMIUMS.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error, v. EGGLESTON.

E., residing at Columbus, Mississippi, procured through an agent at that place, of a New York Life Insurance Company, a policy on his life, containing a provision forfeiting it if the annual premiums should not be paid when due. The first premium was paid to this agent, but thereafter, each year before the premium became due, E. was notified by the company, by mail, to pay to other agents sometimes at Savannah, several hundred miles from Columbus, and sometimes at Vicksburg, one hundred and fifty miles therefrom. In 1871 no notice was given as to where payment should be made, and E. failed to pay on that account when the payment was due, but tendered payment as soon as he could ascertain to whom he should pay. Held, that no forfeiture was incurred by failure to pay the premium when due.

IN error to the District Court of the United States for the Northern District of Mississippi. The facts appear in the opinion.

Mr. Justice BRADLEY delivered the opinion of the court.

This was an action on a policy of life insurance, issued by the plaintiffs in error (the defendants below, a New York corporation doing business in the city of New York), on the 11th of November, 1868, for the sum of \$5,000, on the life of Edward C. Eggleston, a resident of the State of Mississippi, for the benefit of his children, Louisa and Thomas, and in consideration of an annual premium of \$306, payable (after the first premium) semi-annually, one-half on the 11th of November, and one-half on the 11th of May in each year. The policy contained the usual condition that if the premiums were not paid on or before the respective days named, together with any interest that might be due thereon, the company should not be liable. The following clause was added: "All receipts for premiums are to be signed by the president or actuary.

Agents for the company are not authorized to make, alter, discharge contracts, or waive forfeitures." Eggleston died on the 5th of January, 1872.

The defense set up on the trial was, that the policy was forfeited by the failure of the assured to pay the last installment of premium, which fell due on the 11th of November, 1871. The cause was tried by a jury, and the only question raised by the bill of exceptions and brought here for review is, whether the judge properly left to the jury the question of fact which was made by the plaintiffs below in answer to the alleged forfeiture. The case presented on the trial, as shown by the bill of exceptions, was as follows:

The plaintiffs proved that the policy of insurance mentioned in the declaration was delivered and the first premium received thereon by one Stephens, a local agent of the defendant, in Columbus, Mississippi, and that E. C. Eggleston, upon whose life said policy was issued, then and up to his death resided in the immediate vicinity; that soon after issuance of said policy the agency of said Stephens was revoked and no other agent appointed at that place; that said Eggleston was notified by defendant to pay the next premium falling due to Johnson & Co., their agents at Savannah, Georgia, and that he was also notified to pay the subsequent premiums to B. G. Humphreys & Co., the defendant's agents at Vicksburg, Mississippi, except the one falling due November the 11th, 1871, all the other premiums falling due before the death of said E. C. Eggleston having been paid. It was also testified by the sons of said E. C. Eggleston and by Goodwin, the cashier of the bank through which the other payments had been made, that if any notice was given by the defendant to said Eggleston to whom and where the said premium due the 11th day of November, 1871, should be made, they did not know it; and that said Goodwin had the money to pay the said premium, which would have been paid had the notice been given; and after said premium became due and payable, said Goodwin, for said Eggleston, telegraphed to Johnson & Co., at Savannah, Georgia, inquiring to whom payment should be made, who replied to telegraph to B. G. Humphreys & Co., at Vicksburg; that B. G. Humphreys & Co. replied to make payment to Baskerville & Yates, sub-agents at Macon, Mississippi, who held the payment receipt. On December 30th, 1871, a friend of said Eggleston tendered payment of the premium to Baskerville & Yates, which they refused unless a certificate of health was furnished; said Eggleston was then sick, and died on the 5th of January, 1872. One Williams, a clerk of Baskerville & Yates in their insurance business, and a witness for defendant, testified that on the first of November, 1871, he mailed a notice post-paid to said Eggleston, addressed to him at Columbus, Mississippi, to make payment to Baskerville & Yates, agents at Macon, Mississippi, and that they held the proper premium receipt. Macon, Mississippi. It was found, is thirty miles from Columbus by railroad.

Upon this evidence the judge charged the jury as follows: "The non-payment of the premium is admitted, and if nothing more appears from the evidence the plaintiffs will not be entitled to recover. To avoid the defense, it is insisted by the plaintiffs that the non-payment was caused by the defendant's not having given to the said Eggleston notice of the place where payment was required, and, therefore, the fault of the company, and not that of Eggleston or the plaintiffs. The onus of proving the cause for non-payment is on

the plaintiffs. [If you shall believe from the evidence that the payments of the premiums had before that time been made to such agents as the company had designated from time to time, and of which and to where said Eggleston was given notice by the defendant, and that no such notice was given to said Eggleston before the time of the non-paid premium fell due, and that as soon as he did thereafter receive such notice he did tender to the designated agent the premium due, and that such failure to pay was caused by the want of such notice, then the policy was not forfeited, and the plaintiffs will be entitled to recover the amount of the policy, with six per cent interest from sixty days after the company was notified of the death of Eggleston, less the amount of any unpaid premiums, with like interest, up to the death of said Eggleston.] If you shall believe from the evidence that the notices before given were by letter through the mail, and that the agent of the company authorized to receive payments of the premium mailed to said Eggleston at his post-office such notice within such time as by due course of mail he would have received it, and within a reasonable time for Eggleston to make payment, then Eggleston will be held to have received such notice, and the plaintiffs will not be entitled to recover. The onus or burden of proof of such notice having been given is on the defendant." The defendant excepted to so much of said charge as is included in brackets.

We have recently, in the case of *Life Insurance Company v. Norton*, 96 U. S.—, shown that forfeitures are not favored in the law, and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will be incurred, followed by due conformity on his part, will, and ought to, estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture. The representations, declarations, or acts of an agent, contrary to the terms of the policy, of course, will not be sufficient unless sanctioned by the company itself. *Insurance Co. v. Mowry*, 96 U. S.—. But where the latter has, by its course of action, ratified such declarations, representations or acts, the case is very different.

In the present case it appeared that the company had discontinued its agency at the place of residence of the insured soon after the policy was issued, and had given him notice by mail, from time to time, as the premium installments became due, where, and to whom to pay them; sometimes at Savannah, several hundred miles, and sometimes at Vicksburg, a hundred and fifty miles, from his residence. Such notice, it would seem, had never been omitted prior to the maturity of the last installment. The effect of the judge's charge was, that if this was the fact, and if no such notice had been given on that occasion, and the failure to pay the premium was solely due to the want of such notice, it being ready, and being tendered as soon as notice was given, no forfeiture was incurred. We think the charge was correct under the circumstances of this case. The insured had good reason to expect and to rely on receiving notice to whom and where he should pay that installment. It had always been given before; the office of the company was a thousand miles away;

and they had always directed him to pay to an agent, but to different agents at different times.

Although, as we held in the case of *Insurance Company v. Davis*, 95 U. S. 425, the legal effect of a policy, when nothing appears to the contrary, may be that the premium is payable at the domicile of the company, yet it cannot be expected or understood by the parties that the policy is, in ordinary circumstances, to be forfeited for a failure to tender the premium at such domicile, when the insured resides in a distant State and has been in the habit, under the company's own direction, to pay an agent there; and has received no notice that the contrary will be required of him. He would have a just right to say that he had been misled.

Let us look at the matter as it stands. The business of life insurance is in the hands of a few large companies, who are generally located in our large commercial cities. Take a company located, like the plaintiff in error, in New York, for example. It solicits business in every State of the Union, where it is represented by its agents, who issue policies and receive premiums. Could such a company get one risk where it now gets ten, if it was expected or understood that it was not to have local agents accessible to the parties insured to whom premiums could be paid, instead of having to pay them at the home office in New York? The universal practice is otherwise. Local agents are employed. The business could not be conducted on its present basis without them. Now suppose the local agent is removed, or ceases to act, without the knowledge of the policy-holders, and their premiums become due, and they go to the local office to pay them, and find no agent to receive them; are these policies to be forfeited? Would the plaintiffs in error, or any other company of good standing, have the courage to say so? We think not. And, why not? Simply because the policy-holders would have the right to rely on the general understanding produced by the previous course of business pursued by the company itself, that payment could be made to a local agent, and that the company would have such an agent at hand, or reasonably accessible. We do not say that this course of business would alter the written contract, or would amount to a new contract relieving the parties from their obligation to pay the premium to the company, if they can find no agent to pay to. That obligation remains. But we are dealing with the question of forfeiture for not paying at the very day; and, in reference to that question, it is a good argument in the mouths of the insured to say: "Your course of business led us to believe that we might pay our premiums at home, and estops you from exacting the penalty of forfeiture without giving us reasonable notice to pay elsewhere." The course of business would not prevent the company, if it saw fit, from discontinuing all its agencies, and requiring the payment of premiums at its counter in New York. But, without giving reasonable notice of such a change, it could not insist upon a forfeiture of the policies for want of prompt payment caused by their failure to give such notice. In the case of *Insurance Co. v. Davis*, cited above, the agent's powers were discontinued by the occurrence of the war, of which all persons had notice; and the law of non-intercourse between belligerents prevented any payment at all; and the policy became forfeited and ended without any fault attributable to either of the parties. That case, therefore, was entirely different from the present; and it was in consequence of

such forfeiture in the absence of fault that we held, in the case of *Insurance Co. v. Statham*, 98 U. S. 24, that the insured was entitled to recover the equitable value of his policy.

In the present case it seems to us that the charge of the judge was in substantial conformity to the principles we have laid down. The insured, residing in the State of Mississippi, had always dealt with agents of the company, located either in his own State, or within some accessible distance. He had originally taken his policy from, and had paid his first premium to, such an agent; and the company had always, until the last premium became due, given him notice what agent to pay to. This was necessary, because there was no permanent agent in his vicinity. The judge rightly held that, under these circumstances, he had reasonable cause to rely on having such notice. The company itself did not expect him to pay at the home office; it had sent a receipt to an agent located within thirty miles of his residence; but he had no knowledge of this fact—at least, such was the finding of the jury from the evidence.

We think there was no error in the charge, and the judgment of the Circuit Court must be affirmed.

RECENT AMERICAN DECISIONS.

SUPREME COURT OF WISCONSIN, APRIL, 1878.*

ANIMALS.

Liability of owner of dog for trespass by dog.—One whose dog, while trespassing upon the close of another person, kills a domestic animal of the owner of the close, is liable to pay full compensation for the whole injury, though he had no previous knowledge of any vicious propensity of the dog. *Chanot v. Larson*.

CONTRIBUTORY NEGLIGENCE.

Slight contributory negligence will not prevent recovery.—It is the settled law of this State, that "slight negligence" is not a slight want of ordinary care, but merely a want of extraordinary care (*Dreher v. Fitchburg*, 22 Wis. 675, and other cases in this court); and such negligence on plaintiff's part will not prevent a recovery for injuries caused by a defective highway. *Griffin v. Town of Willow*.

MUNICIPAL CORPORATION.

1. *Negligence of defective streets: when unsafety matter of law.*—There being a depression in one of the traveled streets of a city, the authorities raised one-half in width of the street over the depression, by embankment some six feet high in the middle and gradually lessening toward each end; and the side of the embankment, next to that half of the street which was left in its natural state was precipitous and without railing or barrier. Held, that the street was unsafe, as a matter of law, even though each half was safe by itself. *Friedenau v. City of Mineral Point*.

2. *Fact that municipality has no means to repair, no defense to action for injury from unsafe streets.*—Proof in such a case that the defendant municipality has expended all the means at its disposal in repairing its streets will not excuse it, every municipality being bound, at its peril, to keep its highways in sufficient repair, or to take precautionary means to protect the public against danger of insufficient highways. *Id.*

3. *Contributory negligence by driver of private carriage imputable to owner.*—The driver of a private con-

*From O. M. Conover, Esq., State Reporter. To appear in 43 Wisconsin Reports.

veyance is the agent of the person in such conveyance, so that his negligence, contributing to the injury complained of by such person as caused by a defective highway, will defeat the action. (*Houfe v. Fulton*, 29 Wis. 296, as to this point approved.) Ib.

4. *Penal actions when civil actions.*—Penal actions for such violations of municipal ordinances as are not also misdemeanors are civil actions. (R. S., ch. 155, § 1. *Boscobel v. Bugbee*, 41 Wis. 59, explained.) *President, etc., of Platteville v. Bell*.

5. *Power of, to regulate hours of closing of saloons.*—Municipal authorities empowered by charter to regulate saloons, make ordinances for the government and good order of the municipality, and prescribe penalties for their violation, may by ordinance require the closing of liquor saloons at a reasonable hour (in this case 10 o'clock P. M.) Ib.

STATUTE OF FRAUDS.

Sale of interest in standing timber sale of interest in land.—A sale of an interest in standing timber, or of an interest in a contract of sale of standing timber, is a sale of an interest in land; and if by parol and wholly unexecuted, is void under the statute of frauds. *Daniels v. Bailey*.

COURT OF APPEALS, MARYLAND.*

BROKERAGE.

Right of brokers to lien.—Brokers do not usually possess the right of general lien, though, like other agents, they may be in a situation to exercise the right of particular lien. A cargo of sugar was imported by S., A. & Co. under letters of credit from the plaintiffs, dated July 27th, 1875, and arrived in Baltimore under bills of lading in the name of the plaintiffs, in accordance with the agreement between the plaintiffs and S., A. & Co. as contained in the letter of credit. Upon the arrival of the vessel, S., A. & Co. gave a receipt to the plaintiffs for the sugar specified in the bill of lading, in which it was stated that they agreed to hold the sugar on storage as the property of the plaintiffs, with liberty to sell the same and account to them for the proceeds, until the amount of drafts drawn on S. & B. of London, in pursuance of the letter of credit, and accepted by them against the cargo of sugar, should be satisfactorily provided for. The cargo was sold to McK., N. & Co. of Philadelphia, through the defendants as brokers, but before it was all delivered S., A. & Co. failed, on the 26th of August. The defendants were then, on the 27th of August, authorized to deliver the balance of the cargo and to draw for the proceeds. Upon the receipt of the money from the purchasers the defendants retained out of it the amount due them by S., A. & Co. for brokerage in selling other cargoes imported by them and not belonging to the plaintiffs. In an action brought by the plaintiffs against the defendants to recover the amount so retained, it was held, 1st, that the property in the sugar was in the plaintiffs under the letter of credit and S., A. & Co.'s trust receipt; 2d, that the property in the sugar so being in the plaintiffs, the defendants had no lien upon it for, and could not retain out of it, the amount due by S., A. & Co. for brokerage effected by them; 3d, that the only claim the defendants could legally assert against the cargo of sugar or its proceeds was for the amount of brokerage due

them for effecting a sale of that particular cargo. *Barry v. Bontinger*.

CORPORATION.

1. *Reservation of power to alter charter: authority of Legislature.*—Where in the original charter of a railroad company the Legislature expressly reserved the power to alter, repeal or annul the charter at pleasure, the question whether a proposed amendment of the charter is wise or consistent with the public interests and with the prosperity of the company, is one which by the charter is made to depend upon the wisdom and discretion of the Legislature, and is not a question to be determined by the courts. This construction of the terms of the charter is part of the contract, and all parties dealing with the company acquire and hold their rights subject to the reserved power of the Legislature to alter, repeal or annul the charter at its pleasure. And the court cannot presume that the power will be exercised by the Legislature arbitrarily or unjustly.

2. *Reduction of forces: validity of statute.*—In the original charter of the Cumberland and Pennsylvania Railroad Company, the Legislature expressly reserved the power to alter, repeal or annul the charter at pleasure. By the act of 1876, ch. 64, modified by the act of 1876, ch. 80, the rates of toll authorized to be charged by said company were reduced. Held, that both acts were constitutional. *American Coal Co v. Consolidated Coal Co.*

RECENT ENGLISH DECISIONS.

PARTNERSHIP.

Advance by way of loan: lender to share in profit and loss: Partnership Amendment (Bovill's) Act, 1865 (28 & 29 Vict., c. 86), § 1.—By an agreement made between M., S., and D., after reciting that M. and S. had agreed to become partners together in business upon the terms and subject to the stipulations with each other and with D. thereafter contained, and reciting the 1st section of the Partnership Amendment Act, 1865, and that D. had agreed to lend them 10,000*l.* for the purpose of investing the same in the said business, it was agreed that M. and S. should be partners together under the firm of H. and Co. for three years from the 1st July, 1869; that the capital should consist of the said sum of 10,000*l.*, and such further sum as might be advanced by any of the parties to the agreement, such sum of 10,000*l.* and further advances to bear interest at five per cent per annum; that the said sum of 10,000*l.* was advanced by D. to M. and S. by way of loan under the 1st section of the Partnership Amendment Act, 1865, and should not be considered to render D. a partner in the said business; that yearly accounts current should be remitted to D., and the yearly profit or loss divided between D., M., and S. in certain proportions; that in case of the death of any of the partners, or in case his original capital of 10,000*l.* should be reduced by losses to one-half, D. should have the option of dissolving the partnership; and that in case of D.'s death his executors should not withdraw his capital until the expiration of the contract. The agreement was twice renewed for two successive periods of three years each in 1872 and 1875. M. and S. filed a liquidation petition in 1876, and D. sought to prove in the liquidation for 671*l.*, being the amount of further advances made by him in addition to the

* To appear in 46 Maryland Reports.

10,000l. originally advanced. *Held* (affirming the decision of Bacon, C. J.), that the agreement constituted him a dormant partner, and that he could not prove in competition with the creditors of the firm. Ct. App., January 24, 1878. *Ex parte Delhasse. Re Megevand*, 88 L. T. Rep. (N. S.) 106.

STATUTE OF FRAUDS.

Acceptance and receipt: acceptance by agent.—Defendant verbally agreed to purchase a specific quantity of barley from the plaintiff, on the terms that the bulk should be well dressed and equal to sample. The plaintiff accordingly delivered an installment of the barley to defendant, whose foreman received it and gave a receipt marked "not equal to sample." Next morning defendant himself inspected the bulk, and wrote immediately to plaintiff refusing to accept on the ground that the barley was not well dressed nor equal to sample. *Held* (affirming the decision of the Common Pleas Division), in an action by plaintiff for goods sold and delivered to defendant, that there was evidence for the jury of an acceptance sufficient to satisfy section 17 of the Statute of Frauds. Ct. App., February 15, 1878. *Kibble v. Gough*, 88 L. T. Rep. (N. S.) 204.

RECENT BANKRUPTCY DECISIONS.

AGENCY.

When bankrupt agent: misappropriation.—The bankrupt, prior to the commencement of the proceedings, purchased goods of one Q., and gave therefor four notes, secured by a mortgage on the goods, under an agreement to sell the goods and apply the proceeds to the payment of the notes, even before maturity, if sales were brisk enough. He sold part of the goods, and appropriated the proceeds to his own use, and the remainder came into the hands of the assignee. *Held*, that the bankrupt was in effect an agent for the sale of the goods; that the goods remaining unsold should go to Q., and that he should be allowed to prove as an unsecured creditor for the goods sold by the bankrupt and misappropriated, on surrendering the notes and mortgage. U. S. Circ. Ct., Indiana. *Overman v. Quick*, 17 Nat. Bankr. Reg. 235.

CONTRACT.

Filing petition in bankruptcy: breach of contract for employment: damages.—The filing of a petition in bankruptcy by a corporation is, *ipso facto*, such a breach of a contract of employment as will give the employee a right of proof for damages which he may have sustained thereby against the estate of the corporation. It is no objection to a proof that the court or a jury may find difficulty in assessing damages for a breach of an absolutely broken contract; so also as to contingent debts, where the contingency happens before the close of the bankruptcy. Where the contract of employment was to run for ten years, and the parties bound themselves in the sum of ten thousand dollars by way of liquidated damages, and it appears that in a prior contract the sum had been called both a penalty and liquidated damages: *Held*, that it was a penalty. U. S. Dist. Ct., Massachusetts. *Ex parte Pollard; In re Elliott Felling Mills*, 17 Nat. Bankr. Reg. 228.

EVIDENCE.

Authentication of records: certificate of discharge in bankruptcy.—The act of Congress of 1790, in relation to authentication of records, does not relate to pro-

ceedings in the Federal courts. A certificate of discharge in bankruptcy, signed by the judge and attested by the clerk under the seal of the court, is not only sufficiently authenticated, but is precisely the means by which the bankrupt is to prove and to have the benefit of his discharge. Sup. Ct., Louisiana. *Miller v. Chandler*, 17 Nat. Bankr. Reg. 251.

JURISDICTION.

When State court has: mortgage.—A State court has jurisdiction of an action brought by an assignee in bankruptcy to foreclose a mortgage belonging to the estate. To entitle a mortgagee to have a receiver appointed, it must clearly appear that the mortgaged premises are an inadequate security for the debt, and that the mortgagor, or other person personally liable for the debt, is insolvent. Sup. Ct., 4th Dept., New York. *Burlingame v. Parce et al.*, 17 Nat. Bankr. Reg. 246.

PREFERENCE.

Surrender of proceeds of, can only be made to assignee.—P. & D., being insolvent, made an assignment of all their copartnership property to "A," their largest creditor, upon which they were adjudicated bankrupt. At the first meeting of creditors, A, having sold out the partnership goods and collected its notes and accounts in part, appeared before the register and offered to surrender to him a roll of uncounted bills as the net proceeds of the fraudulent preference, to prove his debt and vote for assignee. *Held*, that the surrender of a fraudulent preference can only be made to the assignee, and pending his appointment and qualification the proof of debt must be postponed, and the offer of the preferred creditor to vote for assignee be denied. U. S. Dist. Ct., E. D. North Carolina. *In re Parham & Dunn*, 17 Nat. Bankr. Reg. 300.

TRADESMAN.

Who is, within meaning of bankrupt law: firm: manufacturing corporation.—The word "tradesman," as used in section 5110 of the U. S. Revised Statutes, refers to a smaller class of merchants. The members of a firm which owns a farm and carries on business in connection therewith, but who have not carried on any business of merchandising or held themselves out to the community in that capacity, are not "tradesmen" within the meaning of the act. Nor will their connection with a manufacturing corporation as stockholders and officers constitute them merchants or traders where such corporation is not itself in bankruptcy. U. S. Circ. Ct., E. D. Missouri. *In re Stickney*, 17 Nat. Bankr. Reg. 305.

UNITED STATES SUPREME COURT ABSTRACT.

CORPORATE STOCK.

Holder of, as collateral security, liable for unpaid balance thereon.—An assignee of corporate stock who has caused it to be transferred to himself on the books of the company, and holds it as collateral security for a debt due from his assignor, is liable for unpaid balances thereon to the company, or to the creditors of the company after it has become bankrupt. Judgment of U. S. Circuit Court, N. D. Illinois, affirmed. *Pullman, plaintiff in error, v. Upton, assignee.* Opinion by Strong, J.

COSTS.

Printing records of court taxed to losing party.—The provision of the act of Congress, passed March 3, 1877,

as to the expense of printing the records of the Supreme Court, is still in force, and the cost of such printing paid by the government must, by law, be taxed to the losing party. *Indianapolis & St. Louis R. R. Co. v. Vance*. Opinion by Walte, C. J.

EVIDENCE.

Parol testimony to vary written instrument: showing absolute deed to be a mortgage.—The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the objects and purposes of the parties in executing and receiving the instrument. Thus it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. These purposes and objects are always considered by a court of equity, and constitute the principal grounds of its jurisdiction, which is exercised to give effect to them, or to restrain them so as to prevent fraud or oppression and to promote justice. Accordingly a deed absolute in form, and recorded as such, may be shown to be a mortgage by parol testimony. Decree of Supreme Court of District of Columbia reversed. *Peugh, appellant, v. Davis*.

STATUTE OF FRAUDS.

Part delivery, what constitutes: when question for jury: liquor and labels.—Defendant, while in New York, ordered over \$4,000 worth of spirituous liquor from plain tiffs, to be sent to him in Michigan. At the time, and as part of the agreement for the sale of the liquors, plaintiffs agreed to furnish certain labels, which were copyrighted and furnished exclusively by them, and which added value to the liquor when attached to the packages containing it, without extra charge. The labels were delivered to defendant in New York and the liquors shipped to him in Michigan. By the laws of the latter State, the sale of spirituous liquor is forbidden, and contracts founded on such sale are void. Held, that it was for the jury to determine whether the labels constituted a part of the goods sold to defendant so as to render a delivery of them in New York a sufficient delivery within the statute of frauds, and thus render the contract a New York one and not a Michigan one, and notes given for the purchase-price of the liquors valid, and a verdict for plaintiff on such notes would not be set aside. Judgment of U. S. Circuit Court, E. D. Michigan, affirmed. *Garfield, plaintiff in error, v. Paris*. Opinion by Clifford, J.

TRUSTS.

When court will not remove trustee: mutual ill-will between trustee and cestui que trust.—Complainant brought her bill in chancery to have defendant removed from his place as trustee in a deed made to secure to her the payment of a bond for \$38,000, which was in defendant's possession, and which she prayed might be delivered to her. Defendant asserted a lien on the bond for \$5,000 for legal services rendered to complainant. Held, (1) that while in a case where the trustee has a discretionary power over the rights of the cestui que trust, and has duties to discharge which necessarily bring him into personal intercourse with the latter, a state of mutual ill-will or hostile feeling may justify a court in removing the trustee, it is not sufficient cause where no such intercourse is required and the duties are merely formal and minis-

terial, and no neglect of duty or misconduct is established against the trustee. Decree of Supreme Court of District of Columbia reversed. *McPherson v. Cox*. Opinion by Miller, J. Walte, C. J., dissented.

2. *Contract as to payment of lawyer for services when not champertous nor void under statute of frauds.*—A contract to pay a specific sum of money to a lawyer for his services in a suit concerning real estate out of the proceeds of said land when sold by the client, if recovered, is not champertous, because he neither pays costs nor accepts the land or any part of it as his compensation. Nor is it void under the statute of frauds because not in writing, for it may be performed within the year. *Ib.*

8. *Lien of attorney on securities in his hands for services.*—The land being recovered in the action in which the attorney was employed, and sold by the owner for \$38,000, for which a bond was taken and left with the attorney, he has a lien on the bond for his fee, both by express contract and by reason of the lien which the law gives an attorney on the papers of his client left in his hands, for any balance due him for services. *Ib.*

4. *Attorney also trustee: lien of, on trust securities.*—Where, under the circumstances mentioned, the client brings a bill in chancery to remove the attorney from his position as trustee in a deed to secure the purchase-money and for a delivery of the bond, it is the duty of the court to decide on the existence and amount of the lien set up by the attorney in his answer, and to decree the delivery of the bond on payment of amount of the lien, if one be found to exist. *Ib.*

Practice: failure to file cross-bill.—Though the defendant, by neglecting to file a cross-bill, can have no decree for affirmative relief, it is proper that the court should establish the conditions on which the delivery of the bond to complainant, according to the prayer of the bill, should be made, and require it to be done on that condition being complied with. *Ib.*

COURT OF APPEALS ABSTRACT.

APPEAL.

What is not appealable order to this court: discretion: opening judgment by default.—When a defendant asks to have a judgment by default opened, the sufficiency of the excuse given by him for suffering the default, and the propriety of granting him the relief which he asks are matters within the discretion of the court below, and the order is not appealable to this court. It is not rendered appealable by section 190, sub-divisions 2 and 3 of the new Code, which excludes from review here, orders made during the pendency of the action. Besides the case is expressly provided for by section 1337 of the new Code, which declares that an appeal from an order made after judgment, brings up questions not resting in discretion. Appeal dismissed. *Lawrence v. Farley*. Opinion by Rapallo, J. [Decided March 26, 1878.]

CONTRACT.

Mutuality: statute of frauds: sale of personal property.—Where there is a parol agreement to sell personal property over \$50 in value, and an agreement in writing signed by the purchaser only and delivered by him to the seller, there is a binding agreement which can be enforced against the purchaser, and he cannot

defeat the action on the ground of a want of mutuality. Judgment below affirmed. *Mason v. Decker*. Opinion by Earl, J.

2. Measure of damages for breach of contract of sale.—In case of a failure of the buyer to perform, the seller, in this State, has his election to consider the property his own, the buyer having forfeited his right under the contract, or as belonging to the buyer. In the former case his remedy is to sue the buyer for damages in not taking the stock, and the measure of damage is the difference between the contract price and the market price. In the latter case he may sell the property as the agent for the purchaser, and apply the proceeds upon the purchase-price, and recover the balance, if any, or he may sue for the purchase-price. *Ib.*

[Decided February 22, 1878.]

COVENANT.

By grantee limiting use of real property: rights of beneficiary: estoppel.—H., the owner of six lots, four on 5th ave. and two on 26th street, which occupied the entire block from 26th to 27th street, excepting a single corner lot, conveyed lots to various persons, successively—A, B, C, and plaintiff. In the deed given to each and signed by each grantee, as well as the grantor, the grantee covenanted that neither he nor his heirs, etc., would "erect upon said lot any other building than a genteel dwelling-house, etc., but not to a greater depth than fifty feet," which covenant was declared to be a continuing covenant for the benefit of the owner of lots, then owned by H., so that the same might have "freedom of air, light and vision." Defendant who took title under the conveyance third in order (from H. to C), notified plaintiff that he intended to erect a building more than fifty feet in depth, which building would interrupt the view from plaintiff's house, which was on 26th street, and render it less desirable as a residence. In an action to restrain the erection of such building, *held*, (1) that defendant's notice that he intended to violate the covenant was sufficient to authorize a court of equity to interfere to prevent him; (2) that the fact that the owner of the lot conveyed to A, had erected an obstruction in violation of the agreement in his deed, even if plaintiff acquiesced, would not relieve defendant so long as the performance of his covenant was of substantial value to plaintiff; (3) that the fact that plaintiff had acquiesced in the change of some of the buildings on the lots other than hers, to a hotel, would not deprive her of a right to relief, and (4) that a permission given by plaintiff to the grantee, from her, of one of the lots on 5th ave., which was conveyed to her by H., to erect a building more than fifty feet deep, would not relieve defendant unless it was shown that plaintiff thereby destroyed her easement, and it was upon defendant to show this. Judgment below modified. *Lottimer v. Livermore*. Opinion by Earl, J.

[Decided January 15, 1878.]

EQUITABLE ACTION.

When debtor does not hold property in trust for creditor.—Plaintiffs agreed to construct a railroad for a company upon terms mentioned, and in case they did not comply with their agreement, to forfeit the rights and franchises secured to them therein. They did nothing under the agreement but advanced £14,000 which was used in constructing the road. *Held*, that

they were only ordinary creditors and had no lien on the road or its franchises, or any trust interest therein, and that the purchaser, at a *bona fide* sale and transfer of the road, took it free from any claim of plaintiffs for the moneys advanced by them. Judgment below affirmed. *Thornton v. St. Paul & Chicago Railway Co.* Opinion by Earl, J.

2. Joining legal and equitable claim: when complaint should be dismissed.—An equitable action was commenced by plaintiffs against the St. P. & C. Railway Co. and others for equitable relief. Plaintiffs had a legal cause of action against the railroad company. A jury trial was demanded by defendants and refused and the court tried the case at Special Term and found that plaintiffs were not entitled to equitable relief, but refused to pass upon their legal claim, and ordered that the action might thereafter be brought to trial before a jury as to the legal cause of action against the railway company. *Held*, error. The complaint should have been dismissed as to all the defendants. *Ib.* [Decided January 15, 1878.]

MASTER AND SERVANT.

Duty of master to furnish safe machinery: knowledge of servant: railroad track: presumption of knowledge in locomotive engineer.—A railroad company is bound to furnish a safe road-bed and track for the use of its employees who travel on its trains. But if an employee has knowledge of the fact of the track being defective, or has as good an opportunity to know it as his principal has, and voluntarily continues to use it in the service of the company, he cannot recover for an injury caused by such defect. It cannot be said, however, as a matter of law, that an engineer riding over a track on an engine has as good an opportunity to know of the defects in the track as the company or its employees charged with examining the track, and a general knowledge that the track is somewhat out of repair will not constitute negligence on his part so as to defeat a recovery for his death caused by a defective rail. Judgment below affirmed. *Mehan v. Syracuse & Binghamton Railroad Co.* Opinion per *Curtam*.

[Decided March 19, 1878.]

PRACTION.

1. General exception, when not tenable.—A general exception to the refusal of a judge to correct his findings and make them conform to the facts proved, *held*, too vague to raise any point. Order below affirmed. *Krekeler v. Thaulé*. Opinion by Rapallo, J.

2. Evidence: statements of one claimed to be agent of party not in presence of party.—Conversation between a witness and plaintiff's husband in plaintiff's absence, *held* not admissible against plaintiff, even though the husband was claimed to be plaintiff's agent, it not being shown that such conversation accompanied any act he was doing as such agent. *Ib.* [Decided April 16, 1878.]

WITNESS.

What party may not testify to, under § 399, old Code: remarks by deceased to third person in presence of witness.—In an action to foreclose a mortgage given by defendant to plaintiff's testator, defendant testified that he, testator, and one V. had an interview in which there was a transaction about the mortgage between them, and that all three of them participated in the conversation. *Held*, that defendant

could not, under old Code, § 399, testify to remarks made by testator to V. in relation to the mortgage. In such a case a party may testify to an independent conversation between the deceased and a third party. But if he participated in the conversation and it related to a transaction between him and the deceased, he could not testify. Judgment below affirmed. *Kranshaar v. Meyer*. Opinion by Earl. J. [Decided January 29, 1878.]

CORRESPONDENCE.

CONVEYANCE OF LAND TO HUSBAND AND WIFE SINCE ACTS OF 1848 AND 1849.

To the Editor of the Albany Law Journal:

SIR—Your correspondent, B. (in your issue of 4th inst.), seems to be hard to please, or over-skeptical. It is true that in neither *Wright v. Sadler*, nor in any other reported case (that I am aware of), has the Court of Appeals passed directly upon the effect of the Acts of 1848-9 upon a conveyance to husband and wife jointly, made since the passage of those acts; but it can scarcely be claimed as an open question (to say the least) if the following authorities are to be considered, viz.: 31 Barb. 314, *Goelet v. Gort*; 49 id. 155, *Farmers', etc., Bank v. Gregory*; 3 N. Y. Sup. Ct. (T. & C.) 574, *Fremant v. Barber*; 5 id. 568, *Beach v. Hollister*; 11 Hun. 519, *Baker v. Lamb*.

Perhaps B. will favor us with a General Term decision or two to the contrary. 47 N. Y. 467, and 54 id. 487, are not to the point.

J. C. L.

NEW YORK, May 6, 1878.

SUMMARY PROCEEDINGS.

To the Editor of the Albany Law Journal:

SIR—Will you inform the inquirer whether under the statute (2 R. S. 513, § 28, sub. 2,) a tenant can be dispossessed for non-payment of rent where the agreement under which he holds contemplates the use of various articles of chattel property, the use of which is worth much more than that of the premises, together with the premises, and does not discriminate or sever the rent from the consideration for the use of the chattels, but binds the tenant to pay "for the use of said premises and said chattel property \$400 per year." Now, if a part of this sum (\$240) has been paid, can the landlord have summary proceedings to dispossess the tenant, and if so, what amount should he state as due for rent?

INQ.

NOTES OF RECENT CRIMINAL DECISIONS.

BURGLARY: AT NIGHT.—A store was broken into on a Friday night, and on Sunday morning B. was found in possession of the goods. He was indicted for burglary at night and was tried and convicted. On his trial he was unable to show how the goods came into his possession. A witness for the State was only absent from the store between the hours of 5 P. M. and 7 A. M., and during his absence the burglary was committed. *Held*, that the fact of defendant having possession of

the goods so soon after the burglary, and his inability to account for the same, was sufficient to prove the charge, and that it being in the winter season between the hours of 5 P. M. and 7 A. M., sunset and sunrise, was sufficient to prove that the burglary occurred in the night. Sup. Ct., Georgia, 1878. *Brown v. State*.

LARCENY: JOINDER OF SEPARATE LARCENIES IN INDICTMENT.—An indictment against J. for larceny contained two counts, one for stealing two steers, the property of W., and the other for stealing two oxen, the property of A. A demurrer was sustained on the ground that the indictment charged more than one offense with leave to the State to elect on which count to prosecute. The State refused to elect, and the cause was dismissed, whereupon the State appealed. *Held*, separate larcenies cannot be joined in same indictment. If so, on demurrer, the State must elect. Apparently two larcenies are charged. If the State meant to charge but one offense, her attorney should have stated to the court, and made it appear of record. In a second count there was no use to meet uncertainty of proof as to ownership. Judgment affirmed. Sup. Ct., Arkansas. *State v. Jourdon*.

TRIAL: FORMER JEOPARDY.—C was indicted for stealing a number of articles together, and the jury found him guilty of stealing some of them specified in the verdict. On defendant's motion a new trial was granted. The grand jury the next term found a new bill for the same offense, charging the same articles as in the first. Because of the finding of the second indictment the court quashed the first. To the second indictment, a plea of former jeopardy was sustained, and the State appealed. *Held*, that in legal effect the conviction of stealing some of the articles named in the first indictment was an acquittal of stealing the other articles named; that the quashing of the first indictment, upon the finding of the second, would not deprive defendant of this bar. The new trial was granted only as to articles of which he had been convicted of stealing, and the first indictment being quashed, he may be tried on the second only on those articles. Sup. Ct., Arkansas. *State v. Clark*.

NEW BOOKS AND NEW EDITIONS.

RHODE ISLAND REPORTS, VOLUME XI.

Reports of cases argued and determined in the Supreme Court of Rhode Island. Volume XI. Arnold Green, Reporter. Boston: Houghton, Osgood & Company. 1878.

THE Rhode Island Reports are among the most valuable law reports published, and the present volume is fully equal in every respect to any of its predecessors. It has an unusually large number of cases of general interest and value, among which we can only make selections. *Daniels v. Town of Woonsocket*, p. 4: Proposals made in negotiations for a compromise are privileged communications. *Manuf. and Merch. Bank v. Follett*, p. 98: A note payable to the order of W. and signed by G. was, before issue, indorsed by F. At the request of W. the signature was changed to "G. agent," *Held*, immaterial and not to discharge F. *Francis v. Baker*, p. 108: A statute requiring actions involving accounts to be referred to an auditor and making the auditor's report *prima facie* evidence at the trial of the matters contained therein, *held* unconstitutional as impairing the right of trial by jury. *Aldrich v. Tripp*, p. 141: Water commissioners of water-works, where the city

receives the rents for the water and owns the water-works, are servants of the city and the city is liable for their negligence. *Allen v. Woonsocket Co.*, p. 288: A corporation whose business was not specified and nothing in its name designated is held capable of entering into partnership with an individual. *Beals v. Providence Rubber Co.*, p. 381: A covenant on the part of a lessee to pay all taxes of every name and nature "held not to include an assessment for benefits from street improvements. *Paine v. Schenectady Insurance Co.*, p. 411: A judgment in New York, though appealed from, held a bar to an action in Rhode Island involving the same subject-matters. *Heeny v. Sprague*, p. 457: Defendant, in violation of a city ordinance, permitted snow to remain on the sidewalk in front of her premises. Held, that she was not liable to one injured by slipping down on the sidewalk. *Smith v. Rollins*, p. 465: A livery-stable keeper, in violation of the Sunday law, let a horse and carriage to defendant to go for pleasure to a particular place. Defendant went to a different place and returned the horse injured. Held, that an action of trover for the injury would not lie against defendant. *Williams v. Briggs*, p. 476: A mortgage of personal property to be thereafter acquired is not valid as to that property at law. *Cook v. Corthell*, p. 482: Such a mortgage is valid in equity. *Thornton v. Kelly*, p. 498: Plaintiff made a memorandum wherein he agreed to sell defendant a horse at a certain price. Defendant as well as plaintiff signed this memorandum. Held, that defendant was bound. *Inman v. Tripp*, p. 520: A city is liable for damage done by water gathered by its street gutters and thrown on plaintiff's land. *Durfee v. Jones*, p. 588: Plaintiff left with defendant an old safe he had bought, with instructions to sell. Defendant found in the safe money belonging to an unknown person. Held, that as against plaintiff defendant was entitled to retain the money. The work of the reporter is well done, the volume is excellently printed on fine paper and bound in the best manner.

OBITUARY.

MURRAY HOFFMAN.

Murray Hoffman died at his home in Flushing, N. Y., on the 7th inst. He was born in the city of New York September 29, 1791, and was graduated from Columbia College in 1809. A few years thereafter he was admitted to the bar, and from 1839 to 1843 was Assistant Vice-Chancellor. In November, 1853, he was appointed Judge of the Superior Court, a position in which he remained until the close of 1861. Among the legal works which he published are the following: "Offices and Duties of Masters in Chancery," "Treatise on the Practice of the Court of Chancery," "Treatise on the Corporation of New York as Owners of Property," and "Compilation of the Laws relating to the City of New York," and "Chancery Reports," (1839-40.) "Provisional Remedies," "Treatise on the Law of the Protestant Episcopal Church in the United States," "Ecclesiastical Law."

FRANKLIN W. TOBEY.

Franklin W. Tobey died during a passage from Savannah to New York on the 5th inst. He was born at Jay, Essex Co., N. Y., Feb. 7, 1844. He was admitted to the bar in 1868, and practiced at Port Henry, N. Y., up to the time of his death. He was a member of the Assembly for two terms and of the State Senate for a like number of terms.

NOTES.

THE Southern Law Review for April-May, 1878, is full of good things. The opening article by Orlando F. Bump, Esq., contains a very thorough examination of the effect of exemption laws upon fraudulent conveyances, and compares the conclusions reached in the various cases where that question is touched upon. "Receivers on Railways" is a practical treatise by Leonard A. Jones, Esq., upon a subject of great present importance. Mr. Joel Prentiss Bishop contributes a very readable and useful article about law books, entitled "The tools of the legal trade and how to choose them." Mr. Justice Miller, of the United States Supreme Court, furnishes an able essay which he styles "Introductory to Constitutional Law." "The Theory of Estates by the Entirety," by Harrington Putnam, Esq., is the closing article, and in it the subject mentioned is discussed in a learned and logical manner. The editorial matter as usual is interesting and the digests are of great practical value.

In the case of *Hagg v. Darley*, decided by Vice-Chancellor Bacon, it appeared that by a deed dated February 3, 1877, the plaintiff purchased from the defendant the interest and good will in a business (carried on under the name of the "Government Sanitary Company" at Dunstable and Hackney Downs) of making and selling the "Government Carbolic Disinfectants," the process of making which was a secret in the possession of the defendant, and communicated by him to the plaintiff; and the defendant thereby covenanted not to carry on the like business for fourteen years, and not to disclose the secret for the same period. The plaintiff claimed that the defendant was violating this agreement and for an injunction. The defendant demurred to the complaint on the ground, among others, that the covenant was in restraint of trade and too general. The court held the covenant valid and overruled the demurrer.

In the case of *Hagg v. Darley*, decided in the Chancery Division of the English High Court of Justice on the 25th of March last, it was held that a covenant in restraint of trade, although it is unrestricted in respect of space, is reasonable and therefore good in law, if it relates to the use of a trade secret. In this case the purchaser of the business of certain manufacturers and sellers of well-known disinfectants by his statement of claim alleged, that the mode by which those disinfectants were manufactured was a secret, that the vendors of the business (of whom the defendant was one) had at the time of the sale entered into a several covenant not to carry on the business of manufacturers or sellers of such disinfectants, or other articles of a similar kind, within fourteen years from that date, and that the defendant had infringed this covenant.

PUBLISHERS' NOTICE.

WE would call attention to the advertisement of the Fearless Threshing Machine, which appears in another column. We have not space to give a full description of this valuable machine, and would simply state that its mechanical execution is superior to that of any other, and that it is confidently believed to be the best in the world. Parties desiring a Threshing Machine would do well to communicate with Mr. Miuard Harder, before purchasing elsewhere.

SUPPLEMENTS containing the General Statutes of the State of New York are sent only to those subscribers to the LAW JOURNAL who forward one dollar, in addition to the regular annual subscription price of the LAW JOURNAL. The Supplements will be sent to non-subscribers to the LAW JOURNAL on receipt of \$2.50.

The Albany Law Journal.

ALBANY, MAY 18, 1878.

CURRENT TOPICS.

AMONG the items in the supply bill vetoed by the governor, are those appropriating various sums of money for the support of law libraries in different parts of the State. The reason given by the governor for his action is the same advanced by him a year ago when vetoing similar appropriations, namely, that "there is no more reason for supplying lawyers with their books than in supplying doctors and clergymen with theirs, or farmers and mechanics with their implements and tools." The reason is a good one, but it does not apply. These appropriations are made for the support of public and not private libraries. The law library of a judicial district is as necessary for the use of the courts sitting therein as is a court-room, and it would be as much to the point to say that appropriations should not be made for the building of court-houses, because there is no more reason for supplying lawyers with a place to do business in than there is for supplying clergymen with a place to preach in. The libraries are for the use of the judges, and are chiefly used by them, and the use by the bar is only incidental and occasional. The governor suggests that the courts may be supplied with the law books needed by them by voluntary associations, which must of course be made up from the legal profession. We have no doubt that the bar will do its best in that direction, but it is not right for the State to ask it to do so.

The Senate on the 10th inst. passed the bill to repeal the bankrupt law, amended so as to make the act go into effect on the 1st of September next. This amendment was a concession to the friends of the existing law who have gained considerable strength in the Senate. We trust the House will concur in the amendment, as a refusal to do so might imperil the success of the movement for repeal. While an immediate, unconditional repeal of the existing statute is what is demanded by the great majority of the people, there is an influential and active body who oppose such a course. The only danger to the movement for repeal is in a disagreement of the two houses, which the friends of the law will do their utmost to bring about.

The constitutional amendments which were prepared by a commission appointed by Governor Tilden, and which had been passed at a former session of the Legislature, failed to receive the sanction of the Legislature which has just adjourned. This will be regretted by all who favor reform in municipal legislation. The regret, however, will be modified by the circumstance that so strong an opposition had been made to one of the amendments, that its adoption by the people was extremely improbable. We presume that no further attempt will be made to change the Constitution in respect to the government of cities.

An amendment to article 6 of the Constitution providing for the election of an additional Justice of the Supreme Court, in the second Judicial District, was passed. This had received the approval of a former Legislature. It will of course be adopted by the people.

The Legislature adjourned *sine die* on Wednesday last. It left undisposed of a number of important measures. The uncompleted work of most interest to the profession is of course that relating to the Code of Civil Procedure. The veto by the governor of the bill enacting the last nine chapters of the Code was effectual to accomplish its purpose, but nothing further was done, and our practice is left in substantially the same condition as before. The proposed joint resolution providing for a commission to codify the existing statutes and report to the next Legislature failed to receive the sanction of the Assembly, but the Senate passed a resolution providing for a committee of three senators to consider the Code and report the result of their deliberations to the next Legislature.

It is to be regretted that the matter of codification was not finally disposed of by the late Legislature. That our statute law requires revision is admitted by every one, and hardly a year has passed since the adoption of the Constitution of 1846 without an attempt to secure the assent of the Legislature to some scheme of revision. As a result of all this we have obtained only the statute known as the Code of Procedure and that known as the Code of Civil Procedure. The first named was prepared to serve a temporary purpose, and the last is but part of a complete work. The subject will of course come up before the next Legislature, and before every succeeding one until provision is made for a comprehensive revision of our entire statute law.

In the case of *Ex parte Clarke*, appearing elsewhere in our present issue, the Supreme Court of Appeals of Virginia in decided terms pronounces against the attempts which are being made in that State to break faith with the public creditors. The obligation resting upon the legislative authorities of

the State to provide for the payment of interest upon the public debt the court considers to be binding as any other obligation or duty. We suppose that the views of the court are not popular in Virginia at the present time, but they are correct.

The prospect of war between England and Russia, and the probability that one of the belligerents will seek material assistance in the way of vessels and arms in our own country has led to considerable discussion in the newspapers here and in England upon the subject of the rights and obligations of neutrals. As long as no war actually exists there can be no difficulty, as either nation may buy arms and equip vessels to any extent, but when hostilities actually commence the case will be different. The doctrines which were insisted upon by the United States in the negotiations in relation to the Alabama treaty, and assented to by England, cannot, now that we occupy the position of a neutral, be repudiated, and we believe that our government will do all that we claimed England should have done during the rebellion, to prevent the fitting out here of war vessels for the use of either belligerent.

Dr. Spear gives this week a critical review of the "English Extradition Act" so far as it relates to the issue that existed between Mr. Secretary Fish and Lord Derby in the matter of the Winslow case. This article will be followed, at intervals, by two others on International Extradition, namely, the Constitutionality of Extradition Treaties and Extradition Procedure, and by two or three articles on Interstate Extradition. When completed, this series of articles will constitute the most philosophical discussion of the principles, and the most exhaustive presentation of the law of Extradition that has ever been published.

The Supplement issued with this number of the LAW JOURNAL contains, among other statutes, two acts relating to public instruction, an act for the protection of graves, an act relating to exemption from taxation, and the act to provide for the incorporation of Pipe Line Companies.

NOTES OF CASES.

IN the case of *Second National Bank v. Hemingway*, 81 Ohio St. 168, it is held that the right of set-off in an action is governed by the law of the place where the action is brought. In this case an action was brought in Ohio by the indorsee against the maker of a promissory note payable to order, executed in Kentucky, and indorsed before due. The court held that a Kentucky statute which declares such notes "assignable so as to vest the right of action in the assignee," but provides that such assignment shall not "impair the right to any off-

set the defendant has or might have used" against the payee, did not give to the maker of the note a right to set off a debt due to him from the payee. The court says, laws of set-off relate to the remedy and not to the right, and therefore the law of the forum and not the law of the place of contract must govern in such cases. The object of laws of set-off is to prevent multiplicity of actions. No such thing was allowed at common law. See, to the same effect, *Davis v. Morton*, 5 Bush, 160. This was an action brought in Kentucky by the indorsee of a negotiable promissory note made in Tennessee, where such notes are negotiable as commercial paper, and indorsed before due. The defendant pleaded a set-off of a claim against the maker of the note. The court held that, under the statute in question, the set-off was allowable, the law of Kentucky governing. The court there says: "A set-off is but a part of the remedy," and persons "seeking our forums should be satisfied with the administration of remedies according to our laws." See, also, *Ory v. Winter*, 16 Martin, 277; *Peck v. Hibbard*, 26 Vt. 702; *Aymer v. Sheldon*, 12 Wend. 439. See, however, *Gibbs v. Howard*, 2 N. H. 297; *Holland v. Makepeace*, 8 Mass. 422; *Fuller v. Steiglele*, 27 Ohio St. 855.

A statute of Pennsylvania, passed in 1867, provides that "any railroad corporation that shall exclude from their passenger cars any person or persons on account of color or race," etc., "shall be liable in an action of debt to the person thereby injured in the sum of five hundred dollars, the same to be recovered in an action of debt as like amounts are now by law recoverable." In the case of *Central Railroad Co. of New Jersey v. Green*, 5 W. Not. Cas. 300, decided by the Supreme Court of Pennsylvania, on the 16th of March last, it was held that the damages recoverable are in the nature of a penalty against the railroad company, and not compensation to the person aggrieved, and a recovery by one person thus excluded, in contravention of the provisions of the act, is a bar to a future recovery by another person excluded at the same time. In this case a husband and wife were refused access to a particular car on a railroad train at the same time by the same employee of the company, and it was held that the exclusion of the two constituted a single offense, and that a recovery in an action by the husband and wife, in the right of the wife, was a bar to a recovery in a subsequent action by the husband in his own right. The inclination of courts against multiplying penalties of this nature is very strong, and the laws imposing them are very strictly construed. See *Hill v. Williams*, 14 S. & R. 287; *Commonwealth v. Borden*, 11 P. F. Smith 272; *Hardyman v. Whittaker*, 2 East, 573; *The King v. Bleasdale*, 4 Term, 809; *Pike v. Madbury*, 12 N. H. 262. In *Fisher v. N. Y. Central & Hud. Riv. R.*

R. Co., 46 N. Y. 644, it was held that, under a statute providing that "any railroad company which shall ask and receive a greater rate of fare than that allowed by law shall forfeit fifty dollars, which sum may be recovered together with the excess so received by the party paying the same," only one penalty of fifty dollars, with the excess of fare, could be recovered for all acts done with the party bringing the action previous to its commencement. The same doctrine was applied in *Sturgis v. Spofford*, 45 N. Y. 446. But in *Suydam v. Smith*, 52 id. 383, where a penalty was imposed by the statute "for each offense," it was held that the party aggrieved could recover for each offense.

In the case of *Allen v. Woonsocket Company*, 11 R. I. 288, a corporation existed under a charter wherein there was no specification of the kind of business to be done, nor did any thing in the corporate name suggest it. All the stock was held by one person. This corporation entered into partnership with one Allen, which under the contract might be terminated at the will of the corporation. This contract was held not to be *ultra vires* on the part of the corporation. There are several authorities which seem to hold the view that corporations cannot enter into a partnership. See *Charlton v. New Castle & Carl. Ry Co.*, 5 Jurist (N. S.), 1097; *Whittenton Mills v. Upton*, 10 Gray, 582; *N. Y. & S. Canal Co. v. Fulton Bank*, 7 Wend. 412; *Catskill Bank v. Ulster Iron Co.*, 14 Barb. 479. But as stated in the principal case the grounds on which proceedings of corporations have been held void as being beyond their charter powers, are not applicable here. These grounds are, first, because the charter when accepted constitutes a contract between the stockholders, that the corporation shall be confined to its proper business, and that a majority cannot change it; and second, because public policy requires that it should be confined to the business and the mode of managing business prescribed by the charter, which is its law. Here, so far as the first ground was concerned, no one had a right to complain but the one stockholder who managed the company, and as to the second ground, there was nothing in the act of incorporation specifying or limiting the business directly or by implication, and nothing could be implied from the name. See further on the subject, *Shrewsbury v. N. Staffordshire Ry. Co.*, 35 L. J. Rep. 156; *Columbus P., &c., R. R. Co. v. Ind. & B. R. R. Co.*, 5 McLean, 450; *Androscooggin & Ken. R. R. Co. v. Androscooggin Co.*, 52 Me. 417; *Bartlett v. Nor. & Wor. R. R. Co.*, 33 Conn. 560.

In the case of *Hurdman v. North East. Ry. Co.*, 38 L. T. Rep. (N. S.) 389, it is held that one who places an artificial mound upon his property and thereby causes rain water percolating naturally to come upon the property of his neighbor, is liable to

the latter in respect to the damage so caused. The court distinguishes the case from those of *Fletcher v. Rylands*, 19 L. T. Rep. (N. S.) 220; *Wilson v. Wadden*, 35 id. 689; *Baird v. Williamson*, 15 C. B. (N. S.) 376; *Crompton v. Lea*, 31 L. T. Rep. (N. S.) 469, and other cases, where the principle is held that if, in consequence of a mine owner on the rise working out his minerals, water comes by natural gravitation into the mine of the owner on the deep, the latter mine owner cannot maintain an action for the damage, saying that excavating minerals is the natural use of mineral lands, and the owner of such lands takes them subject to the annoyance caused by the natural user by his neighbor of his land. See *Wilson v. Waddell*, L. R., 2 App. Cas. 99; *Rylands v. Fletcher*, L. R., 3 H. L. 328.

In the case of *Beals v. Providence Rubber Co.*, 11 R. I. 381, a lease contained a covenant by the lessee "to pay the taxes of every name and kind that should be assessed on the premises at any time" during the term of the lease. This was held not to cover an assessment for benefits accruing from street improvements. Such an assessment is a tax in the generic sense of that word, but in its meaning as ordinarily used, a tax is something exacted for the public service and not by way of compensation for benefits specially conferred. As the court says, such a use of language is not uncommon. For instance, men are animals; and yet men are not animals within the meaning of the word as ordinarily used. So an assessment for benefits has frequently been held not to be included in the meaning of the word "taxes" in statutes such as those, exempting particular kinds of property from taxation, etc. *Matter of Mayor of New York*, 11 Johns. 7; *Second Congregationalist Soc. v. City of Providence*, 6 R. I. 474. In *Jeffrey v. Neale*, L. R., 6 C. P. 249, it is said that "it has been frequently held in cases of this nature, some amount of qualification must be placed on words which at first sight might be capable of a very extensive signification." This remark is borne out by the English cases and by American authority. See *Tidswell v. Whitworth*, L. R., 2 C. P. 326; *Baker v. Green*, L. R., 3 Q. B. 148; *Southall v. Leadbeater*, 3 Term Rep. 458; *Barrett v. Duke of Bedford*, 8 id. 602; *Matter of College Street*, 8 R. I. 474; *Bolling v. Stokes*, 2 Leigh, 178; *Harvard College v. Boston*, 104 Mass. 482; *People v. Mayor of Brooklyn*, 4 N. Y. 432. But in some instances constitutional provisions with respect to taxation have been held to include assessments for benefits. In Minnesota a provision that all taxes shall be as nearly equal as may be, and according to the value of the property taxed, was held to apply to a legislative act relating to the improvement of a street. *Stinson v. Smith*, 8 Minn. 366. And in Alabama a like provision was held to forbid an assessment on abutting lots in proportion to the number of front feet. *Mobile v. Dargan*, 45 Ala. 310. See, also, *Chicago v. Larned*, 34 Ill. 203. Also *Codman v. Johnson*, 104 Mass. 491; *Curtis v. Pierce*, 115 id. 188.

THE ENGLISH EXTRADITION ACT.

BY SAMUEL T. SPEAR, D. D.

THE English Extradition Act of 1870, of which frequent mention is made in the correspondence between Great Britain and the United States with reference to the case of Winslow, grew out of the investigations of a committee appointed by the House of Commons, and directed to examine the whole subject of extradition law and report any recommendations adapted to its improvement. The previous practice of Parliament had been to provide by special acts for the execution of extradition treaties. Five such acts were in existence. In 1870 it was judged expedient to establish a comprehensive and general code on the subject, applicable to all the extradition treaties of the British Government, and designed to be corrective of evils which had been disclosed by the committee of the House of Commons. The preparation of this code was mainly the work of Sir Thomas Henry.

Lord Derby, in the Winslow correspondence, gives the following explanation of this law: "It is to be regarded as intended to prevent, for the future, evils that were pointed out by Mr. Hammond and others, as having occurred, and being liable to occur, in private prosecutions to which the attention of the Government had not been called. Her Majesty's Government consider the provisions of the act as having been devised, not in the particular interests or for the particular ends of Great Britain, but as the embodiment of what was the general opinion of all countries on the subject of extradition, and as being beneficial to all and injurious to none. That the general opinion of European nations has justified this view is proved by the acceptance, by most of the leading nations of Europe, of extradition treaties based on its provisions." *Foreign Relations of the United States, 1876, p. 228.*

Mr. Clarke, in an Appendix to his treatise on Extradition, sec. ed., gives the full text of the extradition treaties of Great Britain, since 1870, with Germany, Belgium, Italy, Denmark, Austria, Sweden and Norway, and Brazil, every one of which expressly recognizes the principle that an extradited party is triable only for the crime or crimes in respect to which his surrender was made. The seventh article of the treaty with Germany provides as follows: "A person surrendered can in no case be kept in prison or brought to trial in the State to which the surrender has been made for any crime or on account of any other matters than those for which the extradition shall have taken place. This stipulation does not apply to crimes committed after the extradition." So, also, the sixth article of the treaty with Belgium provides thus: "When any person shall have been surrendered by either of the high

contracting parties to the other, such person shall not, until he has been restored, or had an opportunity of returning to the country from whence he was surrendered, be triable or tried for any offense committed in the other country prior to the surrender, other than the particular offense on account of which he was surrendered."

Similar provisions are found in the other treaties contained in the Appendix of Mr. Clarke. The acceptance of this principle by these nations, in accordance with the English act of 1870, shows their understanding of the general doctrine of extradition. If the English doctrine on this subject had been repulsive to their views, they certainly would not have made treaties embodying it in express terms.

A letter addressed by Sir E. Thornton to Secretary Fish, on the 22nd of September, 1870, soon after the English act was passed, called the attention of the United States Government to its provisions. Mr. Fish made the letter an occasion for inquiring whether it would not be possible, in a new treaty, to provide "that, if during the trial of a person whose extradition had been asked for a crime, such as larceny, evidence previously unknown should appear that a prisoner had been guilty of a higher crime, such as murder, it should be legal to try him for the latter crime." Sir E. Thornton was instructed to answer this question, and did answer it, as follows: "That any provision in the treaty by which the fugitive surrendered for one offense mentioned in the schedule may be tried for any offense committed prior to his extradition, other than the extradition crime for which he was surrendered, would be inadmissible." *Foreign Relations of the United States, 1876, p. 228.*

The "schedule" here referred to is a part of the act of 1870, containing a list of extradition crimes, including those in the then existing treaties of Great Britain, which must not be exceeded in the negotiation of other treaties. Parliament chose by law to make a list of such crimes, and thereby limit the treaty power.

The correspondence between Sir E. Thornton and Secretary Fish, immediately after the passage of the English act, and the subsequent correspondence between them in relation to a new treaty, show that the position taken by the British Government in regard to Winslow was not an idea extemporized for that occasion, and hitherto unknown to the United States. The course which the former, by a mistake, supposed that the latter meant to pursue with reference to Lawrence, raised the question in regard to Winslow whether, in the event of his surrender, a similar course might not be adopted in respect to him. A guaranty against such a course, as expressly provided for in the English act, and, as claimed by Lord Derby, virtually involved in the treaty of 1842, was hence required before making the delivery.

Secretary Fish declined to give any guaranty as to the trial of Winslow; and thus the whole question, as to the construction of the treaty and the application of the English act thereto, was opened for diplomatic discussion.

This discussion was continued until the early part of July, 1876; and in the meantime the President, on the 20th of June, informed Congress that, if the British Government maintained its position, he should not, unless specially requested to do so by Congress, take any farther "action either in making or granting requisitions for the surrender of fugitive criminals under the treaty of 1842." On the 27th of the following October, Sir E. Thornton informed Secretary Fish that Her Majesty's Government had determined, "as a temporary measure until a new extradition treaty can be concluded," and without abandoning its construction of the treaty of 1842, to recede from the demand of a formal guaranty in respect to the trial of an extradited person; and, on the 22nd of the next December, the President communicated this fact to Congress, and declared his purpose to regard the treaty as still operative, and in the future to make and grant requisitions for the surrender of fugitive criminals under it. Thus the controversy came to an end, leaving the question in such a form that, although the Government of the United States is not required to give a positive pledge as to the trial of an extradited party, considerations of prudence and international courtesy clearly suggest that the British view on this subject should not be practically disregarded.

In the course of the discussion between the two governments, three of the provisions of the English Extradition Act, and especially two of them, came under consideration; and these we now proceed to examine:

1. The nineteenth section of the act contains one of these provisions, and reads as follows:

"Where, in pursuance of any arrangement with a foreign State, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this act, is surrendered by that foreign State, such person shall not, until he has been restored or had an opportunity of returning to such foreign State, be triable or tried for any offense committed prior to the surrender in any part of Her Majesty's dominions, other than such of the said crimes as may be proved by the facts on which the surrender is grounded."

The party in relation to whom this statute operates is represented as having been surrendered "in pursuance of any arrangement with a foreign State," and as having been "accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this act." This language distinctly designates the person to whom the statute refers.

The schedule provides that the crimes, therein mentioned, shall "be construed according to the

law existing in England, or in any British possession (as the case may be), of the date of the alleged crime, whether by common law or by statute made before or after the passage of this act." The theory of this provision is, that the law, as it was when the crime was committed, shall fix its character, and hence that no subsequent legislation, giving to the act a new and different character, shall be operative in that particular case.

Now, from the list of crimes triable under the special jurisdiction secured by extradition, the statute excludes all offenses "committed prior to the surrender in any part of Her Majesty's dominions," and all offenses not "proved by the facts on which the surrender is grounded," until the extradited party "has been restored or had an opportunity of returning to said foreign State." This provides that, before he can be tried for any but the extradition crime or crimes, he must by the British Government have been restored to the country from which he was removed, or must have had an opportunity of returning thither by the withdrawal for a reasonable time of all restraint upon his liberty. The implication is that, if being thus restored, he chooses, of his own accord, to return to the jurisdiction of the British Government, or that if not being restored, but having the opportunity of return to the foreign State from which he was removed, he chooses not to do so, but to remain under the jurisdiction acquired by the removal, then, in either case, he may be tried for an offense committed prior to the surrender, and not included in the terms thereof. The immunity against trial for any but the extradition charge is limited by these qualifications. Moreover, if the party shall, after his surrender, commit a crime or crimes in any part of Her Majesty's dominions, either while in custody or after his discharge, then no immunity whatever, as to trial therefor, is secured to him. His case, upon this supposition, would be similar to that of any other offender.

The obvious design of the statute is to confine the jurisdiction gained by extradition to the specific purpose set forth in the proceedings when gaining it. The rule laid down to this end is that the triable crime, subject to the qualifications above stated, must be such "as may be proved by the facts on which the surrender is grounded." This assumes that these "facts," supported by the proper evidence, were submitted to the government asked to make the delivery; that, in its judgment, they sufficiently established the commission of the crime or crimes for which the extradition was sought, and that on this ground the delivery was made in pursuance of a treaty. The crime, thus shown by the "facts" brought out in the extradition proceedings, is the only one for which the party can be put on trial under British authority, "until he has been restored or had an opportunity of returning to

such foreign State," unless he shall commit some other crime after his extradition. This does not preclude additional evidence, besides that on which he was surrendered, in proof of the crime when he is brought to trial; but it does preclude a trial for any other crime until one of the specified conditions of such trial shall be supplied, or the party, after extradition, shall have committed some other crime.

The British Government, by this part of the English act, concedes and means to concede to other governments precisely what it expects and demands from them. There can be no pretense that the statute is in conflict with their rights, as growing out of extradition treaties. It simply limits the jurisdiction of British courts to the offense or offenses on the charge and proof of which extradition was claimed and granted, and thus protects the extradited party against any abuses of power by these courts. Such a case as that of Heilbronn, to which Secretary Fish referred, could not occur under this statute.

2. A second provision, found in the second subsection of the third section of the English act, reads as follows:

"A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by an arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded."

Lord Derby, in his letter to General Schenck, immediately after the demand for Winslow was made, referred to this statute, remarking that "the Secretary of State for the Home Department fears that the claim advanced by your Government to try Lawrence in the recent case of extradition, with which you are familiar, for other crimes than the extradition crime for which he was surrendered, amounts to a denial that any such law [exempting him from such trial] exists in the United States," and further remarking that "the disclaimer of your Government of any implied understanding existing with Her Majesty's Government in this respect, and the interpretation put upon the act of Congress of August 12, 1848, chapter 147, section 3, preclude any longer the belief in the existence of any effective arrangement which Her Majesty's Government had previously supposed to be practically in force." *Foreign Relations of the United States*, 1876, p. 207. On this ground the surrender of Winslow was refused unless the requisite guaranty in respect to his trial was given. This was according to the English act of 1870, and, as claimed by Lord Derby and denied by Secretary Fish in the subsequent correspondence, according to the spirit and intent of the treaty of 1842.

The practical end, sought by this clause of the English act, is to limit the jurisdiction over a fugitive criminal when surrendered by Great Britain to a foreign State to "the extradition crime proved by the facts on which the surrender is grounded." This description of the crime assumes that it comes within the enumeration of the treaty; that the foreign State has charged the crime upon a given person; that, as a basis for his surrender, proof of his guilt has been furnished; and that the British Government, having examined the case, has judged the evidence sufficient to justify the surrender, in order that the party accused may, in the foreign State demanding him, be put on trial for the crime, and that only, which was proved by the facts on which the surrender was grounded. The theory of the provision is that this, and this only, is the crime for the trial of which the surrender was made, and hence that the jurisdiction granted thereby is limited to this purpose.

The method of gaining this end, as provided for in the clause, is to forbid the surrender of a fugitive criminal "to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded." Parliament chose in this way to secure a guaranty beforehand, that the jurisdiction, given by surrender on the part of Great Britain, would be confined to the purpose for which it was given.

It is true that the treaty of 1842 between the two governments does not, in express terms, contain any such provision in respect to the manner of its execution; yet if it implies that the jurisdiction acquired under it is to be limited to the purpose for which it was acquired, then the provision is consistent with the treaty. The treaty limits the right of demand and the obligation of delivery to seven distinctly enumerated crimes, thereby implying that the jurisdiction secured under it is not to exceed this enumeration. The treaty still further provides that, in every case of actual delivery, the crime or crimes for which the surrender is demanded shall be definitely specified, just as clearly implying that the jurisdiction sought, if gained, has its limits in this specification. There is still further a provision that the delivery shall be made only when the charge is proved by evidence that would, according to the laws of the government asked to make the surrender, be sufficient to justify the apprehension and commitment of the accused person for trial, if the offense charged had been committed under its jurisdiction; and this implies that the offense deemed proved by the delivering government, and in respect to which the delivery was made, is the

only one for which the party may be put on trial in virtue of the custody secured thereby. There is no right of demand, and no obligation of delivery, in violation of the terms from which these implications arise. A special and limited jurisdiction over the extradited party is, by the terms and necessary implications of the treaty, the only jurisdiction that can be gained under it in respect to any crime or cause of detention that antedates his surrender; and this jurisdiction relates to the offense or offenses for which he was surrendered.

What we then find in this clause of the English act is an express statement, in the form of a legal statute for the government of British officers, of the implied doctrine of the treaty of 1842 in respect to the crime for which the party surrendered under the treaty may be tried. The act denies no right which the treaty grants. It is not an attempt to supplement the treaty with provisions in contradiction of or inconsistent with its terms. It adds nothing to the treaty. It claims no authority or operation in or over the United States, or over any of the judicial or executive officers thereof. It simply asserts a British right under the treaty, and provides for securing it. There is no occasion for the United States to find fault with it, unless it is proposed to go beyond the treaty in dealing with an extradited person; and then the occasion for fault-finding would be with Great Britain.

The question as to *when* this treaty right shall be asserted, whether before delivery and as a condition thereof, or afterward in the form of a protest if there be an attempt to disregard it, is quite immaterial, so far as the right itself is concerned. If it exists at all, then its recognition may be made a condition of delivery, or it may be asserted by protest in the event of its violation. If Great Britain under the treaty has the right to protest against trial for any but the extradition offense, then it has an equal right to refuse a surrender without an adequate guaranty in this respect. The right of protest and the right of refusal rest on precisely the same principle. No government, in the execution of a treaty, is bound to consent in advance to what would be a violation of it, or omit such legislation as will secure its own rights as involved in the treaty. It has the right to insist upon its own rights; and this we understand to be the purpose of the English act in relation to the detention and trial of persons who, as fugitive criminals, may by the British Government be surrendered to foreign States.

3. A third provision of the English act, contained in its twenty-seventh section, reads as follows:

"The acts specified in the third schedule to this act are hereby repealed as to the whole of Her Majesty's dominions; and this act (with the exception of any thing contained in it which is inconsistent with the treaties referred to in the acts so repealed) shall apply (as regards crimes committed

either before or after the passage of this act), in the case of the foreign States with which those treaties were made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this act, and as if such Order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this act: Provided that if any proceedings for or in relation to the surrender of a fugitive criminal have been commenced under the said acts previously to the repeal thereof, such proceedings may be completed, and the fugitive surrendered, in the same manner as if this act had not been passed."

There are four provisions in this section. The first is a repeal of the acts named in the third schedule to the act of 1870. The second is the application of this act to the extradition treaties referred to in the acts repealed. The third is an exception in this application as to any thing in the act inconsistent with those treaties. The fourth is the permission, where extradition proceedings have been commenced in any case, that they should be completed "in the same manner as if this act had not been passed."

The acts named in the schedule are five, and the treaties referred to in them are those with the United States, France, and Denmark. Secretary Fish claimed that the treaty of 1842 with the United States, as to the matter under discussion between the two governments, comes within the exception specified in this section of the act of 1870, because, as to that matter, the act is inconsistent with the treaty, and, hence, that in this respect it has no application to the treaty. Lord Derby, on the other hand, denied these propositions, and insisted that the English act of 1870 and the treaty of 1842 are not in conflict with each other, that the express doctrine of the act in regard to the trial of extradited criminals is implied in the treaty, and, hence, that on this subject, which was the only point in controversy between them, there is nothing in the act to except the treaty from its application.

It would be unreasonable to suppose that the British Parliament, consciously, and by intention, passed an act for the execution of extradition treaties, which it deemed in any particular inconsistent with these treaties, and at the same time adopted an exception in general terms to avoid a result for which it had deliberately provided, or that it meant to repeal or change the treaties when professing to legislate for their execution. The exception as to the application of the act is evidently a general provision of caution, for the purpose of being sure not to legislate in contradiction of existing treaties, and not a confession on the part of Parliament that it had so legislated in respect to any treaty. The exception is stated with no specific mention of any treaty, or of any provision in any treaty. To assume that Parliament designed, as to the matter in debate, to except the treaty of 1842 with the United

States from the full operation of the act, is a palpable begging of the whole question that was at issue in the Winslow controversy. Such, certainly, was not its intention unless, as to that matter, the two are inconsistent. If it be true that, as to the offense for which a surrendered criminal may be tried, the treaty implies what the act expressly declares, then there is no inconsistency between them on this point, and, hence, no reason why the act should not in this respect apply to the treaty. The guaranty which the one requires simply secures beforehand the immunity which the other implies. Lord Derby, as we think, correctly claimed that the treaty and the act are identical in this respect.

Indeed, the special act passed by Parliament soon after the treaty was negotiated, and the act of Congress of August 12th, 1848, and also the supplementary act passed by Congress in 1869, clearly imply the doctrine which the English act of 1870 expressly asserts. In the first two of these acts provision is made for the delivery of a fugitive criminal, in order that he may "be tried for the crime of which such person shall be so accused." Both acts, in precisely the same words, specify such a trial as the end or object of the delivery. So, also, the act of 1869 describes the trial contemplated by the delivery, as having reference to "the crimes or offenses specified in the warrant of extradition." This legislation implies a construction of the treaty which the English act of 1870 puts into express and positive terms. It names the offense for which the trial is to be had, as being the one of which the person has been accused, or as the one "specified in the warrant of extradition." It does not give the remotest hint of any other trial, and, hence, by what it says and by what it does not say, implies that the party is to be tried only for the crime "proved by the facts on which the surrender is grounded," which is the express doctrine of the English act of 1870.

Judge Benedict, in *The United States v. Lawrence*, 13 Blatchf. C. C. R. 295, after remarking that "the British act of 1870" has no authority as a law in the United States, proceeded to say: "It would appear that the English courts incline to the opinion that the act of 1870 has no effect in England, even, to limit the operation of the treaty of 1842," which, as he held in that case, allows the trial of an extradited person for any offense, whether it is or is not the one for which the surrender was made. As proof of this statement, he quotes the following words of the Lord Chief Justice of the Queen's Bench in *Ex parte Bouvier*: "I see plainly what was the intention of the legislature—that is to say, it was intended, while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full integrity and force."

The case of Bouvier, who was demanded by the French Government in 1872, arose under the treaty of Great Britain with France, and had no relation

to that of 1842 with the United States. The important question, as Mr. Clarke observes in his *Treatise on Extradition*, sec. ed., p. 149, came before the Court of the Queen's Bench, "whether the effect of the Extradition Act of 1870 had not been to render the treaty with France entirely inoperative." The relation of the act to the treaty of 1842 with the United States was not under consideration at all, and no opinion was expressed as to whether it did or did not in England "limit the operation of the treaty of 1842."

So far, moreover, as the opinion that was expressed had anything to do with the effect of the English act in England, Judge Benedict was entirely mistaken as to its character. Bouvier was before the court on a writ of *habeas corpus*; and it was urged by his counsel that he should be discharged, because, as was alleged, there was no law in France to prevent "his trial for an offense other than that for which the rendition was demanded." The counsel for the Crown, in reply to this position, presented the affidavit of M. Adolphe Moreau, the officially appointed counsel to the French embassy in London, to the effect that "it is a principle of French and international law, that the individual whose extradition has been granted can only be prosecuted and tried for the very crime for which his extradition has been obtained." This affidavit, says Mr. Clarke, "was accepted by the court as decisive of the question;" and accordingly the court "remanded the prisoner to custody, holding that provision was made by the French law that he should be tried only for the offense for which extradition was asked." Clarke on Extradition, sec. ed., pp. 149-152. The remanding of Bouvier to custody was on the assurance by an affidavit, which the court accepted as "decisive of the question," that under the law of France he would be tried only for the offense for which his extradition had been obtained. This is exactly the doctrine of the English act of 1870, and the facts clearly show that the court treated the act as operative in England with reference to the treaty with France.

It deserves to be noted also that the words of the Lord Chief Justice, as quoted by Judge Benedict, have nothing to do with the specific question whether the English act of 1870 and the treaty of 1842 are consistent with each other, and hence nothing to do with the question whether the act has effect or not in England with reference to that treaty. What he says is that Parliament, by the exception as to any thing in the act inconsistent with the treaties referred to, intended "to save existing treaties in their full integrity and force." There is no doubt of this; yet it does not follow that he regarded "the treaty of 1842" as coming within the exception because inconsistent with the act of 1870, and hence regarded the act as having "no effect in England" in respect to that treaty.

On this point he expressed no opinion. For aught that appears in the words quoted, he may have agreed with Lord Derby as to the construction of "the treaty of 1842," and as to the entire consistency of the English act of 1870 with it. Supposing the two to be consistent, then, of course, the act would not limit the operation of the treaty in England, or anywhere else, not because the latter is excepted from the application of the former, but because there is no inconsistency between them. Judge Benedict, however, assuming an inconsistency, sought on this ground to exclude the treaty from the application of the act as to the question which he was discussing, and thereby retain the treaty in full force with his understanding of its operation, supporting his opinion by quoting the words of the Lord Chief Justice in the case of *Bouvier*, which, as we have seen, neither contain the opinion nor hold any relation to it whatever. The Judge was certainly very unfortunate in the case which he cited, as well as in the words which he quoted.

There are three other provisions, all of them found in the third section of the English act, which, though not involved in the Winslow controversy, deserve a brief mention, since they operate as restrictions upon the surrender of fugitive criminals. The first declares that "a fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character." The design of this provision is to guard against any surrender for what are called political offenses, which, though not always expressly excluded in extradition treaties, are, nevertheless, according to the settled policy of Great Britain and most of the nations of Europe, regarded as non-extraditable.

The second provision declares that "a fugitive criminal who has been accused of some offense within English jurisdiction, not being the offense for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise." This simply postpones the delivery in the cases specified until the purposes of English jurisdiction shall have been completed.

The third provision declares that "a fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender." This in the eleventh section of the act is supplemented by a re-

quirement that the committing magistrate "shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*." The object of these provisions is to secure to the person accused a reasonable opportunity to have the legality of the proceedings tested before a court prior to his actual surrender, and to be discharged from imprisonment in the event that the proceedings shall be held to be illegal. The protection thus afforded is meant to be remedial as against any hasty or improper action on the part of the Government.

The other provisions of the English act call for no comment, since they relate to matters of purely domestic procedure, and involve no international questions in respect to the construction and application of British extradition treaties.

CHINESE NOT ENTITLED TO NATURALIZATION.

UNITED STATES CIRCUIT COURT, DISTRICT OF CALIFORNIA, APRIL 29, 1878.

MATTER OF AH YUP.

A native of China, of the Mongolian race, is not entitled to become a citizen of the United States under the Revised Statutes as amended in 1875. Rev. Stat., § 2,169, amendment, R. S., p. 1,435.

A Mongolian is not a "white person" within the meaning of the term as used in the naturalization laws of the United States.

PETITION for naturalization. The facts appear in the opinion.

SAWYER, J. Ah Yup, a native and citizen of the Empire of China, of the Mongolian race, presented a petition in writing, praying that he be permitted to make proof of the facts alleged, and upon satisfactory proof being made, and his making the oath required in such cases, he be admitted as a citizen of the United States.

The petition stated all the qualifications required by the statute to entitle the petitioner to be naturalized, provided the statute authorizes the naturalization of a native of China of the Mongolian race. The petition was presented by B. S. Brooks, a counselor of this court. This being the first application made by a native Chinaman for naturalization, the members of the bar were requested by the court to make such suggestions *amici curiæ* as occurred to them upon either side of the question; whereupon S. Heydenfeldt, Jr., argued the case very fully in opposition to the application. Suggestions were also made by other members of the bar present.

The only question is, whether the statute authorizes the naturalization of a native of China of the Mongolian race.

In all the acts of Congress relating to the naturalization of aliens, from that of April 14, 1802, down to the Revised Statutes, the language has been "that any alien, being a free white person, may be admitted to become a citizen," etc. After the adoption of the thirteenth and fourteenth amendments to the National Constitution — the former prohibiting slavery and the latter declaring who shall be citizens — Congress, in the act of July 14, 1870, amending the naturalization laws, added the following provision:

"That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent." 16 Stat. 256, § 7.

Upon the revision of the statutes the revisers, probably inadvertently, as Congress did not contemplate a change in the laws in force, omitted the words "white persons," section 2,165 of the Revised Statutes being the section conferring the right reading: "An alien may be admitted to become a citizen," etc. The provision relating to Africans of the act of 1870 is carried into the Revised Statutes in a separate section, which reads as follows:

"The provisions of this title shall apply to aliens of African nativity and to persons of African descent." § 2,169. This section was amended by the "Act to correct errors and to supply omissions in the Revised Statutes of the United States," of February 18, 1875, so as to read: "The provisions of this title shall apply to aliens, being free white persons, and to aliens of African nativity, and to persons of African descent." (Rev. Stat., p. 1, 435; 18 Stat. 318), and so the statute now stands.

First. Is a person of the Mongolian race a "white person" within the meaning of the statute?

Second. Do those provisions exclude all but white persons and persons of African nativity or African descent?

Words in a statute, other than technical terms, should be taken in their ordinary sense. The words "white person," as well argued by petitioner's counsel, taken in a strict literal sense, constitute a very indefinite description of a class of persons, where none can be said to be literally white, and those called white may be found of every shade, from the lightest blonde to the most swarthy brunette. But these words, in this country at least, have undoubtedly acquired a well-settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used anywhere in the United States one would scarcely fail to understand the party employing the words "a white person" would intend a person of the Caucasian race. In speaking of the various classifications of races, Webster, in his dictionary, says: "The common classification is that of Blumenbach, who makes five. First, the Caucasian, or white race to which belong the greater part of the European nations and those of Western Asia; second, the Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; third, the Ethiopian, or negro (black) race, occupying all Africa, except the North; fourth, the American, or red race, containing the Indians of North and South America; and fifth, the Malay, or brown race, and occupying the islands of the Indian Archipelago," etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair and skull. Linnæus makes four divisions, founded on the color of the skin: First, European, whitish; second, American, coppery; third, Asiatic, tawny; and fourth, African, black. Cuvier makes three—Caucasian, Mongol, negro. Others make many more, but none include the white or Caucasian with the Mongolian or yellow race; and none of those classifications, recognizing color as one of the distinguishing characteristics, include the Mongolian in the white or whitish race. § 22, "New American Cyclopaedia," title "Ethnology."

Neither in popular language, in literature, nor in

scientific nomenclature do we ordinarily, if ever, find the words "white person" used in a sense so comprehensive as to include an individual of the Mongolian race. Yet, in all, color, notwithstanding its indefiniteness as a word of description, is made an important factor in the laws adopted for the determination and classification of the races. I am not aware that the term "white persons," as used in the statute, as they have stood from 1802 till the late revision, was ever supposed to include a Mongolian, while I find nothing in the history of the country, in common or scientific usage, or in legislative proceedings, to indicate that Congress intended to include in the term "white person" any other than an individual of the Caucasian race. I do not find much in the proceedings of Congress to show that it was universally understood in that body, in its recent legislation, that it excluded Mongolians. At the time of the amendment, in 1870, extending the naturalization laws to the African race, Mr. Sumner made repeated and strenuous efforts to strike the word "white" from the naturalization laws, or to accomplish the same object by other language. It was opposed on the sole ground that the effect would be to authorize the admission of Chinese to citizenship. Every senator who spoke upon the subject assumed that they were then excluded by the term "white person," and that the amendment would admit them, and the amendment was advocated on the one hand and opposed on the other upon that single idea. Senator Morton, in the course of the discussion, said: "This amendment involves the whole Chinese problem. * * * The country has just awakened to the question and to the enormous magnitude of the question involving a possible immigration of many millions; involving another civilization; involving labor problems that no intellect can solve without study and time. Are you now prepared to settle the Chinese problem, thus in advance inviting that immigration?" Congressional Globe, part 6, 1869-70, p. 5,122. Senator Sumner replied: "Senators undertake to disturb us in our judgment by reminding us of the possibility of large numbers swarming from China; but the answer to all this is very obvious and very simple. If the Chinese come here they will come for citizenship or merely for labor. If they come for citizenship then in this desire do they give a pledge of loyalty to our institutions. And where is the peril in such vows? They are peaceful and industrious. How can their citizenship be the occasion of solicitude?" *Id.*, p. 5,155.

Many other senators spoke pro and con on the question, this being the point of the contest. *Id.*, pp. 5,121 to 5,177. It was finally defeated, and the amendment cited, extending the right of naturalization to the African only, was adopted. It is clear from these proceedings that Congress retained the word "white" in the naturalization laws for the sole purpose of excluding the Chinese from the right of naturalization. Again, when it was found that the term "white person" had been omitted in the Revised Statutes, it was restored by the act passed "to correct errors and to supply omissions" in the Revised Statutes before cited. Upon reporting this bill, Mr. Poland, chairman of the committee, explained the various amendments correcting errors, and upon the amendment to insert the words, "being free white persons," said: "The original naturalization laws only extended to free white persons." * * * "A very few years since (in 1870) Mr. Sumner, of Massachusetts, then in the Senate,

moved to strike out the word 'white' from the naturalization laws, and it was objected to on the ground that that would authorize the naturalization of that class of Asiatic immigrants that are so plentiful on the Pacific coast. After considerable debate, instead of striking out the word 'white,' it was provided that the naturalization laws should extend to the Africans and persons of African descent." After explaining the omission in the Revised Statutes he adds: "The member of our committee who had this chapter on the naturalization laws to examine as a sub-committee failed to notice this change in the law, or it would have been brought before the house when the revision was adopted." Congressional Record, vol. 3, part 2, session 1875, p. 1,081.

Upon this report the amendment was made as it now stands in the statute. Thus, whatever latitudinarian construction might otherwise be given to the term "white person," it is entirely clear that Congress intended by this legislation to exclude Mongolians from the right of naturalization. I am, therefore, of the opinion that a native of China, of the Mongolian race, is not a white person within the meaning of the act of Congress.

The second question is answered in the discussion of the first. The amendment is intended to limit the operation of the provision as it then stood in the Revised Statutes. It would have been more appropriately inserted in section 2,165 than where it is found (in section 2,169). But the purpose is clear. It was certainly intended to have some operation, or it would not have been adopted. The purpose undoubtedly was to restore the law to the condition in which it stood before the revision, and to exclude the Chinese. It was intended to exclude some classes, and as all white aliens and those of the African race are entitled to naturalization under the words, it is difficult to perceive whom it could exclude unless it be the Chinese.

It follows that the petition must be denied, and it is so ordered.

VALIDITY OF THE VIRGINIA FUNDING ACT OF 1871.

SUPREME COURT OF APPEALS OF VIRGINIA,
MARCH, 1873.

EX PARTE CLARKE.

By a provision of the Constitution of Virginia all fines paid in criminal proceedings are appropriated for the support of public schools. By an act of the Legislature, known as the Funding Act, coupons of State bonds issued under such act are made receivable for "all taxes, debts, dues and demands due the State." Held, that the statute included fines, and the coupons were receivable therefor, and the statute was not in violation of the constitutional provision mentioned.

PETITION for *habeas corpus*. The facts appear in the opinion.

CHRISTIAN, J. This case is before us upon a petition filed by James Clarke, invoking the original jurisdiction of this court for a writ of *habeas corpus*. The petition and the record therewith filed show that the petitioner is confined in jail under an execution issued upon a judgment of the Hustings Court of the city of Richmond, for the sum of thirty dollars, the fine assessed by said court, and twenty-two dollars and five cents, the cost of prosecution on behalf of the Commonwealth.

It is further shown, that the petitioner tendered to James M. Tyler, sergeant of the city of Richmond,

"a coupon, which was due and past maturity, for thirty dollars, which said coupon was cut from a bond of the State of Virginia, issued under the provisions of the act of Assembly passed March 30th, 1871, commonly known as the Funding Bill;" and the sum of twenty-two dollars and five cents, in money, that being the amount of costs.

The city sergeant refused to receive the coupon tendered, in payment of the fine imposed by the court. And thereupon Clarke applied to this court for a writ of *habeas corpus*, and insists upon his right to pay the fine assessed against him by the Hustings Court in a coupon of a bond of the State; and that upon such payment, with the costs of prosecution, he is entitled to his discharge from further imprisonment.

This record, therefore, presents for our consideration the simple question, Whether a fine imposed for a violation of law can be discharged in coupons, or whether it can only be demanded and paid in money?

This is the same question which was elaborately argued at the January term of this court in the case of *Tyler v. Taylor*. That case was argued upon a petition for a writ of *mandamus*, to the court, to compel the auditor of public accounts to receive from the sergeant of the city of Richmond, certain coupons which had been received by him, in payment of a fine imposed on one Mayo, for a criminal offense.

In that case, this court unanimously held, that the writ of *mandamus* could not be issued against the auditor of public accounts, because he was not the public officer whose duty it was, under the law, to receive fines collected by the city sergeant, and declaring that this court could only exercise its extraordinary jurisdiction by way of *mandamus*, to compel a public officer to discharge a duty which the law imposed on him, and not on another. And inasmuch as the city treasurer, and not the auditor of public accounts, was the public officer whose duty it was to receive all fines collected by the city sergeant, the rule was discharged and the case dismissed, without deciding the question on its merits.

In that case it was said, and is here repeated: "This court is always ready and willing to decide, to the best of its ability, all questions, however important or difficult, or however they may affect public or private interests, which are properly brought before it, no matter how great or far-reaching may be the responsibilities it must assume in such decision. But the court is not willing, nor is it any part of its judicial function, to decide questions outside of the case before it, and thus constitute itself a moot court to determine abstract questions."

The question argued in the case of *Tyler v. Taylor* did not arise upon the pleadings in the cause, and the court did not (for the reasons stated in its opinion) feel called upon to decide an abstract question. But the same question now does arise properly, upon the record in this case, and the court is now prepared to meet the question and assume all the responsibilities which may be attached to the decision, however it may affect individual or public rights, private or political questions.

But the question we have to determine (however it is sought to be connected with questions which are the subject, unhappily, of political agitation) is purely a legal question, to be determined upon well-defined legal principles, and the rules of construction universally recognized as applicable to the statute law. It

all depends upon the true construction to be given to the second section of the act approved March 30th, 1871, entitled "An act to provide for the funding and payment of the public debt." This section, after declaring that the owners of any of the bonds, stocks or interest certificates heretofore issued by this State * * may fund two-thirds of the amount of the * * in six per centum coupon or registered bonds of this State, etc., contains the following provision: "The bonds shall be made payable to order or bearer, and the coupons to bearer, at the treasury of the State, and bonds payable to order may be exchanged for bonds payable to bearer, and registered bonds may be exchanged for coupon bonds, or *vice versa*, at the option of the owner. The coupons shall be payable semi-annually, and receivable at and after maturity for all taxes, debts, dues and demands due the State, which shall be so expressed on their face." The only question, then, we have to determine is, whether *fnies* imposed for a violation of law are included within the terms of the statute? I say this is the only question we have to determine, because the question of the constitutionality of the act above referred to, known as the Funding Act, has already been determined by this court. The case of *Antoni v. Wright*, 22 Gratt., settles this question. The same argument against its constitutionality made in this case was urged in that. I refer to that case and adopt its principles and reasoning as a clear and conclusive exposition of the law, and am of opinion that this decision of the court declaring the constitutionality of the act of March 30th, 1871, and declaring that any act of the Legislature in conflict with the provisions of that act, so far as it may "forbid the collecting officers of the State to receive in payment of taxes and other demands of the State any thing else than gold or silver coin, United States treasury notes, or notes of the national banks of the United States," must be held to be an act "impairing the obligation of a contract," and therefore unconstitutional and void. This decision of *Antoni v. Wright* was recognized and re-affirmed in *Wise v. Rogers' Admr.* and *Maury v. Wright*, 24 Gratt., and must now be held to be the settled law of this State. It is not necessary, therefore, and indeed it would be a vain and useless task, to attempt to go over again the reasons which govern this court in coming to the conclusion there reached, and firmly adhered to ever since. I can only say for myself, that after a careful consideration of all the views which have been presented on this question, the opinion of Judge Bouldin, in *Antoni v. Wright*, is a lucid, able and conclusive exposition of the law—is one based upon judicial logic and fortified by judicial authority, which makes it impregnable against every assault which may be made upon it.

Adopting, therefore, the principles and reasoning in the case of *Antoni v. Wright*, we are left in this case to a simple and very narrow inquiry—and that is, Are *fnies* imposed for a violation of law included in the purview of the statute? One of the principal and universally adopted rules of construction of statutes is, that in the construction of statutes the rule of interpretation is, in respect to the intention of the Legislature, that where the language is explicit, the courts are bound to seek for the intention, in the words of the act itself, and they are not at liberty to suppose, or to hold, that the Legislature intended any thing different from what their language imports. Potter's *Dwarria on Statutes*, p. 146. Words in a statute are never to be considered as unmeaning and surplusage,

if a construction can be legitimately found which will give force to and preserve all the words in the act. The best rule by which to arrive at the meaning and intention of a law is to abide by the words which the law-maker has used. *Dwarria*, p. 179, note. Especially is this the case where the words used have no double or doubtful meaning, but are plain and explicit in their signification, for it is a rule of universal application that effect must be given to the words used by the Legislature where there is no uncertainty or ambiguity in their meaning.

Now, the words used in the act we are called upon to construe are as broad, explicit and comprehensive as any terms which could possibly be used. The act declares that "coupons shall be receivable at and after maturity, for all taxes, debts, dues and demands due the State." Is there any uncertainty or ambiguity in these terms? They all have a certain definite, explicit and technical meaning. We cannot discard any one of them as unmeaning and surplusage, but must, according to the rules of construction which bind the courts, give effect to all. We must suppose the Legislature knew the ordinary meaning and legal force of the words which they used. If the provision of the act had been that these coupons should be receivable "for all taxes and debts due the State," there might be some room for doubt whether *fnies* were embraced—for although *fnies* are recoverable by action of debt, and in a certain sense a *fine* is a debt due the State, yet it might be said, with much force, if not conclusively, that the word *debt* refers to matters of contract, and that, therefore, a *fine* is not embraced in the meaning of the statute in the word *debt*. But the words "dues and demands" are added. Shall we give no effect to these words of explicit meaning? Can we take the liberty of striking these words out of the statute? If we can, then the courts may override the powers of the Legislature, and construe away any act it may pass. These words, "dues and demands," are not uncertain and ambiguous, but have a certain definite and explicit meaning.

The word "due" is defined by Webster to be "that which is owed," "that which custom, station or law requires to be paid," and by Worcester "that which any one has a right to demand, claim or possess," "that which can justly be required." The word *demand* is a word of still larger significance and more comprehensive meaning. Indeed, Lord Coke says, the word "demand" is the largest word in law except "claim." In 2 Coke upon Littleton, 291, b, he says, "*Demandum* is a word of art, and in the understanding of the common law, is of so large an extent, as no other word in the law is, unless it be *clamum*, whereof Littleton maketh mention, section 445." Webster defines "demand" "the asking or seeking what is due or claimed to be due;" and Worcester, "a calling for a thing due or claimed to be due." No words of more explicit or broader signification could have been used than these two words "dues and demands." We cannot discard them, but must give them effect. Do they embrace *fnies*? I am bound by every rule of construction to say they do. A *fine* is something "which the law requires to be paid" and that is the meaning of the word "dues." A *fine* is a thing "due or claimed to be due" to the State, a liability which the State has a right to enforce and demand, and that is the meaning of the word "demand."

I am, therefore, of opinion that *fnies* are clearly embraced within the meaning and the very words of the

statute. The Legislature has used words which by their explicit, comprehensive and unmistakable meaning embrace *fin*es as well as taxes and debts. If, after using the words "dues and demands," they had intended to exclude *fin*es, how easy it would have been to have added the words, "except *fin*es" after the words "dues and demands." But having used these broad and comprehensive terms, which, by their common and explicit meaning, embrace *fin*es, and having used no words of exception, it follows, upon every rule of construction, that *fin*es are embraced in the terms "dues and demands."

This construction, which would seem to be free from all doubt, if it rests upon the language of the act, is objected to upon two grounds. First. It is insisted that *fin*es are imposed, as one of the potent means of punishing offenses against the law, and that the offender does not satisfy the judgment of the court if he pays an amount less than the fine assessed against him, which he does if he may pay in coupons instead of money (the coupons being at a discount). In answer to this view, it is sufficient to remark that the State has a right to say and has said, in the act of her Legislature under consideration, how her "demands" against her citizens shall be satisfied, how the liabilities "due" to her shall be discharged. It might, with the same propriety and with equal force, be argued that debts and taxes due the Commonwealth are not fully discharged by payment in coupons, and yet this is done every day under the statute law, sustained and enforced by the judgment of this court. But in point of fact the judgment for the fine is discharged to its full extent, so far as the State is concerned, because the coupon represents the obligation of the State for the face value of the coupons offered in payment of the fine.

Second. It is objected that *fin*es are dedicated by the Constitution and by statute enacted in pursuance thereof, to the literary fund for school purposes, and if the act under consideration embraces *fin*es, to that extent it is unconstitutional.

Now, it is to be observed that neither the Constitution, nor any act passed in pursuance thereof, requires the collectors of the public revenues, nor the auditor, to keep separate and distinct each particular fine assessed against offenders, and pay it over as collected to the literary fund; but the requirement is, upon fair construction, to turn over to the literary fund *whatever amount* may come into the treasury from the *source of fin*es, and dedicate *that amount* to the purpose indicated. This same argument was pressed most vigorously in the case of *Antoni v. Wright*, and was answered, I think, successfully and by the lamented Judge Bouldin—and I prefer to adopt his views, so clearly and ably put, rather than mar or weaken them by words or views of my own. He says:

"But it is argued that the contract in this case is void because it is repugnant to the 7th sec., 8th art., and 3d sec., 10th art., of the State Constitution, dedicating certain portions of the State revenue to the support of free schools. We think there is no such conflict in the case. * * * It only requires that the obligations of succeeding Legislatures shall be firmly met; that there should be what the creation of every new debt imperatively demands, to wit: an increase of taxation if the existing rate be insufficient. The argument is based on the assumption that subsequent Legislatures will fail in their duty, and pursue such a course as may result in malappropriation of the funds

referred to; that they will decline to meet faithfully the high obligation resting on them, and then rely on the irregular consequences of their own default, as an argument against the validity of the debt for which they will have failed to provide. The malappropriation which would follow, would not be the legitimate result of the Funding Act, but in effect would be the act of the Legislature failing to discharge its duty. The obligation to provide for the interest due by these coupons is as high as the duty of applying the capitation tax and other funds to the schools. Both duties are alike obligatory and both may be discharged, as there is no conflict between them. It is only by a failure to discharge the one that the performance of the other can be put into jeopardy, and it rests with the Legislature, by faithfully and fearlessly meeting both obligations, to preserve the plighted faith of the State and protect her Constitution from violation."

After this opinion of the court, delivered by Judge Bouldin, was announced, there was a motion for a rehearing, submitted by the attorney-general, and the court held the case under advisement, for several weeks, anxious to correct its decision, if it should appear in any respect to be erroneous, and to give to the case that calm and careful reconsideration which the gravity and importance of the question involved required. After a candid and anxious review of the case, the court could find no reason to change its opinion, but was confirmed in the justice and reasons of its conclusions. In delivering the judgment, upon a motion for a rehearing, Judge Anderson, in an able and exhaustive opinion, discusses the whole question, re-affirming and enforcing the views of Judge Bouldin. And in these views the same judges concurred as in the original decision. I mention this to show with what deliberation and care the questions involved in the case of *Antoni v. Wright* were considered, and the futility of again considering these questions except to re-affirm and adopt the principles of that case so far as they apply to the case before us.

With respect to the argument made in that case, as it was pressed in this case, that *fin*es and other revenues were dedicated to the school fund, and, therefore, cannot be paid in coupons, Judge Anderson, in his opinion (22 Gratt. 874), says: * * * "It is said that those provisions of the Constitution which set apart certain funds and a certain proportion of the tax for the public schools would be defeated by this legislation. It would seem to be a sufficient reply to say that if it were impracticable to raise a sufficient amount of revenue for both purposes, the latter did not impose an obligation on the Legislature paramount to the obligation to provide for the payment of the interest on the public debt. That was an obligation antecedent and paramount to the Constitution itself and could not be repudiated by the Constitution if it had so provided. But it is not repudiated nor ignored, but the obligation is clearly recognized by sections 2, 8, 19 and 20 of art. 10, at least to pay Virginia's proportion. And, furthermore, this being an obligation of debt and not eleemosynary in its character as are the other provisions referred to, and however desirable and important it may be that they should be carried out, I hesitate not to say this is of higher obligation. But there need be no clashing of duties here. It is only required that the Legislature should levy a tax sufficient for both objects—a duty imposed on it by the Constitution. It has not been the practice to set apart in the public treasury the identical money

received for the public schools; nor is it required by this Constitution, nor the acts of assembly. And the Legislature has discharged its constitutional obligation when it has set apart the required amount for that purpose."

These views, expressed both upon the first hearing and the rehearing of the case of *Antoni v. Wright*, are applicable to the case before us, and must govern our decision in this case.

Much has been said in the case before us about the sacredness of the school fund and the paramount obligation of the State to educate the people. This is a great and high obligation, and no doubt will be faithfully and firmly met by the Legislature. But however great and high this obligation, it cannot and ought not to be met, at the sacrifice of other obligations equally sacred, and other duties equally high and binding. A State, like an individual, must be just before it is generous. No honest man can or will abstract from his creditors what is justly due them in order to give it to his children. No State, in order to educate its citizens, ought to withhold from its just creditors that which has been pledged, by its honor and plighted faith, to the payment of its just debts. Both obligations must and will be met. The people must be educated, but they must not be educated at the price of repudiation and dishonor. Better would be ignorance than enlightenment purchased at such a fearful price.

In conclusion, I will repeat here the utterance of the unanimous voice of this court in the *Homestead Cases*, 22 Gratt. 301, when it declared that "No State and no people can have any real and enduring prosperity, except where public faith and private faith are guarded by laws wisely administered and faithfully executed. The inviolability of contracts, public and private, is the foundation of all social progress, and the cornerstone of all the forms of civilized society when an enlightened system of jurisprudence prevails. Under our system of government it has been wisely placed under the protection of the Constitution of the United States, and there it rests secure against all invasion."

It only remains for me to say that the petitioner has the right under the law to discharge the fine imposed upon him by the Hustings Court, with a coupon of a bond of the State, which the State has agreed to receive in payment of "all taxes, debts, dues, and demands due the State," and that he must be discharged from further custody.

Staples, J., dissented.

RECENT AMERICAN DECISIONS.

SUPREME JUDICIAL COURT OF MAINE.*

CARRIER.

Passenger not traveling with trunk: liability of carrier.—A railroad company is not obliged to carry as baggage the trunk of one who does not go by the same train. Upon receiving the trunk of such person to be forwarded it is received as freight, and the duties and liabilities of a common carrier attach, with the right to a reasonable compensation for transportation. (*Wilson v. Grand Trunk*, 56 Me. 60, and 57 id. 138, affirmed.) *Graffam v. Boston & Maine Railroad Co.*

* To appear in 67 Maine Reports.

CONSTITUTIONAL LAW.

1. *Exemption from taxation: legislative authority: municipal corporation.*—It is within the constitutional authority of the Legislature, to empower the city council of the city of Portland, to exempt from taxation for a term of years property belonging to the Portland Water Company, in consideration of an undertaking and agreement by the company to furnish, free of cost to the city, a supply of water for its public and municipal purposes. *City of Portland v. Portland Water Co.*

2. *Municipal legislation: validity of.*—Under an act of the Legislature, authorizing an exemption for six years, a vote of the city council to exempt for five years, is valid. The term of exemption does not necessarily commence running from the passage of the act by the Legislature, but may begin when the exemption is voted by the city council, if the vote is passed within a reasonable time afterward. *Ib.*

3. *Authority to city to exempt property to be acquired.*—The legislative act allowed the exemption to extend to property of the company not in existence when the act was passed. *Held*, that this would include, as taxable, all real estate at a value according with the condition it was then in, and would exclude all personal property acquired after that time. *Ib.*

CONTRIBUTORY NEGLIGENCE.

Crossing railroad track in front of moving train.—The plaintiff in his declaration stated that he being in a narrow fenced lane leading to the crossing over the defendants' railroad, and distant about two and a half rods from its track, and perceiving the defendants' train forty rods from, but approaching the crossing, he being distant seven rods therefrom, attempted to cross the track before the train should reach it; that his attempt was unsuccessful, and that he was injured. *Held*, on demurrer to the declaration, that on the plaintiff's statement of facts he was not in law entitled to recover. *Grows v. Maine Central Railroad Co.*

DAMAGES.

On failure by employer to permit performance of contract for personal services.—The plaintiff contracted with the defendants to play first old man and character business for thirty-six weeks. At the close of the nineteenth week the defendants discharged the plaintiff without fault on his part, who commenced an action for breach of the contract during the next week. *Held*, that the action was not premature; *held*, also, that the plaintiff was entitled to recover as damages for the remainder of the term at the stipulated rate, less what he actually earned or might have earned by the exercise of reasonable diligence, with interest; that having obtained another contract within the line of his profession within the time of his original contract with the defendants, the sum which he might have earned thereby to the time when his contract with the defendants expired, should be deducted from the contract price with the defendants. *Sutherland v. Wyer.*

MALT LIQUOR.

When what is, question of fact for jury.—Revised Statutes, chapter 27, section 22, enacts that "ale, porter, strong beer, lager beer, and all other malt liquors, shall be considered intoxicating liquors within the meaning of this chapter, as well as all distilled spirits." *Held*, that the question "what is the malt liquor in-

tended by and embraced in the statute and prohibited from sale," is one of fact for the jury and not one of law for the court. *State v. Starr*.

MUNICIPAL CORPORATION.

Not liable to one injured by defect in highway while racing.—An action does not lie against the town in favor of a person who receives an injury from a defective highway, while using such highway for the express purpose of horse-racing, and matching his horse for speed against other horses. *Semble: Aliter*, if the fast driving was merely incidental to travelling upon the highway for any of the legitimate purposes for which a highway is designed to be used. *McCarthy v. City of Portland*.

PATENT.

Contract for royalty under litigated patent valid.—If a patentee, in consideration of a royalty, grants to another a license to use his patent, who uses it, the patentee's right being in litigation and that fact known to the licensee, he not having been interfered with, cannot plead in defense that the invention was not new nor that the patentee was not the first inventor. *Jones v. Burnham*.

SALE.

Of personal property: transfer of title: fraud.—If C. delivers his oxen to T. as a pledge to secure payment of a note, and T. afterward permits them to remain in C.'s possession to be redelivered if C. does not pay the note in a week, a subsequent purchaser of C. within the week, without fraud against T., acquires a valid title against him. If there is no delivery from C. to T., and the transaction between the parties is an agreement merely that the oxen shall be held as security, to be taken by T. in case of failure to pay the note, then T. takes no title and cannot contest the title of a subsequent purchaser, though his purchase was fraudulent. *Mosher v. Smith*.

TROVER.

Mistaken removal of fence under authority of town officer.—Trover lies against a person who removes a quantity of fence from the land of its owner, although such person was acting at the time under the direction of town officers and mistakenly supposed the fence to be upon the land of the town. *Smith v. Colby*.

RECENT BANKRUPTCY DECISIONS.

CHATTEL MORTGAGE.

Assignee in bankruptcy cannot maintain trover for mortgaged property against mortgagee.—Where, before the commencement of the proceedings in bankruptcy, the holder of a chattel mortgage executed by the bankrupt took possession of the mortgaged property and appropriated it to his own use, held, that the assignee could not maintain an action of trover to recover the value of such property. U. S. Cir. Ct., New Jersey. *Jones v. Miller*, 17 Nat. Bankr. Reg. 316.

COMPOSITION.

When creditor entitled to double security: refusal to pay composition.—Defendants, who were indorsers of a promissory note, were adjudged bankrupts before its maturity, and proposed a composition at fifty cents on the dollar, which was accepted and recorded, the note being entered on their schedule as held by the party from whom plaintiff had received it, plaintiff having no

knowledge of the proceeding, and not assenting thereto. After the maturity of the note the makers were adjudged bankrupts, and offered a composition of fifty per cent to the creditors, including plaintiff, which was accepted and duly performed. The defendants then offered to pay fifty-five per cent of the balance remaining due, which was refused. Held, that plaintiff was entitled to its double security; that, as the note was not provable in bankruptcy before maturity, it could not be satisfied by the composition, and that, even if it could, the defendants, having refused to pay according to their composition, could not protect themselves by it from an action at law. Sup. Jud. Ct., Massachusetts. *National Mount Wollaston Bank v. Porter*, 17 Nat. Bankr. Reg. 329.

DISCHARGE.

1. *What it bars.*—A discharge in bankruptcy bars the collection of a claim for the purchase-money of land which has been allotted to the debtor as a homestead in the bankruptcy proceedings. Sup. Ct., North Carolina. *Hoskins v. Wall*, 17 Nat. Bankr. Reg. 314.

2. *Does not operate as payment: husband and wife.*—A discharge in bankruptcy does not operate as a payment, but is simply a bar to the enforcement of the obligation; and, unless pleaded in defense by the debtor, it is waived. The discharge of the husband in bankruptcy cannot be pleaded by the wife in bar of an action against her, under the laws of Louisiana, to recover her half of a community debt, where she has accepted a community. Sup. Ct., Louisiana. *Ludeling v. Felton et al.*, 17 Nat. Bankr. Reg. 310.

GENERAL ASSIGNMENT.

1. *An act of bankruptcy: when it will not prevent discharge.*—The making of a voluntary general assignment by a debtor is an act of bankruptcy of itself. But to prevent a discharge, the assignment must have been made, not only in contemplation of bankruptcy, but with intent to prefer some creditor, or for the purpose of preventing the property from coming into the hands of the assignee in bankruptcy, or from being distributed in satisfaction of his debts. U. S. Dist. Ct., N. D. Illinois. *In re Croft Brothers*, 17 Nat. Bankr. Reg. 324.

2. *Partnership: homestead: when discharge refused.*—Partnership assets are a trust fund for the payment of the firm debts, and no exemptions can be set apart from them to the individual partners until all the partnership debts are paid. The bankrupts made a general assignment for creditors. One of the members of the firm, whose homestead, which had been paid for and furnished out of the partnership earnings, was held in his wife's name, took from the assignee the amount he claimed as exemptions, and continued business in his wife's name. Subsequently the bankrupts were adjudicated in voluntary proceedings. On application for a discharge, held, that the assignment was made in contemplation of bankruptcy and for the purpose of preventing the property of the firm or some part of it from coming into the hands of the assignee for distribution, and that a discharge should be refused. *Ib.*

LEASE.

One valid against bankrupt is valid against assignee.—A lease of property owned by the bankrupt, which is valid against him, although not recorded as required by the statute of the State, is valid against

the assignee, although he had no knowledge of its existence. Sup. Jud. Ct., Maine. *Goss v. Coffin*, 17 Nat. Bankr. Reg. 332.

MORTGAGE.

When mortgage creditor cannot prove claim for deficiency: valuation of security.—A creditor of the bankrupts, holding security by way of mortgage upon real estate, obtained leave of the bankrupt court to foreclose his mortgage in a State court, sold the real estate under the decree of foreclosure, and proved his judgment for deficiency on the sale as a claim against the estate. On re-examination of the claim, *held*, that he could not prove for his deficiency; that if he desired to do so, he should have taken the necessary steps to obtain a valuation of his security in the manner prescribed by section 5075. The ordinary order granting leave to foreclose a mortgage upon the bankrupt's property, cannot be construed as directing that the value of the creditor's security be ascertained by a sale under a decree of foreclosure. Dist. Ct., N. D. New York. *In re Herrick*, 17 Nat. Bankr. Reg. 335.

TRUSTS.

Default of factor.—The default of a factor in not making payment to his principal is not a fraud, nor is the debt created by such default, "while acting in any fiduciary character," within the meaning of section 33 of the Bankrupt Act. Only technical or special trusts, as contradistinguished from those which the law implies from the contract, are within the meaning of the section. U. S. Circ. Ct., W. D. Pennsylvania. *Keime v. Graff & Co.*, 17 Nat. Bankr. Reg. 319.

UNITED STATES SUPREME COURT ABSTRACT.

CONSTITUTIONAL LAW.

Law impairing obligation of contract: corporate charters: consolidation of existing corporations: amendment of charter.—Charters were granted to two railroad companies, in each of which it was provided that a specific tax therein named, and that only, should ever be levied or assessed on the corporations, or any of their franchises, and that the charter should not be revoked, annulled, altered, limited or restrained without the consent of the corporation. Subsequently under legislation for that purpose the corporations consolidated and formed a new corporation, which were by the statute under which the consolidation was made to have all the powers, privileges and immunities of each old corporation, but the new corporation was subject to the general law of the State providing that corporate charters could be altered. *Held*, that the new corporation could not claim immunity from taxation under the provisions of the charters of the old corporations constituting it. Judgment of Supreme Court of Maine affirmed. *Maine Central Railroad Co., plaintiff in error, v. State of Maine.* Opinion by Field, J. Strong, J., dissented.

EVIDENCE.

Burden of proof: negative allegation.—When a negative allegation involves a criminal neglect of duty, official or otherwise, or fraud, or the wrongful violation of actual lawful possession of property, the party making the allegation must prove it, for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged. Accordingly in an action against a collector of customs duties to recover for an alleged illegal exac-

tion of duties, *held*, that it devolved upon the plaintiff to make out his case by showing the illegality complained of. Judgment of U. S. Circuit Court, S. D. New York, reversed. *Arthur, plaintiff in error, v. Unkart.* Opinion by Hunt, J.

JURISDICTION.

Of Court of Claims.—The Court of Claims has jurisdiction of a suit brought to recover an amount allowed by the commissioner of internal revenue upon the claim of a brewer for an excess of special tax stamps used by him in payment of the special tax upon his business at the beginning of the year, when, at the close, it was found he had manufactured less than five hundred barrels, and the payment of the amount so allowed had been refused upon proper application to the disbursing officers of the Treasury Department. Judgment of Court of Claims reversed. *United States, appellants, v. Kaufman.* Opinion by Waite, C. J.

REAL ESTATE.

Open possession operates as notice of title.—In Illinois actual, visible, and open possession of real estate is equivalent to registry of the conveyance thereof, and operates as notice of title to creditors and subsequent purchasers. Decree of U. S. Circuit Court, N. D. Illinois, affirmed. *Noyes, appellant, v. Hall.* Opinion by Clifford, J.

STATUTES.

Repeals of revenue laws by implication not favored.—Repeals by implication of revenue and collection laws, except when the prior laws have been subjected to a general statutory revision, are not favored in legal decision, unless it appear that the prior provision has been re-enacted in the new regulation, or that the later act is repugnant to the former, and the Revised Statutes provide in express terms that whenever an act is repealed which repealed a former act, such former act shall not thereby be revived unless it shall be expressly so provided. (Rev. Stat., § 12, p. 2.) Judgment of U. S. Circuit Court, S. D. New York, affirmed. *Kohlsaat, plaintiff in error, v. Murphy.* Opinion by Clifford, J.

NOTES OF RECENT CRIMINAL DECISIONS.

INTENT: WHEN ESSENTIAL TO OFFENSE.—Defendant was indicted for selling intoxicating liquor in violation of the provisions of the act to provide against the evils resulting from the sale of intoxicating liquor in the State of Ohio. It was held by Ashburn, J. (Scott, J., dissenting), that where one does an act in apparent violation of a criminal statute, but under circumstances that tend to show a want of guilty intention, he may be allowed to introduce as evidence, to show his good faith, or that he was ignorant of the facts, that made his acts criminal, the exculpatory circumstances. *Farrell v. State*, Sup. Ct. Ohio, Dec. 1877.

MALT LIQUORS: LAGER BEER PRESUMED TO BE.—In a prosecution under a statute against selling "ale, wine, rum or other strong or malt liquors" without a license, the government, without introducing evidence that lager beer is either a strong or malt liquor, simply proved the selling of a glass of lager beer. Defendant contended that in the absence of evidence to prove that lager beer is either a strong or a malt liquor, the jury could not find a verdict of guilty, and moved a dismissal of the complaint. Defendant also requested the court to instruct the jury, that, before they could render a verdict of guilty, they must be

satisfied that from the proof the lager beer claimed to be sold was either a strong or malt liquor. The motion and request were denied. The defendant excepted and appealed. *Held*, that although the government does not name lager beer in the prohibitory clause of its statute, it does name it in prescribing the license fees "for a license to sell lager beer, ale and other malt liquors only, at retail only," the fee shall be "not less than fifty dollars, etc.;" that in view of the fact of its recognition in the statutes, as a malt liquor, the court might rightly assume that it is such, and that it would not be necessary for the government to show by proof that lager beer is a malt liquor. *State v. Goyette*, 11 R. I. 592.

CONVEYANCE OF LAND TO HUSBAND AND WIFE SINCE MARRIED WOMAN'S ACTS.

To the Editor of the Albany Law Journal:

SIR—I have read with pleasure the communication of your correspondent J. C. L., in your issue of 4th inst. My "akepticism" is so deep seated that it will not be entirely removed, until the Court of Appeals shall decide the precise question in hand. I know of no case involving it; pausing there, and perhaps a brief resume of the authorities, and a word or two in reference to the matter may be of service to the profession.

Goelet v. Gori, 31 Barb. 314, seems to have been the pioneer case. It arose on demurrer at Special Term, and all the court decided was that the joint and several covenant of husband and wife—who were joint lessees for a term of years—to pay rent did not *per se* bind the separate estate of the wife. There was no charge upon her separate property; and the court held that her covenant did not bind her.

The court (Judge Sutherland) says: "The statutes were intended to enable married women to take, and hold, and dispose of property, as if they had no husbands.

In *Farmers and Mechanics' Bank v. Gregory*, 49 Barb. 155, a judgment creditor of the husband sought to reach money in the hands of his wife, received by her on a sale of lands which had been conveyed to her and her husband, and held by them as *joint tenants*, under a conveyance, which in terms describes them as such. The court decided that the money did not belong exclusively to the wife, but must be applied to the payment of the judgment, and that the referee who had held that the husband and wife were each entitled to a moiety of the proceeds had committed no error of which the wife could complain. All else is *obiter*, and the only authority as to the effect of the statutes in question, cited by the learned and lamented judge, is *Goelet v. Gori*, *supra*.

The point under discussion was not then necessarily involved in either of these cases.

In *Miller v. Miller*, 9 Abb. (N. S.) 444, the supposed controlling authority of these cases led the court at Special Term (Murray, J., contrary to his own convictions), to decide that husband and wife were not tenants in common, of lands conveyed to them since the statutes.

In *Freeman v. Barber*, 3 N. Y. Sup. (T. & C.) 574, it was decided that the wife could not maintain an action for use and occupation of, or waste on lands, given to her and husband by parol. The husband and wife went into possession of lands under a parol gift, the

terms of which—as will be seen by reference to the case of *Freeman v. Freeman*, 51 Barb. 307 (S. C., 43 N. Y. 35)—do not fairly present the question as to the effect of a conveyance of land to husband and wife, in fee, with no particular designation of the character of the tenancy.

The only authorities cited in *Freeman v. Barber* for what the court characterises as *res adjudicata* on this subject, are *Goelet v. Gori*, *F. & M. Bk. v. Gregory*, *supra*.

In *Beach v. Hollister*, 5 N. Y. Sup. (T. & C.) 568, all the court decided was, that the husband's interest in lands conveyed to husband and wife could be sold on execution against him, and the grantee in the sheriff's deed could recover possession of the property, and this notwithstanding a divorce *a vinculo* had been procured by the wife. Justice Mullin dissented. See 3 Hun, 517, S. C.

All else is *obiter*. The only cases cited from our reports are *Goelet v. Gori*; *F. & M. Bk. v. Gregory*; *Freeman v. Barber*, *supra*. The cases cited from Michigan and Pennsylvania are not applicable. Their statutes differ from ours.

In *Baker v. Lamb*, 11 Hun, 519, all that is decided is, that a married woman is not seized of a separate estate in lands conveyed to husband and wife, sufficient to charge the same with the payment of a promissory note made by her, and no express charge having been made, she was not liable on the note. The point was not necessarily involved in the decision of *Baker v. Lamb*. The cases of *F. & M. Bk. v. Gregory*, and *Beach v. Hollister* are the only ones cited, as bearing upon it.

In *Meeker v. Wright*, 11 Hun, 533, the action was brought for the foreclosure of a purchase-money mortgage executed by a wife to her husband, of lands originally conveyed to husband and wife, and afterward conveyed by husband to wife. The court held the deed and mortgage void in law, and the latter not enforceable in equity. The learned judge cites only the case of *F. & M. Bk. v. Gregory* in support of the position that the old rules as to the effect of the conveyance to husband and wife are not affected by the Married Women's Acts. Here, again, I think the point in question was not necessarily involved in the decision.

I do not find in any of the cases above referred to an analysis of the statutes in question, or their comparison with the rules which prevailed at common law.

Clearly, the effect of the decisions in *F. & M. Bk. v. Gregory*, and *Beach v. Hollister*, is to fasten on the wife, in respect to the estate conveyed to herself and husband, all the common law disabilities of coverture, to subject her "interest therein, and the rents, issues and profits thereof," during their joint lives, to the absolute control, possession of and alienation by her husband, as well as to liability for his debts.

In *Moore v. Moore*, 47 N. Y. 467, it is held, that a wife can hold an equal undivided half part of real estate, as tenant in common with her husband, and can maintain an action for partition against him.

In *Wright v. Wright*, 54 N. Y. 444, the court (Reynolds, C.) says: "I do not see why a married woman may not sue her husband, to enforce any right affecting her separate property, in any form of action in the same manner that she may sue any stranger, and such, I think, is the judgment of the court." Citing cases.

The statute for "the more effectual protection of the property of married women" says:

"Any married female may take * * * and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the same effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts." 4 Edmonds' Statutes, p. 513, § 3.

It is believed that the real object of legislative enactment on this subject has been to destroy the legal unity of husband and wife where their respective rights of property are involved, and that such object has been attained by the passage of what are called the Married Women's Acts.

The only reason why, prior to 1848-9, and under the Revised Statutes, which provides "that every estate granted or devised to two or more persons, in their own right, shall be a tenancy in common, unless expressly declared to be in joint tenancy" (1 Edm. Stat. 676, § 44), a conveyance of an estate to husband and wife did not vest it in them as tenants in common was, because husband and wife were deemed one person in law, had no separate existence, could hold no separate title to lands, their several identity was merged in their unity, their rights and interests were incapable of severance during coverture.

The wife's right of property, under the statute of 1849, where land is conveyed to her singly, differs *totò* from her common-law rights. It is hers absolutely. It is a legal estate, and in respect of it, she and her husband are two distinct persons. Does the mere insertion of her husband's name as a co-grantee in the conveyance reunite this separate relation? Suppose a conveyance is made to an unmarried female and another person, who subsequently intermarry. They are tenants in common when the conveyance is made. Do they cease to be such because of the supervening unity of person? Why does she not "take" the same estate after marriage as before, when the statute says she shall take and hold any interest or estate in land "in the same manner and with the same effect as if she were unmarried?" (I cannot favor my friend with any satisfactory answer to be found in the authorities cited by him.) I think the question has not been squarely met in any reported decision, except perhaps in *Miller v. Miller*, above referred to, and may be fairly claimed as an open one until the Court of Appeals shall settle it.

It seems pertinent to add, that the reasons which originated this peculiar tenancy of *per tout et non per neg*, in England, have no existence with us. An adherence to the old doctrine is a check on the transmission and alienation of property, at war with our system. It is a relic of the feudal institution which has lost its vigor in our changed relations. We believe that the laws passed, as their title indicates, for the benefit and protection of married women, were designed to entirely obliterate it.

B.

NEW YORK STATE BAR ASSOCIATION.

COMMITTEE ON LEGAL BIOGRAPHY.

At a meeting of the executive committee of the New York State Bar Association held at Albany on the 15th day of May, 1878, the following resolutions were adopted:

I. *Resolved*, That the committee on legal biography be requested to prepare for presentation at the next annual meeting of the association, brief memorials of the lives and characters of any distinguished members of the Bar of this State who may have died between the date of the organization of this association and such next annual meeting.

II. *Resolved*, That upon the death of any member of this association it shall be the duty of the member or members of the committee on legal biography who shall reside in the district where such deceased member resided, to transmit to the chairman of such committee, a professional obituary of suitable length, for reading at the annual meeting of the association and for publication among the proceedings of the association.

III. *Resolved*, That there shall hereafter be published in the yearly proceedings of this association a brief obituary notice of such members and such highly distinguished lawyers and judges of this State, not members, as shall have died during the current year.

LOCAL BAR ASSOCIATIONS.

IV. *Resolved*, That the several district committees of the executive committee be requested to use their influence to promote the formation of local bar associations in their respective districts.

ABUSES AFFECTING THE ADMINISTRATION OF JUSTICE.

V. *Resolved*, That the committee on grievances be requested to inquire and report at the next annual meeting of the association, whether any, and if so, what abuses now exist in any of the courts of record in this State affecting the administration of justice or the interests of the legal profession in either of the following matters:

1st. The appointment of referees, the hearing of matters before referees, or the fees and expenses of proceedings in references.

2d. The manner of publication of legal notices or the expenses thereof.

3d. The fees of registers, sheriffs or county clerks for searching or exemplifying legal records in their official custody.

4th. The preservation or classification of records of conveyances or judicial proceedings by the registers, clerks or other officers having charge thereof.

5th. The charges of attorneys and counsel in the conduct of legal proceedings and in the management of office practice.

And that such committee also report, if such abuses are found to exist, what remedies if any, either by legislation or rules of court, or both, or otherwise, they deem advisable in the premises.

LAW REFORM.

VI. *Resolved*, That the committee on law reform be requested to consider whether any, and, if so, what legislation is necessary or proper concerning either of the following matters:

1st. The law touching "warranties" as distinguished from the law touching "false representations" in policies of insurance.

2d. The law exempting the master from liability for injury to his servant occasioned by the negligence of a fellow servant.

3d. The law relating to fraudulent misappropriation of partnership property, by one partner, without the knowledge or against the will of other partners.

4th. The law relating to the notice to *bona fide* purchasers or mortgagees of lands by registration of written instruments, especially in large cities.

5th. The fees of jurors or witnesses serving in the trial of causes.

6th. The fees of stenographers for copies of minutes of testimony taken on the trial of causes.

And that such committee report at the next annual meeting of the association its views upon such subjects.

VII. *Resolved*, That it be also referred to the committee on law reform to inquire and report to this association at its next annual meeting whether any, and if any, what legislation is necessary and practicable in order to diminish the labor, expense and risk, now involved in the transfer of real estate in the large cities of the State upon sale or mortgage; by reason of: (1) the decisions of the courts under the recording acts in respect to constructive notice to purchasers and mortgagees (see *Ring v. Steele*, 3 Keyes, 450; *Tefft v. Munson*, 57 N. Y. 97; *Dusenberry v. Hulbert*, 59 id. 541; *Washburn v. Burnham*, 63 id. 132); (2) the manner of making up and preserving records showing jurisdiction and judgments in the surrogate's court and other courts of record in this State affecting titles to real estate; (3) the various liens imposed upon real estate by statute; (4) the labor and fees of officials and quasi officials necessarily employed to search and give certificates respecting taxes, assessments, and other liens upon real estate; (5) also any other matters in the judgment of the committee germane to those hereinbefore specifically referred to.

REMITTANCE OF DUES TO MEMBERS ELECT.

Resolved, That all members elect of this association, who shall, besides their initiation fee, pay their annual dues for the year 1878, be deemed full members, and that notice hereof be given by the treasurer to all such members elect.

The following resolution was adopted at a meeting of the executive committee of the New York State Bar Association, held at the city of New York, January 26, 1878.

Resolved, that the chairman of the executive committee appoint a committee of five from the association to make arrangements for the annual meeting in November, with power to add one from each district; and they shall have power to prepare an order of exercises for the annual meeting; invite the attendance of the honorary members, and any distinguished lawyers from abroad; invite the reading of theses, or the delivery of addresses by designated persons on topics to be assigned by the committee; and take such other steps as they may deem best to secure a large attendance of the profession, and give permanent interest to the proceedings.

In pursuance of the foregoing resolution, the chairman appointed the following named committee: Isaac Grant Thompson, Albany; Elliot F. Shepard, New York city; E. C. Sprague, Buffalo; Joshua M. Van Cott, Brooklyn; George J. Greenfield, Richmond.

CORRESPONDENCE.

ASSUMPTION OF MORTGAGES BY GRANTEES.

To the Editor of the Albany Law Journal:

SIR — In last week's issue you refer to the injustice of the rule holding a grantee of mortgaged premises assuming the mortgage liable for deficiency. It is doubtful if the legislation proposed to meet this (apparent) injustice, viz.: to require the signature of the party claimed to be liable as a condition precedent of his liability, would be effectual, as the result would be to require (as used to be the practice some years ago) the signature of the grantee in every instance to deeds containing an assumption clause, and if such were the case eager purchasers would be compelled to and would assume the obligations of their grantors as often as hitherto. But *quere?* as to the justice or equity of the rule suggested by you, of making each assuming grantee liable only to his immediate grantor? To practically enforce such a rule, would it not require to fix the liability of such assuming grantee, that such immediate grantor be first damnified, and the remedy of the mortgagee against him be first exhausted? Is not this putting the cart before the horse? Would it not be more equitable to reverse the rule and hold assumers of mortgages equally liable with the original bondsmen, but in the inverse order of assumption, and requiring the return of an execution *nulla bona* against each assumer before giving the right of execution against his grantor? And would not this be more in harmony with the rule recognizing the grantor after conveyance to the assuming grantee, in the light of a surety or guarantor, and such grantee as the principal debtor? You speak of the hardships of assumers. I think the original bondsmen and mortgagors are more to be pitied, years after they have parted with their property, and after it has passed through many hands and they suppose their mortgages paid, perhaps have forgotten all about them, they are called upon, possibly, in a period of unusual depression, to pay deficiencies on nearly every mortgage they ever executed and had not seen satisfied. Let me illustrate in another form: A, in 1870, owning a lot worth \$4,000, on which is a house worth \$10,000, obtains a loan of \$8,000 on the premises, on his bond and mortgage, payable in three years, and containing the usual insurance clause, and shortly thereafter conveys to B, who assumes the mortgage, and who in 1874 conveys to C, who does not assume. C forgets to renew the insurance, and a day or two after the building is wholly destroyed by fire.

The mortgagee forecloses and A has to pay a deficiency arising from no fault of his own but exclusively from the neglect of others. Certainly as between A and B, should not the latter be compelled to pay before A?

It seems to me that legislation is more needed to protect the mortgagor than the assuming grantee. It has been supposed that it was well settled that time given by the mortgagee to the assuming grantee without the knowledge or consent of the mortgagor released the latter, but the General Term in the second district in *Meyer v. Lathrop*, 10 Hun, 66, held the contrary, and that the original obligor always remained liable to the mortgagee, and I understand the case has just been affirmed in the Court of Appeals, but on what ground I have not been informed. J. C. L.

NEW YORK, May 13, 1878.

NEW BOOKS AND NEW EDITIONS.

DESTY'S FEDERAL CITATIONS.

Federal Citations, an alphabetical table of English and American cases cited in the opinions of the courts of the United States, stating the points as to which they are cited, and showing the effect of such citation by letters and characters. By Robert Desty, author of "Federal Procedure," "California Citations," etc. San Francisco: Sumner Whitney & Co., 1877.

THIS volume, as stated in the preface, is designed to show the value as authority of every case referred to in the decisions of the various Federal courts. It embraces all the American and English cases which have been cited, together with the subject-matter, or points to which they have been cited, with an indication of their value as authority in the courts mentioned. The work will prove valuable to the bench and bar in preparing for the argument or decision of cases on trial, as it will readily show whether a case cited has been either acknowledged as authority by the Federal courts, or has been received as authority on a single point but denied as to another, or has been doubted, limited or entirely overruled. The preparation of the book must have required a vast amount of labor and care, but it has been thorough and accurate. We are confident that the work will be welcomed by those for whose use it is designed, and that they will find it a very valuable aid in their professional labors. The book is excellently printed on fine paper and is finely bound.

MORGAN'S LEGAL MAXIMS.

An English version of Legal Maxims, with the Original Forms, alphabetically arranged, and an Index of Subjects. By James Appleton Morgan, author of "The Law of Literature." Cincinnati: Robert Clarke & Co., 1878.

The tendency to embody principles of law, and indeed of every other science, in what are known as maxims has been common in every age. The ancient works upon moral science were very usually in the shape of a collection of maxims, and very many of the fundamental principles of political science are known to most people only in the form of maxims. The work before us is an attempt to bring together all known legal maxims. These are given in their original Latin or law-French form with the English translation and a reference to the place where each first appears. The maxims are arranged alphabetically under the first word of the Latin or French form, and as a still further means of facilitating reference, an index of subjects is also given. This is the most extensive collection of maxims we have met with, the number contained in the book being two thousand eight hundred and eighty-two, and we suppose every thing of value in the early writers will be found here.

OBITUARY.

SAMUEL A. FOOTE.

Samuel A. Foote, formerly Judge of the Court of Appeals of this State, died at Geneva, N. Y., on the 11th instant. He was born at Watertown, Conn., Dec. 19, 1790, and after a course of academical study entered Union College, where he graduated with distinguished honors. He at once chose the law as his profession, and pursued his legal studies in Albany. Upon being admitted to the bar he rapidly rose to distinction in his profession. While yet young he was elected District Attorney of Albany county. In 1825 he moved to New York city and entered into a law partnership with the

late Judge William Kent, son of Chancellor Kent, and subsequently became associated with Judge Henry E. Davis. After remaining in New York city two years he moved to Geneva, where he made his home for the rest of his life. He was actively engaged in the labors of his profession up to the last week of his life. As a lawyer he ranked very high, and his decisions delivered while in the Court of Appeals placed him among the foremost jurists of his time. He was averse to politics, and did not seek official position. He was believed at the time of his death to be the oldest lawyer in practice in the State.

NOTES.

SALEM, Mass., has a case which would have gladdened the hearts of the old persecutors of witches. The *Boston Advertiser* says: "A bill in equity has been filed in the office of the clerk of the courts at Salem, by Miss Lucretia Brown of Ipswich, against Daniel H. Spofford, formerly of Salem, but now of New York, in which she sets forth that she is now suffering from a serious spinal disease, caused by the mesmeric influence which Spofford exerts over her, and she petitions the Supreme Judicial Court for an injunction against Spofford, to restrain him from further exerting his influence upon her. The case is a somewhat curious one, and has excited considerable interest in the community. Spofford professed to cure diseases by the laying-on of hands and mesmeric influence. It appears that he was a pupil of Mrs. M. B. Eddy, of Lynn, who claims to have acquired the art of healing all diseases by a special revelation. She agreed to impart her knowledge to Spofford for \$100 cash and ten per cent on his future accruing profits. The \$100 was paid, but the royalty has not been, and Mrs. Eddy claims that Spofford has set up in the practice of her especial system, and has interfered with her in several of her cases, to the great injury of her patients, Miss Brown's case being one of those in which Spofford has exerted a counter influence. It does not appear that Spofford was ever called professionally to Miss Brown, but that he exerted his influence from a distance, and does now from New York. The issue of the application will be watched with considerable interest."

The enterprise started by Mr. F. H. Norton, of this city, for furnishing lawyers with any desired information from the State Library, seems, from its success, to "meet a want long felt." To be able to have authorities hunted up, briefs prepared, opinions copied, cases examined, etc., must be of good service to one who has not a large library at his command.

At the annual election of the New York Law Institute, held on Monday, May 13, 1878, the following officers were elected: President, Charles Tracy; First Vice-President, Samuel Blatchford; Second Vice-President, Joseph H. Choate; Third Vice-President, Stephen P. Nash; Treasurer, Cornelius Van Santvoord; Recording Secretary, Joseph S. Bosworth; Corresponding Secretary, Benjamin D. Silliman; Librarian and Assistant Treasurer, Aaron J. Vanderpoel; Library Committee, Edmund Terry, Thomas H. Rodman, Samuel Brown, Edward Patterson, James C. Carter, William Watson, Thomas M. North and Everett P. Wheeler; Committee on Jurisprudence, William M. Everts, George DeForest Lord, Edwin W. Stoughton, John E. Burrill, Charles F. Stone, Enoch L. Fancher and Edmund Wetmore; Committee on Censorship, Erastus C. Benedict, Charles F. Southmayd, John McKeon, Clarence A. Seward, Benjamin T. Kissam, Henry D. Sedgwick, William H. Arnoux, Rocellus S. Guernsey and Montgomery H. Throop.

Up to Thursday the 16th inst. the Governor had signed 286 acts of the Legislature.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, MAY 25, 1878.

CURRENT TOPICS.

THE United States District Court for New Jersey, in the case *Matter of Noyes* appearing elsewhere in this number, decides that a State which has procured the rendition under the act of Congress of a fugitive from justice who has fled to another State, may put him on trial for an offense other than the one for which he was delivered up, and can try him even though he was surrendered without legal authority. The principle which governs the law of extradition between the States of the Union is in this respect different from that which governs when an alleged fugitive from justice is surrendered by one nation to another. Only a few offenses are considered of sufficient gravity to justify the denial of the privilege of an asylum, which most modern nations give to those fleeing from other countries, and the various extradition treaties particularly define these. But between different parts of the same country there can be no privilege of asylum, and the constitutional provision in reference to the delivering up of fugitives includes every crime and not a few specified ones, as do the extradition treaties.

In the case of *Ex parte Schollenberger*, just decided by the Supreme Court of the United States, and which will appear in our next issue, an important question of jurisdiction was passed upon. By the United States statute of 1875, determining the jurisdiction of the Federal Circuit Courts, it is provided that no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding. By a statute of Pennsylvania non-resident insurance companies, as a condition of doing business in that State, are required to designate an agent on whom process against them therein may be served, and to stipulate that such service shall have the same effect as personal service. The court holds that a company making such a designation and stipulation is "found" in Pennsylvania under the Federal statute, and the service of process from the Circuit Court

in that State upon the designated agent gives that court jurisdiction.

The Senate committee on the judiciary, on the 20th inst., reported back adversely the bill providing that women who have been members of the bar for three years in any State or territory, etc., shall be admitted to practice in the Supreme Court of the United States, and that no person shall be excluded from practicing as attorney or counselor before any court of the United States on account of sex. The reason given for the adverse report was that there is now no law excluding females from the bar in the courts mentioned, and therefore there is no necessity for the passage of the bill.

A Brooklyn clergyman during the delivery of a sermon on Sunday last, charged the district-attorney of Kings county with a violation of his duty as a public prosecutor, in not procuring an indictment against a young man named Johnson, who was confined in the jail of that county upon a charge of assault with intent to kill, and in permitting steps to be taken for the transfer of the prisoner, who is alleged to be insane, to a lunatic asylum. The most serious part of the charge was that the sum of \$25,000 had been expended by the friends of Johnson in securing this result outside of the amounts paid the counsel who appeared for him, and the congregation before whom the sermon was delivered were left to infer that the public officials had shared in this sum. As the sermon contained a large amount of clap-trap talk about the favoritism shown in the administration of justice to the rich, the general criticisms upon what had been done would have attracted little attention, and the remarks of the reverend gentleman would have been passed by as a harmless tirade against a class of individuals whom certain of the clergy think they have the right to denounce *ad libitum*. But the specific charge of the improper expenditure of money brought one of the speaker's hearers to his feet, and the speaker was informed promptly that what he had said was not the fact, and that he knew it. The district-attorney, in a letter published in the Brooklyn papers, explains fully and satisfactorily what has been done in the Johnson matter and the reasons therefor, and denies the principal slander. The prisoner has not been indicted because the principal witness, and the only one by whom an important part of the case can be proved, is too ill to appear before the grand jury. In respect to the steps taken for removing the prisoner to an asylum, two of the leading physicians of Brooklyn have sworn that he is insane and should be removed. The every day remark that the poor man and the rich one do not fare alike before the criminal courts is only partially true. It may be that violators of

the law who stand high, socially, or are possessed of an abundance of means, very frequently escape punishment for their misdeeds, and that those without friends or money have but little chance of escape if the evidence is strong against them. But the reason for this apparent injustice is not, as is generally believed, because the public authorities fail to do their duty. So far as this is concerned, the wealthy or influential offender is often at a disadvantage, and courts and juries strain a point that he may not cheat justice. The reasons why men of means and standing when guilty of crime escape are these: First, the offenses they commit as a rule are those that are made so by statute, such as forgery, obtaining money under false pretenses, etc. The evidence of their acts is usually documentary, within a narrow compass, and easily repressed or destroyed. Then the results of these offenses except in rare cases can affect very few persons. Second, those injured by the criminal act are, as a rule, fully compensated for the wrong done them, and are indisposed to appear as witnesses, and render it practically impossible for the public prosecutor to successfully conduct the case. Third, in very many instances the offender is if unpunished reasonably certain to lead thereafter an upright life, and punishment will be of no benefit to him or to the community, while the disgrace attending it will injure many innocent persons. Wealth may sometimes be used to corrupt witnesses, and social or political position to influence the public prosecuting officers, but the power of these things is felt more outside of the courts than in them.

The provision in the bankrupt law requiring one-third in value and one-fourth in number of the creditors of an insolvent person to join in the petition for his involuntary bankruptcy has been of very small advantage in preventing the institution of bankruptcy proceedings of this nature. Creditors were in the habit of presenting petitions in which the requisite statements were contained, the parties making them neither knowing nor caring whether they were true nor not. The debtor might show that the statements were not true, but the bankrupt court would not dismiss the proceedings, but would allow time to enable the petitioning creditors to induce enough others to join to make up the requisite number. A different course was however taken last week in the case of *Keller et al.*, by the United States District Court for the southern district of New York, and a petition, which was shown to be false in the respect mentioned, was dismissed and proceedings connected therewith set aside.

NOTES OF CASES.

IN *Kelly v. City of Pittsburgh*, 5 W. N. Cas. 324, decided on the 7th of January last by the Supreme Court of Pennsylvania, it is held that where

farm lands situated within the boundaries of a city are taxed for the support of the city government, the fact that such tax is unfairly burdensome, or that the lands, owing to their distance from the built-up portion of the city, are not within the reach or protection of particular departments of the city government, for the support of which they are taxed, does not render the tax unconstitutional. In this case, under authority of an act of the Legislature of Pennsylvania, the city of Pittsburgh extended its boundaries by the annexation of adjacent territory. In this territory was situated a tract of land used exclusively for farm purposes, and which, on account of its distance from the built-up portion of the city, was not within the reach of the water, fire, police, and other departments of the city government. The city, however, for the support of these departments, levied a tax on such farm, the amount of which was largely in excess of the farm's annual productive value. It was held that the tax was not unconstitutional. The court sustained its decision by the cases of *Weber v. Reinhard*, 23 P. F. Smith, 370; *Philada. Assoc. v. Wood*, 3 Wr. 73, and *Kerby v. Shaw*, 7 Har. 258, where the principle was held that a tax cannot be pronounced unconstitutional upon the mere grounds of injustice and inequality. The general rule is that a tax must be considered valid unless it be for a purpose in which the community taxed has no palpable interest and where it is apparent that the burden is imposed for the benefit of others. See *Sharpless v. Mayor of Philada.*, 9 Har. 147; *Speir v. Blairsville*, 14 Wr. 150. Agnew, C. J., and Sterrett, J., dissented, saying that under the doctrine of numerous cases in Pennsylvania and elsewhere, the tax should not be upheld. See *Bradshaw v. Omaha*, 1 Nebr. 16; *Taylor v. Porter*, 4 Hill, 140; *Holden v. James*, 11 Mass. 396; *Case of Washington Ave.*, 19 P. F. Smith, 363; *Cheany v. Hooser*, 9 B. Monr. 330; *Covington v. Southgate*, 15 id. 491; *Morford v. Unger*, 8 Iowa, 82; *Langworthy v. Dubuque*, 18 id. 86; *Fulton v. Davenport*, 17 id. 404. The case has been taken to the United States Supreme Court upon the question of the constitutionality of the tax under the clause of the fifth amendment to the Federal Constitution which provides that private property shall not be taken for public use without compensation.

In the case of *Harrison v. Collins et al.*, decided by the Supreme Court of Pennsylvania on the 8th of the present month, defendants employed one Conner to move certain machinery from a railroad depot to their premises. He was paid a specified sum per day for his work, and his assistants who were employed by him were also paid by the day. In doing the work he left open a coal hole in the sidewalk in front of defendants' premises, and plaintiff fell therein, injuring himself, for which he brought this action. The court held that if Conner

was the mere agent or servant of the defendants in doing the work they would be liable for his negligence in leaving the coal hole open, but if his employment was an independent one, they would not be liable. This is in accordance with the distinction recognized in numerous cases in England and this country. It is well settled that employers not personally interposing or giving directions respecting the manner of the work, but contracting with a third person to do it, are not liable for a wrongful or negligent act in the performance of the contract, if what was agreed to be done was lawful. *Gray v. Hubble*, 32 L. J. Rep. (N. S.); *Hillard v. Richardson*, 3 Gray, 349; *Blake v. Ferris*, 5 N. Y. 48; *Painter v. Mayor of Pittsburgh*, 10 Wright, 213. The fact that the contractor is paid by the day does not necessarily destroy the independent character of his employment. *Forsythe v. Hooper*, 11 Allen, 419; *Corbin v. America Mills*, 27 Conn. 274. If one renders service in the course of an occupation representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished—it is independent employment. See *Pack v. Mayor of New York*, 8 N. Y. 222; *Barry v. City of St. Louis*, 17 Mo. 121; *Mercer v. Jackson*, 54 Ill. 397.

The Supreme Judicial Court of Maine, in the case of *Emerson v. Europ. & N. Am. Railway Co.*, 67 Me. 387 holds that a mortgage by a railway company of "all its right, title and interest in and to all and singular its property, real and personal, of whatever nature and description now possessed, or to be hereafter acquired, including all its rights, privileges, franchises and easements," cannot be regarded at law as including money earned by the railway company in carrying freight for an express company under a contract entered into after the mortgage was made. This is an application of the common-law maxim of *Nemo dat quod non habet*. There are apparent departures from this principle, but those are where the results are produced by other principles not inconsistent with it. Thus where property has been added to mortgaged property by way of accession, natural or artificial, and the property annexed cannot be separated from the other without much injury, it is permitted to remain. For instance, a house is built on mortgaged land or a fixture is added to a house. And a man may sell property of which he is potentially in possession, such as the wine his vineyard will produce, the grain his field will grow, the milk his cow will yield, what may be taken at the next cast of his fishing net, fruits to grow on his trees, or young animals not in existence, the offspring of animals, owned by him. 2 Kent's Com. 468, note (a). The thing sold must, however, be specific and identified. A person cannot sell the products of a field he expects to own. *Farrar v. Smith*, 64 Me. 74.

There must even in equity which sometimes enforces these pledges of property to be acquired, be some subject for the contract to attach to. Here when the mortgage was made there was no contract with the express company for the carriage of freight. See, also, *Brachett v. Blake*, 7 Metc. 335; *Mulhall v. Quinn*, 1 Gray, 105; *Lau v. Pew*, 108 Mass. 347; 11 Am. Rep. 357.

In the case of *Ex parte Singer Sewing Machine Co., Re Blackwell*, 12 Ir. L. T. Rep. 57, decided by the Irish Court of Bankruptcy on the 16th of last month, the familiar sewing machine contract question came up. A sewing machine was let on hire to a trader by the company mentioned on an agreement that the trader should pay a certain monthly rent, and keep the machine in his own custody, and that, if he should fail to perform on his part, the machine might be taken by the company which might also recover the amount of rent in arrear. He had an option to purchase the machine within a year when the payments of rent were to apply toward the purchase-money. He paid rent for two months, and then did not pay for nine months when he became bankrupt. The company claimed the machine from the assignee in bankruptcy and asked to be permitted to prove for the balance of rent due. The matter was referred to a jury to determine whether there was a custom or usage in Ireland, allowing such contracts of sale of sewing machines as this one, where the title to the property was to remain in the vendor after he had parted with possession. The jury found that there was such a custom. The court held that the custom was not an unreasonable one, and thus the company was entitled to resume possession of the machine, and this, notwithstanding its laches in allowing the installments of rent to remain so long overdue. The court, however, expressed its disinclination to favor such contracts by refusing to grant the successful party any costs. The *Irish Law Times* in an article upon the decision gives instances where the Irish courts have condemned these contracts as "entirely at variance with all principles of fair trading," (*Mackintosh v. Kewran*, Q. B. Div., Feb. 4, 1878; *Ex parte Harpus, Re Smith*, 9 Ir. L. T. Rep. 52) and cites several articles and cases which have appeared in the ALBANY LAW JOURNAL as sustaining the view taken in the Irish courts. See 15 Alb. L. J. 64; 16 id. 442; 17 id. 98.

The Supreme Court of Ohio in *Matter of Victor*, 31 Ohio St. 206, passes upon a peculiar question, and one which has not heretofore been presented before the courts, namely, whether to render valid a commutation by the executive of the punishment of a convicted and sentenced criminal, the criminal must accept or acquiesce in such commutation. The court holds that the commutation is presumed to be for the culprit's benefit, and is valid without any action on his part.

PRIVITY IN NEGLIGENCE.

THE Court of Appeals in *Robinson v. New York Central & Hudson River Railroad Co.*, 66 N. Y. 11, manifested an unusual degree of timidity or rather caution in regard to the question of imputed negligence. The facts of that case were that the plaintiff—a woman—was invited to ride by one Conlon in his carriage and accepted the invitation. Conlon was a fit and proper person to manage a horse; but through the alleged negligence of the defendants' servants, its train was run against the carriage, and plaintiff was injured. The defendants alleged that the negligence of Conlon contributed to the injury, and that this negligence was imputable to the plaintiff, but the court below charged that even if Conlon was negligent the plaintiff would not be responsible therefor, and this ruling was sustained by the Court of Appeals. The opinion of the court ends thus: "It is not intended by this decision to establish a rule which will embrace cases not within the facts developed in this case, as construed by the court and found by the jury."

The English decisions are undoubtedly in favor of privity in negligence. The point was first raised in *Thorogood v. Bryan*, 8 C. B. 115, which was an action under Lord Campbell's act. The deceased, wishing to alight from an omnibus in which he was a passenger, got out while it was in motion, and without waiting for it to draw up to the curb; and, in doing so, he was knocked down and fatally injured by an omnibus belonging to the defendant. Williams, J., who tried the cause, told the jury that if they were of opinion that want of care on the part of the driver of the omnibus in which the deceased was traveling, or on the part of the deceased himself, had been conducive to the injury, their verdict must be for the defendant. A rule for a new trial on the ground of misdirection having been obtained, was, after consideration, discharged by the court, Coltman, J., observing: "The negligence that is relied on as an excuse is not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me that, having trusted the party by selecting a particular conveyance, the plaintiff has so far identified himself with the owner and her servants, that if any injury results from their negligence he must be considered a party to it." To the same effect Maule, J., says: "On the part of the plaintiff, it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom, by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it."

A like decision was come to in the case of *Bridge*

v. The Grand Junction Railway Company, 3 M. & W. 244, where it was held in a case of a collision between two trains, that the plaintiff must show the accident to be due exclusively to the defendant's negligence, and that joint negligence of the defendant, with other persons having charge of the train in which the plaintiff was traveling, was not sufficient.

In *The Milan*, Lush. Adm. 388, Dr. Lushington said he would not be bound by and did not approve of *Thorogood v. Bryan*, and in the note to *Ashby v. White*, 1 Smith's L. C. (6th Eng. Ed.) 266, that case was sharply criticised. See, also, S. C., 7th Am. Ed. at p. 481. And consult *Rigby v. Hewitt*, 5 Exch. 240, and *Greenland v. Chaplin*, id. 243.

The question was again directly involved in *Child v. Hearn*, 22 W. R. 864; L. R., 9 Ex. 176. The facts of that case were as follows: The plaintiff, a plate-layer, in the employment of a railway company, was returning from work along their line upon a trolley, when some pigs belonging to the defendant escaped from his field, which adjoined the railway, and running on to the line in front of the trolley, upset it, thereby causing the injury to the plaintiff for which he sought to recover damages from the defendant. A verdict was entered for the plaintiff, which the court afterward set aside, holding that the company had not maintained a sufficient fence under 8 Vict., c. 20, s. 68, and that the plaintiff could not recover, since he was identified with the company whose line he was using for their purposes. Bramwell, B., in his judgment, observed: "The plaintiff was a servant of the owner of property which was unfenced through the owner's default. It is manifest, as I have before said, that if the pigs got on to that unfenced property through its owner's default, the owner could not maintain an action; and, if so, it is impossible to say that a third person using the property through the license of the owner, and on his behalf, can. The servant can be in no better position than the master when he is using the master's property for the master's purposes. Therefore, without saying any thing as to the decision in *Thorogood v. Bryan*, it is sufficient to say that the defendant's pigs escaped through the negligence of the plaintiff's employer, and that, having met with the accident through his employer's negligence, the plaintiff can maintain no action against the defendant."

This decision has recently been followed by the same court in the case of *Armstrong v. The Lancashire and Yorkshire Railway Company*, 23 W. R. 295; L. R., 10 Ex. 47. The plaintiff, who was in the employ of the London and North-Western Railway Company, sued the defendants, over whose line the North-Western have running powers, for compensation for an injury he had sustained from a collision between some of the defendant's trucks

and a North-Western train in which he was traveling. It appeared that the North-Western train being late, the station-master at one of the defendant's stations ordered the trucks in question to be shunted, the signals being put at "danger" while this was being done. Notwithstanding this, the driver of the North-Western train came on, and the collision ensued by which the plaintiff was injured. The jury found that there was negligence in the defendants in shunting at a time when the North-Western train was overdue, and in the driver of the latter in disregarding the signals, and must be assumed that it was on the part of the defendants negligence proximately contributing to the accident. A verdict was thereupon entered for the defendants, which the court refused to disturb.

BRAMWELL, B., said: "I am of opinion that this rule must be discharged. It is impossible, I think, to distinguish the present case from *Thorogood v. Bryan*, except in one particular, and that is in the defendants' favor. It must not be supposed, so far as my individual opinion is of any value, that I am at all dissatisfied with the decision in *Thorogood v. Bryan*. It has been admitted by Mr. Pope that, if his contention is right, the owner of a bale of goods, which was being carried by the defendants, and had been damaged by an accident similar to the one from which the plaintiff has received injury, would be entitled to have an action. The learned counsel was also constrained to admit that if a carriage had been let to hire and injured by the joint negligence of its driver and the driver of another carriage which came into collision with it, the owner of the hired carriage could maintain an action for compensation for such damage. These, I confess, seem to me to be startling propositions. But there is another difficulty. If the present action is maintainable against the defendants, it is upon the ground that they were joint wrong-doers with the London and North-Western Railway Company? If so, there is this difficulty, that one of the wrong-doers is so through contract, and the other by tort. Can there be a joint liability with regard to the negligence or breach of duty toward the plaintiff, and no joint liability as to the contract under which he was being carried? Would another action be maintainable against the London and North-Western Railway Company? Suppose that the plaintiff had merely been an ordinary passenger, could he maintain one action for breach of contract against the London and North-Western Railway Company which carried him, and also another action against the defendants, through whose negligence the coal wagons which caused the accident were left on the line of railway? These are questions worthy of consideration; and in this particular case there is, I think, good reason for holding that the rule in *Thorogood v. Bryan* should apply, however unreasonable it may at first sight appear to be. The plaintiff cannot bring an action against the London and North-Western Railway Company, because he was their servant; and yet it is said that he may maintain an action against another company, the defendants, who only contributed to, and certainly were not the proximate cause of the mischief. It would follow from that, therefore, that the servants of a railway company may in case of a collision sue what I may call the opposing company, but that they cannot sue the

company who were the proximate cause of the injury suffered by them. Surely a most preposterous consequence. I am, however, prepared to decide the present case on the authority of *Thorogood v. Bryan*, which, though it may have been questioned and impeached, has never been overruled, and has since been acted on. But, as I have already said, I think this case is distinguishable from that case, and in a point that is favorable to the defendants, and that the latter are entitled to avail themselves of it upon this rule, notwithstanding that there is no cross rule. Certain points were put by the learned judge to the jury, and he reserved leave to the plaintiff to enter a verdict on the ground that, if the findings of the jury were supported by the evidence, and these findings showed the plaintiff to be entitled to the verdict, then it should be entered for him. Now, in assenting to leave to move to enter a verdict against him, the learned counsel for a defendant does not consent to have the matter decided against him and the rule made absolute without regard to the verdict of the jury. He must be taken to adopt the proceedings only so far as they are supported by the evidence. The question whether there was any evidence of negligence in the defendants was left open. The point may be put thus: The defendants, doubtless, were guilty of negligence, but it was negligence the consequence of which the other railway company might have avoided by the use of reasonable care; and it is clear to my mind that the defendants might have maintained an action against the London and North-Western Railway Company to recover compensation for the damage sustained by their coal wagons by reason of the collision, for which the case of *Davies v. Mann*, *ubi sup.*, is an authority; and if that be so, it would be highly unreasonable that the plaintiff should have this action against the defendants."

POLLOCK, B., said: "I also think that this rule should be discharged. It is sufficient to say that I think the case is not distinguishable from *Thorogood v. Bryan*, and is governed by that decision. I must not be taken as in any way expressing dissatisfaction with the decision in that case. The only difficulty I have had in applying it has been in consequence of the use of the word 'identified' in the judgment of the court there. If the court are to be taken as meaning by that word that the plaintiff, by his own proper conduct, as by the selection of the omnibus in which he was riding, so acted as to constitute the driver his agent, the proposition would, I think, be an unsustainable one. But I do not understand the word to be used in that sense. I take the court to mean by it that, under the circumstances of the case, the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver. The case of *Waite v. The North-Eastern Railway Company*, E. B. & E. 719, is an illustration of this, where the child, as far as regards contributory negligence, was 'identified' with its grandmother, in whose charge it was, although it could not be said that the child exercised any volition in the selection of its grandmother for its companion. If, then, the rule laid down by Parke, B., in *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244, that 'although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequence of the defendants' negligence, he is entitled to recover; if, by ordinary care, he might have avoided it, he is the author of his own wrong,' be adhered to, it

seems to me that no hardship follows, inasmuch as the plaintiff is only in the same position as the donkey in the case of *Davies v. Mann*, 10 M. & W. 546, and, notwithstanding the carelessness of the driver of the train he was traveling by, he would be entitled to recover against the defendants, supposing that their negligence was of a similar character to that of the defendant in *Davies v. Mann*. It may be said, why should he not have a right of action against both companies? The answer to that question is that a man may have an action against two tort-feasors for any act causing the injury; but there is no hardship in saying that, if two independent persons are in a position somewhat hostile to each other, then the right to maintain a separate action against one may be an answer to an action against the other, for the plaintiff must show that the negligence of the one whom he sues was the proximate cause of the accident. Therefore, I think that the defendants are entitled to our judgment."

It is to be observed of this case, that the plaintiff was the servant of the company in whose train he was traveling, and was therefore precluded from suing them for the injury which arose from the negligence of their servants.

In this country the prevailing opinion is unquestionably against imputed negligence. Shearman & Redfield on Negligence, § 46; Wharton on Negligence, § 395. In *Chapman v. The New Haven Railroad Co.*, 19 N. Y. 341, the Court of Appeals of this State held that a passenger by railroad is not so identified with the proprietors of the train conveying him, or their servants, as to be responsible for negligence on their part, and could recover for personal injuries from a collision through negligence of the defendant, although there was such negligence contributing to the collision on the part of the train conveying him, as would have defeated an action by its owners. And in *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. 492, it was held that the injured passenger could maintain his action against the proprietors of both, on the ground of their concurring negligence. These cases were followed and approved in *Webster v. Hudson River Railroad Co.*, 38 N. Y. 260.

So in *Metcalf v. Baker*, 1 Abb. (N. S.) 431, the Superior Court of New York, at General Term, held as in the principal case, that one riding on invitation with the owner of a private vehicle was not chargeable with his negligence contributing to an injury, occasioned by the negligence of the defendant, to the plaintiff; and to the same effect are *Robinson v. N. Y. C., etc., R. R. Co.*, 65 Barb. 146; *Sheridan v. Brooklyn City R. R. Co.*, 36 N. Y. 39; *Knapp v. Dagg*, 18 How. Pr. 165.

But in *Payne v. The Chicago, Rock Island & Pacific R. R. Co.*, 39 Iowa, 523, where the plaintiff was injured at a railroad crossing, by a collision between the wagon in which he was riding and defendant's train, the court decided, without discussing the question, that the negligence of the one who was driving defeated plaintiff's right to recover, citing

therefor *Arts v. C., R. I. & P. Railway Co.*, 34 Iowa, 153. But the case is like that of *Beck v. East River Ferry Co.*, 6 Rob. 82, where the plaintiff and the one guilty of negligence were engaged in a joint enterprise. In the Iowa case, three neighbors, one of whom was plaintiff's intestate, were traveling for a common purpose in a wagon belonging to none of them, but procured for the purpose. They drove by turns. The case was correctly decided, and is not an authority against the doctrine of the principal case.

In *Bennett v. The New Jersey Railroad Co.*, 7 Vroom, 225; S. C., 13 Am. Rep. 435, it was held that where a passenger in a horse car is injured by the carelessness of the engineer of a railroad company, in the management of his locomotive, it is no defense to show contributory negligence in the driver of the horse car.

In *Lockhart v. Lichtenhaler*, 46 Penn. St. 151, this question was considered at great length. The action was brought to recover damages under a statute by the widow and children of one killed by a collision between a train of cars and oil barrels owned by the defendant, and placed too near the track by his servants. The deceased was a brakeman on a car belonging to a coal company but which was drawn by a locomotive belonging to the railroad and controlled by its servants. The court held that the deceased was not a servant of the railroad company, but that he "must be considered in the light of a passenger in charge of property being conveyed with himself by the railroad company for his employers," and that if the negligence of the railroad directly contributed to the accident, the defendant would not be liable. After a review of the authorities, Thompson, J., who delivered the judgment of the court, said: "If in this case there was no contributory negligence chargeable to those conducting the train, by which the cars in charge of the deceased were with himself being conveyed; in other words, if their negligence did not directly contribute to the disaster, although they may have been negligent in a general sense, the defendants will be answerable if the act of their servants or agents was the proximate cause of it. The negligence on the part of the train which would be a defense must be directly involved in that result; it must by itself, or concurring with the defendants, be the proximate cause of the death. For instance, running too rapidly on a road in bad repair, driving instead of drawing the train, would not abstractly be such negligence as would be a defense. To be such the consequences of these acts, or some of them, must have directly entered into and become active agents in the very disaster itself. This must be the rule of all such cases."

Smith v. Smith, 2 Pick. 621, is frequently cited as an authority in support of the rule of *Thorogood*

v. *Bryan*, but all that was decided in that case was that one who is injured by an obstruction placed unlawfully in a highway cannot maintain an action for damages if it appears that he did not use ordinary care by which the obstruction might have been avoided. This rule is well established and is, we take it, not in conflict with the principal case. See *Stiles v. Geesey*, 71 Penn. St. 439; *Cleveland, Columbus & Cincinnati R. R. Co. v. Terry*, 8 Ohio St. 570; *Williams v. Mich. Cent. R. R. Co.*, 2 Mich. 259; *Murphy v. Deane*, 3 Am. Rep. 390.

In *Puterbaugh v. Reesor*, 9 Ohio St. 484, the plaintiff put R. in charge of his team. R. and the defendant engaged in a fight which frightened the team and it ran away, and one horse was killed. The defendant was held not liable because the plaintiff, having placed R. in charge of the team, was responsible for his negligence. Shearman and Redfield cite this case as well as that of *Cleveland, etc., v. Terry*, and *Smith v. Smith*, *supra*, as authorities for the rule of *Thorogood v. Bryan*, but they are obviously not so as to the question of privity in negligence.

THE RELATION OF THE BLOOMINGDALE ASYLUM TO THE STATE.—ANOTHER PHASE OF THE QUESTION IN THE DARTMOUTH COLLEGE CASE.

ONE of the most interesting documents, from a legal standpoint, submitted to the Legislature during its recent session, was a report of the State Commissioner in Lunacy—Prof. Ordronaux—on the relations of the State to the Society of the New York Hospital, and more particularly as to the right of the county of New York to the aid of the Bloomingdale Asylum in caring for the pauper insane. The Society of the New York Hospital, of which the Bloomingdale Asylum forms a department, was incorporated by royal charter in 1771, the motive or reason therefor being thus expressed in the charter: "We, taking into our royal consideration the beneficial tendency of such an institution within our said city, calculated for relieving the diseases of the indigent and preserving the lives of many useful members of the community, are graciously pleased to grant," etc. This preamble clearly indicated the class of citizens to be benefited by the hospital.

In 1810 this charter was amended by the Legislature at the request of the society. In 1816 the society was authorized by statute to build the Bloomingdale Asylum, and the sum of \$10,000 was directed to be paid annually from the State treasury for its support. Since that act the State has contributed to this Asylum \$440,000 for the specific purpose of building and maintaining a public asylum for the insane; it has beside contributed to the Society of the New York Hospital over \$800,000.

But the Governors of the Bloomingdale Asylum have treated these trust funds as a private gift to a private corporation, and have refused and still refuse to receive or care for the pauper insane, taking the ground that "this asylum was particularly intended for those able to pay." They also claim, as was claimed in the Dartmouth College case, that their charter, being from the Crown, is a contract beyond the control or limitation of the State.

After an elaborate presentation of the facts, Prof. Ordronaux sums up the legal aspects of the question as follows:

The foregoing facts, based upon historical data which admit of no disproof, point conclusively to the duty which the State owes to itself, as well as to the county of New York, of seeing that its gifts to charitable uses are no longer diverted to other and unauthorized purposes. And whatever may be said in general of its authority over all eleemosynary corporations founded by itself, to visit, investigate and direct their management, we shall find that the common law of England, which became, under the first Constitution of this State, the common law of New York, explicitly provides means by which the sovereign authority can always interfere to mould the character of a public charity, for the greatest good to the greatest number. Under the shadow of its time-honored principles we shall accordingly find the following propositions arranging themselves on the side of the State's unquestionable rights, viz.:

First. That if the Society of the New York Hospital, originally founded by private benefaction, be, in point of law, a private corporation, although dedicated to public charity, then the Bloomingdale Asylum, founded and built wholly by State subsidies, satisfies every condition necessary to make it a public charity.

Second. The principle is indisputable that the founder of an eleemosynary corporation may dispose and order it as he will, and may give it whatever shape he pleases, provided it be a legal one. 1 Kyd on Corp. 50; 2 id. 186; *Dartmouth College v. Woodward*, 4 Wheat. 518.

Third. Before the passage of the act of 1816 there was no Bloomingdale Asylum in existence. This act made annual grants to the Society of the New York Hospital for the specific purpose of founding and erecting it as a public charity. Chap. 203, Laws of 1816; Assembly Doc. 263, March, 1831. The State, being thus the sole founder (*fundator perfectus*) of that institution, had the exclusive right, from its inception, to direct its management. The fact that it has allowed it to remain in the hands of the Society of the New York Hospital, as trustees, does not in the least invalidate its present right to discharge such trustees and appoint others of its own selection; or to direct the present trustees as to the future management of such trust for *cujus est dare ejus est disponere*. Nor does lapse of time bar these rights in respect to the State. For this is not recalling the charity but only directing its application. The State has always the right to follow its gifts to charitable uses, they being public gifts, and to ascertain how they are being carried out.

Fourth. Were it even true that the State had only added its funds to those already possessed by the Society of the New York Hospital, and thus joined in the erection of the Bloomingdale Asylum, that fact would not divest it of authority, for, as we have elsewhere shown, it is an established principle of the common law that if the King and a private man join in endowing a charitable corporation, the King alone shall be the founder. Kyd on Corp. 51. Under that same principle, also, there could be no partnership between the King and a private citizen, and all that the King in England might do, in relation to granting franchises, the State with us may do. Hence the right to appoint visitors being always inherent in the founder of a charity, the State could at any time have done the

same, and can still do so in the case of the Bloomingdale Asylum. Its right in this respect is paramount and indefeasible.

Fifth. It has long been settled that the capacity of a corporation, universally to be a trustee, is among the elementary principles in the law of trusts. 1 Saund. on Uses, 349; Willis on Trustees, 31; Lewin on Trusts, 10, 11; 2 Co. Litt. 706, note; Penn. v. *Ld. Baltimore*, 1 Ves. 453; *Att'y-Gen. v. Foundling Hospital*, 2 Ves. Jr. 46; *Green v. Rutherford*, 1 Ves. 467. Many American authorities may also be cited. *Trustees Phillips Academy v. King*, 12 Mass. 556; *Am. Acad. of Sci. v. Pres. and Fellows of Harvard Univ.*, 12 Gray, 583; *Drury v. Natick*, 10 Allen, 169; *Chambers v. Baptist Soc.*, 1 B. Monroe, 216; *Harv. Coll. v. Soc. Th. Eng.*, 3 Gray, 280.

It will not be denied that these subsidies of the State were a gift to charitable uses, and, under the common law, charitable donations are to be liberally construed with a view to promote the general charitable intent of the donor. *Att'y-Gen. v. Christ's Hosp.*, 1 Russ. and Myl. 626; *Att'y-Gen. v. Caius Coll.*, 2 Keen, 163.

Sixth. The grant to a corporation must be accepted as it is offered, and the grantees are not at liberty to act under part of its provisions and to reject the rest. 1 Kyd, 66. The Society of the New York Hospital, although the annual subsidies intrusted to them by the State were paid in gross, had no right to merge the Bloomingdale Asylum fund into their general funds.

In the present case the appropriations of the State were made under chap. 203 of 1816 for the express purpose, as recited in the title of this act, of enabling the Society of the New York Hospital to erect a new building for the accommodations of insane patients. These patients, belonging to the indigent class for which the Hospital was originally founded, were the *cestui que trusts* for whose beneficial use the State subsidies were granted. They were specifically designated. These funds were given to the Governors of the New York Hospital not as part of a general appropriation, to be subdivided by them according to their pleasure, but as specified trust funds to the uses of an insane department distinct from the hospital, and of which the State thus became the *fundator perfectus*; and the two departments, having distinct duties to perform, there was no necessary merger of one into the other.

Seventh. An ordinary hospital, whether incorporated or not, cannot convert itself at will into a lunatic asylum. For a lunatic asylum implies the right of permanent confinement of an insane person, meaning thereby the right of restraining his personal liberty. This is a prerogative right exclusively vested in the State, which alone can delegate authority to restrain personal liberty in accordance with the law of the land. Hence such authority is never presumed to exist as a natural right in any person or corporation, but must be specifically delegated. At common law all prisons were King's prisons, and since the passage of the Statute of 14 Geo. 3, c. 48, A. D. 1774, for the regulation of Insane Asylums, all such institutions in Great Britain must be legalized by public authority.

Now, under the Constitution of 1777, it was ordained that "such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the Legislature of the Colony of New York, as together did form the law of the said Colony on the 19th day of April, in the year of our Lord 1775,

should form the law of the State, subject to such alterations and provisions as the Legislature of the State should from time to time make concerning the same."

Therefore, when the State founded the Bloomingdale Asylum it only delegated by implication the authority to hold lunatics in custody. It did not grant it absolutely, because it could not. That authority it can withdraw at any time, and it may in like manner direct that the institution be put to any other charitable use. The Society of the New York Hospital, as a charitable corporation, because intrusted with the erection of the Bloomingdale Asylum, have no continuing or vested right of management as against the State, for the State cannot divest itself of the right of controlling personal liberty, by gift to any person or corporation. *Cooley's Const. Lim.* 282-4. Therefore it may withdraw the right of personally restraining lunatics from the Bloomingdale Asylum at any time, and may convert it into any other form of public charity it pleases, for the power of custody can never be made the subject of contract between the State and a corporation, and no vested rights can accrue under it. It is one of the police powers of the State, which is inalienable. 8 Coke, 375.

Eighth. The trustees of the Asylum funds were bound to act up to the end or design for which they were incorporated, viz.: the care, chiefly, of the indigent insane. This is a fundamental principle in the law of corporate grants. Hence, the by-law adopted by them, which, in its effects, was calculated to exclude, and has always excluded, the indigent class from the Asylum was a willful abuse of the spirit and letter of their charter. For the intention expressed in the charter is in the nature of a duty imposed upon the corporation, and, as such, was, by implication, annexed to the grant of their franchise.

Ninth. The indigent insane of the city of New York were the beneficiaries intended by the State in the erection of the Bloomingdale Asylum, and nothing is better established in the law of charitable uses than that such beneficiaries have a vested equitable interest in such charity. Hence, ministers of the gospel may have a vested interest in a gift to a church according to the regulation of the founder. *Att'y-Gen'l v. Pearson*, 3 Merl. 402; *Att'y-Gen'l v. Jones, Shelford*, 765; note *g*; *Doe v. McKeag*, 10 Barn. and Cr. 721. So pensioners in a hospital. *Att'y-Gen'l v. Locke*, 3 Atk. 164. Also scholars in a free school. *Att'y-Gen'l v. Lehigh*, 3 P. Wms. 146, note; Shelford, 769. And it is a postulate sustained by the current of decisions, both in the United States as well as in England, that equity will carry out a gift to charitable uses, however vaguely stated. *Mills v. Farmer*, 1 Meriv. 55; *Vidal v. Mayor, Aldermen, etc., of Philadelphia*, 2 Howard, 127.

Tenth. There has not been on their part so much even as a substantial performance of this intention so far as relates to the pauper insane of the county of New York. This misuse of their franchise has been continuous for over forty years. It cannot, therefore, be called either accidental or unintentional.

Eleventh. It is also well settled that non-performance of a particular act required by the charter of a corporation, whether for the benefit of an individual or of the State, is, or may be, a cause of forfeiture, although not specially declared to be such by the charter itself. *Att'y-Gen'l v. Petersburg R. R. Co.*, 6 Ired. 456.

Twelfth. If the Bloomingdale Asylum be a private corporation, it can only be so by virtue of having been founded by private donations. The mere fact that the funds for building it were intrusted to a private corporation does not constitute it a private charity, since, as before shown, a corporation has capacity to act as trustee of a fund, and the private character of the Society of the New York Hospital cannot impart itself, by implication, to the State funds intrusted to it for public uses.

If, on the other hand, the Bloomingdale Asylum be a public charity, it can only be so by virtue of opening its doors to all classes of the insane, whether self-supporting or not, for "it is the extensiveness of a charity," says Lord Hardwicke (in *Att'y-Gen'l v. Pearce*, 2 Atk. 87), "which makes it public."

It is evident, therefore, that the State may direct the use to which its funds, invested in the Bloomingdale Asylum, shall in future be put, and, as its founder, it may also appoint its own visitors to that institution, because the power of appointing visitors to any corporation is always a prerogative right in its founder. *Phillips v. Bury*, 1 Ld. Raymond, 8; *Dartmouth Coll. v. Woodward*, 4 Wheat. 518.

Upon the recommendation of the Commissioner, it was referred to the Attorney-General to determine—

First. What duty the Corporation of the New York Hospital owe to the State in respect to making provision for the pauper insane of the county of New York;

Second. What legislation is necessary to enforce such duty; and,

Third. Whether the State has power to appoint, as founder of the Bloomingdale Asylum, a Board of Governors for its management.

DROIT D'AUBAINE AND THE CONDITION OF ALIENS IN FRANCE.

TO those lawyers who are students of comparative jurisprudence and institutions no apology is due for an inquiry into the condition of aliens in France—the representative civil law country of Europe. But aside from all theoretical value, this subject has immediate claims upon the attention of the general legal practitioner. The interest of the American traveler and the American merchant in the private law of France is an actual interest, looking to the protection of their personal and proprietary rights.

One of the most certain symptoms of the progress of civilization is the more and more kindly protection which peoples have extended to foreigners; and between the period when all strangers were regarded as enemies and barbarians and our own day, the distance is immense, almost beyond our power of realization. The origin of this feeling of hatred and contempt for foreigners is to be found in primitive religious and political institutions, and its survivals in racial feeling and national bias deserve careful study. When Alexander the Great, in a celebrated edict, proclaimed that all honest men, of whatever country they might be, should be regarded as brothers, and that criminals alone were aliens, he was guilty of a noble anachronism,* for neither Grecian polity, nor Grecian ethos, was sufficiently enlightened to apply this humane principle. The chances of such an edict be-

ing obeyed were somewhat better when Charlemagne, in the name of Christ, urged upon his subjects the exercise of a large hospitality toward travelers and immigrants.

At an early date, it is common learning, the Romans saw the necessity of allowing to the *peregrini* (aliens) who began to play an important part in the commercial and industrial life of the State, certain rights and privileges. They were not permitted to participate in the advantages accruing from the civil law (*jus civile*), and were debarred from all those rights which were peculiar to it. Their rights were governed by the *jus peregrinorum* *jus gentium*, law common to all nations, and the *prætor peregrinitis* was chosen for its administration. As a result almost all forms of contracts originated and were developed in the *jus gentium*, as for instance, buying and selling (*emptio et venditio*), letting and hiring (*locatio et conductio*), partnership (*societas*), deposit (*depositum*), loan (*mutuum*), and others. Had these forms of contract been peculiar to the *jus civile* strangers could not have profited by them.

When the barbarians overran the Empire, the *peregrini* having obtained mastery, came to participate in the civil law, still preserving their personal laws by which their *status* was fixed. There was no longer any national point of view. Every one was regarded from the communal or tribal standpoint.

Mess. Malécot and Blin, in their *Précis* of Feudal and Customary Law, treating of the development of the law relative to the condition of strangers in France prior to the Revolution of '89, divide it into three main periods, the Frankish, the Feudal, and the Monarchical.

The first, or Frankish, is the tribal period. The principle of solidarity, or communal responsibility, was then universal, the solidarity of the members of the same family, of the inhabitants of the same city. This accounts for that rule of the Salic law which made the opposition of a single citizen, declared within a year, sufficient to prevent the permanent settlement of an alien within the city. Down to the time of Charlemagne, the prevailing principle had its origin in the communal organization of the people, each community protecting itself against emigrants from others.

When we reach the Feudal period the principle changes. It is no longer from the communal, but from the *seigniorial* standpoint that laws and institutions must be regarded. Every one born beyond the territorial limit of the seigniority was an alien. A man might be an alien both to the seigniority and to France, or being a Frenchman, alien to the seigniority alone. The latter, if belonging to the same diocese as the lord, was treated the same as an allodial proprietor; if belonging to a different diocese he was called a *forain* (non-resident, stroller), and allowed a year and a day in which to do homage and swear fealty. If he did this he became a regular dependent of his lord according to his anterior rank, either as noble (*gentilhomme*, *vassal*), or as mean (*roturier*, *censitaire*). In default of any such avowal the *forain* became the serf of the seigneur who acquired over him *possession* and *seisin*.

Aliens both to France and the seignory were known as *aubains* (foreign-born), and the difference between these and the *forains* were somewhat as follows: 1. Both alike might do homage, but while the homage of

* Flore.

the *forain* might not be refused without grave reasons, that of the *aubain* need be received only at the pleasure of the lord. 2. The *forain* who, in default of having done homage, had been reduced to serfage, might still make a will and dispose of his property upon condition of leaving to his lord a few pence in acknowledgment of his dependent condition. On the other hand the *aubain*, not permitted to do homage, having become a serf, lost all testamentary faculty.

We next reach the Monarchical period, and here we must begin to study institutions from the national point of view. The horizon has gradually widened from the commune to the feud, and from the feud to the nation. The emancipation of the communes had established new relations, and with a growing commerce change of residence became less difficult.

The Monarchical period may be divided naturally into two sub-periods. In the first the kings, claiming to be the patrons of the *aubains*, and exercising their patronage as an attribute of the crown, disputed with their nobles the exploitation of foreigners. In the second the kings, beyond all fear of competition or rivalry, ceased to play the roll of benevolent patrons, and appeared as exacting tyrants.

First period. During the 13th century, in those countries where the king was feudal seigneur, he received the homage of the *aubains*, not as seigneur, but as king, and in default of homage inherited their property. In the 14th century royalty, become bolder, no longer limited its claims to its own particular provinces, but spoke in the name of all France. Charles VI, in 1388, declared by letters patent that throughout France the crown alone had the right of succeeding to the goods of *aubains*. A hundred years later, say Malécot and Blin, the class of *forains* had disappeared, and the *aubains* were *clients du roi*, and no longer serfs of the seigneur. But it appears that anterior to Charles VI, and during the reign of Philip the Fair, the *droit d'aubaine*, as between different seigniories, had fallen into disuse.

Second period. In the 14th century strangers in France had been declared capable of exercising all rights *juris gentium* (*du droit des gens*), such as those of acquisition and possession, but were still held incapable of performing any acts peculiar to the civil law (*droit civil*), such as those of inheritance, or transmission *ab intestat*, or by testament. It had been a principle of the Roman law, and laid down in the digests as we are reminded by Kent (Comm. I, 8), that a stranger passing from his own country to another became immediately a slave. Now, during that period of French law of which we are speaking, the maxim was that the foreigner was a freeman while alive, but died a slave, *peregrinus vivit liber et servus moritur*. The king was his heir absolutely, until the 16th century, when it was admitted that the succession of the *aubain* passed to his French heirs if there were any such. But the fiscal spirit soon turned back the tide of amelioration. The system of the Roman emperors was reproduced by the legists. Under the inspiration of the Roman jurisconsults, holding the faculty of transmission by succession or testament as essential to the civil law, they laid it down as legally a complementary principle, that the king was in all cases whatever absolute owner of the goods of a deceased alien. Consequently, when any one was permitted to inherit the goods of an *aubain*, the king was reputed to have granted a license which he might revoke at will.

Hence there resulted for the alien, in respect of succession, three main incapacities:

1st. He could not acquire property or goods situated in France, either by succession, testament, or *donatio causa mortis*.

2d. He was incapable of making a will; and

3d. He could at the utmost only transmit his property to his legitimate descendants, born or naturalized in France, and living there.

But the Revival of Learning, the Reformation, and all those varied agencies and indoles of civilization which are best summed up in the single word Commerce, had been steadily modifying international relations in Europe. And national cupidity, or what, had it been more enlightened, might be called legitimate desire for national prosperity, played a leading part in modifying the rigors of private international law. Exemptions from the *droit d'aubaine* were accorded by Louis XI and Charles VIII to the province of Languedoc. Henry IV, Louis XIII and Louis XIV accorded like privileges in the interest of industry and manufactures, and to certain seaport towns; and it was because of such exemptions that Bordeaux, Lyons, Marseilles and Dunkirk grew in wealth and prosperity. When the French government went about establishing the funds and a public credit, it saw clearly enough that they could not co-exist with the *droit d'aubaine*. Foreigners resorting to France for political, scientific or commercial purposes, had by this time been generally permitted to transmit their *movables* to their kinsmen, whoever they might be. Under Louis XV and Louis XVI numerous treaties were concluded with the European powers for a reciprocal abolition of the *droit d'aubaine*, or the right in the State to confiscate the property of a deceased foreigner to the exclusion of his heirs. But these treaties reserved to the King of France the right to the tenth or the twentieth of the estate of the deceased, which reservation was known as the *droit de détraction*. So far as the subjects of Great Britain were concerned, Louis XVI in 1787 abolished the *droit d'aubaine* without reservation or reciprocity, notwithstanding the rigor of the English law, according to which an alien could not acquire or hold immovable property. Prior to this, by the treaty of amity and peace of 1778, it was provided that the subjects of the United States should not be reputed *aubains* in France, and should be exempted from the *droit d'aubaine* or other similar duty under any name whatever, and might by testament, donation, or otherwise, dispose of their goods, movable and immovable, to whomsoever they willed, and that their heirs might succeed *ab intestat* without naturalization.

Such was the state of the law relative to the transmission and acquisition of property by aliens down to the end of the period of the Ancient Law, by which term French lawyers designate all law prior to the Revolution of '89. Independent of the incapacities that have been already spoken of an alien could not be a *tuteur* (stand in *loco parentis*), witness a solemnity (*un acte solennel*), or take the benefit of an insolvent assignment. He could claim no rights by prescription. His right to come into the French courts was limited; and he could only appear as plaintiff upon giving security for costs (*judication solvi*). He was subject to bodily constraint in civil cases, and was deprived of all political rights. To briefly sum up, he possessed all the rights warranted by the law common

to all nations, and no more. Thus at the conclusion of the period of the Ancient Law the condition of the *aubain* (alien) was almost exactly similar to that of the *peregrinus* at Rome after the development of the *jus gentium*, and but slightly more advantageous. To attain to full legal capacity an alien had to become naturalized, that is, had to acquire the *qualité de français*. And the inverse of this latter principle was, that he who had lost the *qualité de français*, no matter what his prior condition, was incapacitated to exactly the same extent as an alien.

In France the ancient and the modern law are separated by an interval of revolutionary legislation, the law of which time is called by French writers the *Droit intermédiaire*. In 1790 and '91, the Constituent Assembly felt that the laws in respect of the treatment of aliens, like almost every other institution in France, were much in need of reform. Had not Montesquieu called them *droits incensés* and the philosophers characterized them as *droits barbares*? They remembered the words of Le Trône upon provincial administration: "Has it not in general been to your advantage that strangers should come among you, that they should bring you their wealth, their industry, become consumers, and augment the number of your subjects? When a desire has been felt to especially favor some particular institution, such as the markets of Lyons, or some privileged manufacture, and to attract strangers, a commencement has always been made by relieving them from the *droit d'aubaine*. But if that policy is useful for the encouragement of this or that object, it is so generally and under all circumstances for the kingdom at large." Necker, also, in his work on the Administration of the Finances, had said: "If that right were exercised by some nations as against the French, that would be no good reason for treating them in the same way; for reciprocity is never reasonable when it cannot exist save to its own damage * * * and the *droit d'aubaine* is more prejudicial to the nations which insist upon it, than to the strangers whose fortunes it usurps."

The Constituent Assembly, apart from all questions of administrative utility, believed it to be its destiny to realize the dream of the fraternity of nations. This was its decree: "The National Assembly, considering that the *droit d'aubaine* is contrary to the principles of fraternity, which ought to bind all men, whatever their country or their form of government; that that law, established in times of barbarism, should be proscribed among a people which has founded its Constitution upon the rights of man, and of the citizen, and that France liberated ought to open its bosom to all the peoples of the earth, by inviting them to enjoy, under its free government, the sacred and inalienable rights of humanity, has decreed and doth decree as follows: The *droit d'aubaine* and the right of detraction are abolished forever." The Assembly hoped, as Mourlon says, that all other nations, abjuring, as it had done, all national egoism, would with an equal liberality permit the French to enjoy among them "the sacred and inviolable rights of humanity." But in place of a general fraternity their overtures were only met with the most extreme illiberality, and the barriers between nations were not broken down.

The abolition of the *droit d'aubaine* gave to aliens in France the right of transmission *ab intestat* or by testament, and the right to recover property left by alien ancestors in France, but it did not give them the

power of succession to the property of their French ancestors. This last concession was made, however, by the law of 1791 and by the Constitution. Such was the law when the compilers of the Code, unwilling longer to permit France to be the victim of her too hasty and too generous action, designed a system of reciprocity such as that which in certain instances had made its advantages felt during the latter days of the monarchy. And we here touch the Modern Law and the more immediately practical part of our study.

EXTRADITION BETWEEN THE STATES

UNITED STATES DISTRICT COURT, NEW JERSEY,
MAY 7, 1878.

IN THE MATTER OF NOYES.

A fugitive from justice extradited under the act of Congress from one State of the Union on the charge of the commission of a specific crime, can be held by the courts of the State to which he is surrendered for trial for another and a different crime.
When such a fugitive has been surrendered without legal authority, he can be detained for it by the authorities of the State to which he is surrendered.

PROCEEDINGS by *habeas corpus* to secure the release of the petitioner. The facts appear in the opinion.

NIXON, J. I am quite clear that the facts presented by the return and testimony in this case preclude the court from discharging the prisoner on these proceedings, whatever may be the opinion of the court in regard to the methods adopted by the agents of the State to obtain the possession of the body of the petitioner, and I should be sorry to say or do any thing which might be construed into disapproval of such methods and proceedings. It, nevertheless, appears affirmatively that the prisoner is detained by the legal authority of the State to answer certain alleged violations of the criminal laws of New Jersey. The case falls within the provisions of section 753 of the Revised Statutes of the United States, which restricts the writ of *habeas corpus* to a case, where a prisoner in jail is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or a law or treaty of the United States * * *

* or unless it is necessary to bring the prisoner into court to testify.

It appears in the petition, return and evidence that the prisoner was brought into the State of New Jersey, from the District of Columbia, by persons claiming to act under the Constitution and laws of the United States in regard to the extradition of fugitives from justice.

The second section of Article IV of the Constitution provides that a person charged in any State with treason, felony, or any other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State whence he fled, be delivered up to be removed to the State having jurisdiction of the crime.

The act of Congress of February 12th, 1793 (§ 5278 of

Rev. Stat. of U. S.), was passed to provide the machinery to carry into effect this provision, and it is thereon made the duty of the executive of the State or Territory, to which a person charged with crime, generally designated in the Constitution, has fled, upon lawful demand, to cause the fugitive to be arrested and surrendered up.

The alleged fugitive in the present case being in the District of Columbia, the demand was made upon the Chief Justice of the Supreme Court, under section 843 of the Revised Statutes relating to the District of Columbia, wherein that officer is directed to deliver up fugitives from justice in the same manner as the executive authorities of the several States are required to do, under the extradition act.

The demand of Governor McClellan upon Chief Justice Carter was dated March 11th, 1878, and was based upon the allegation that the prisoner stood charged with the crime of perjury, committed in the county of Essex, State of New Jersey, that he had fled from the justice of said State, and had taken refuge within the District of Columbia.

It is requested that the petitioner be delivered up to Robert Lang and Andrew J. McManus, who were authorized to receive and convey him to the State of New Jersey, there to be dealt with according to law.

The grounds alleged in the petition for the discharge of the petitioner were that he was a citizen of Connecticut, residing at New Haven, in said State; and in the latter part of February last he left his home for the purpose of attending to certain business in the city of Washington in relation to the legislation pending before the Congress of the United States, and under consideration by a committee of the Senate; that he passed openly in the daytime through the State of New Jersey, took rooms at a hotel in the city of Washington, where he remained from day to day in the open and public pursuit of the business objects for which his presence was required at the capital, and attended from time to time before the Senate committee, and held conferences with different members of Congress, concerning business which he had in hand; that he was thus engaged on the 11th day of March last, and in the evening of that day had retired to his bed as usual, when, at about midnight, he was awakened and disturbed by the entrance of three men into his room, who informed him that they had authority to arrest him and take him to the State of New Jersey, which they did. * * *

That the indictments which formed the basis of such extradition proceedings do not charge any crime under any statute or at common law, and that, therefore, the arrest in the manner aforesaid was illegal, and a violation of the rights of the petitioner as a citizen of the United States.

If the return had been made to the writ of *habeas corpus* in this case, that the warden annexed to the writ, issued for the prisoner on his application to the Supreme Court of the State to be admitted to bail, to wit: that he was held in custody only by virtue of the commitment issued by the Governor to the keeper of the jail of the county of Essex, the sole question presented would be, whether it was competent for this court to inquire into the sufficiency of the evidence upon which the Governor of New Jersey and the Chief Justice of the District of Columbia acted, in making the requisition by the one and the order for the rendition by the other.

But the return, as amended, set forth the exist-

ence of new facts, which had arisen since the writ was allowed.

It not only averred that the prisoner had been delivered into his custody by virtue of the writ of commitment, issued by Governor McClellan, of New Jersey, but also that he was held (1) by writs of *captas* from the Court of Oyer and Terminer in and for the county of Essex for the term of April, 1877, and the term of April, 1878; (2) by virtue of orders of said court remanding him to his custody for trial upon the indictments to which he had hitherto pleaded, the tenors of which were annexed, and which were the cause of his detention.

The writ of *habeas corpus* was tested and allowed April 18, 1878. It appears by the copies of the papers annexed to the return, that on the 19th day of April the Court of Oyer and Terminer, of the county of Essex, caused the prisoner to be placed at the bar to be charged on the indictments for perjury, upon which the requisition had been made, and, on his plea of not guilty, the court had remanded him to the custody of the warden of the jail for trial upon the 8th of May, upon the indictments to which he had before pleaded; that on the 26th of April he was again set to the bar of the court, to be charged upon another indictment for conspiracy, and, upon his plea of not guilty, the court had again remanded him to the same custody and control, to be held for trial.

The traverse to the return substantially admits the truth of these allegations, but it seeks to break their force by claiming that if the arrest of the petitioner, by means of which he was brought within the jurisdiction of this State, was unlawful, he is entitled to his discharge from custody, and return to his home, notwithstanding he was charged upon other indictments and has been ordered to be held for trial since the service of the writ of *habeas corpus*.

We are thus brought to the consideration of the naked questions: (1) Whether a fugitive from justice extradited from one State of the Union to another on the charge of the commission of a specific crime can be held by the courts of the State to which he is sent for trial, for another and different crime? And (2) whether such persons may be detained by the authorities of the State for prosecution notwithstanding it may appear that his arrest under the rendition proceedings was without legal authority?

If these inquiries are answered in the affirmative; if the State court, without regard to the lawfulness or unlawfulness of the methods adopted to obtain the custody of the body of the prisoner, may detain him for trial upon the same or other indictments charging him with offenses against the criminal laws of the State, he has no claim upon this court for a discharge on the ground that his rights as a citizen were violated by the parties who secured his person in a foreign jurisdiction other than by due process of law.

Questions were discussed in the argument which may properly arise between governments, as to the construction of the extradition treaties or between individuals, as to responsibility for the invasion of personal rights, but which, in my judgment, are not involved in the present inquiry.

It may be true that where a treaty exists between two independent nations in regard to the surrender of fugitives, or a criminal is given up on the allegation that he had committed a specified crime, good faith between the governments requires that he should not be tried for other offenses.

It may be true that when a citizen has been placed under restraint without lawful cause, and without due process of law, he can hold every one, who caused or contributed to his imprisonment, to a strict accountability in a civil action. In the one case the right of asylum is sacred, except so far as it has been yielded by the terms of the international compact, and any abuse or perversion, by one government, of the privileges of arrest granted by the treaty, is a just cause of complaint on the part of the other.

In the other case, so jealous is the law in regard to the invasion of the individual liberty of the citizen, that all unauthorized restraint of his person is followed by damages against the offending party.

But here, a court of competent jurisdiction has the custody of a person who is charged with the commission of certain offenses against the laws of the State. The answer to the charge is, that some other person has done a wrong to the prisoner, by violating the laws of another State, in arresting him without proper authority.

In a criminal case, this can hardly be reckoned a pertinent response. A person arraigned for the commission of a felony cannot plead in bar, that he ought to be excused from answering the charge, because other parties trespassed upon his personal rights.

It is confounding of matters which are essentially separate and distinct. It is a claim, on the part of the accused, that his criminal violations of the law are to be condoned by his personal injuries. It is asking a court to suspend its most responsible duties, to wit: the trial of alleged offenders against the penal code of the State, while the persons charged with the crime are instituting preliminary investigations into the methods adopted to bring them within its jurisdiction. Such a course, for obvious reasons, is allowable in a civil suit between private litigants, but, for like obvious reasons, cannot be and never has been allowed in criminal proceedings, where the object of the prosecution is to punish an offender against the public. On a claim of this sort the court says to the prisoner: "You are going too fast. We will consider one thing at a time, and every thing in its regular order. The precise matter which now concerns you and the court is, whether you are guilty of the crime charged against you. As you happen to be found within our jurisdiction, we will first settle that question, and afterward, if needs be, will inquire into the circumstances attending your rendition for trial, or will leave the respective governments to discuss them, or will remit you to the recovery of such damages as you may be able to obtain in the civil courts for the violation of your rights of person."

All the authorities of Great Britain and the United States, when carefully distinguished and interpreted by their circumstances, support this view of the law.

The earliest cases in England, to which the attention of the court has been called, are *Rex v. Marks*, 3 East, 175, before the King's Bench in 1802, and *Ex parte Kraus*, 1 Barn. & Cress. 238, in the same court in 1823, in both of which it was held that when a party was liable to be detained on a criminal charge, the court would not inquire on *habeas corpus* into the manner in which the capture had been effected.

The case of *Susannah Scott*, 9 Barn. & Cress. 446, before the King's Bench in 1829, was thus: A rule nisi had been obtained for a *habeas corpus* to bring the body of the prisoner in the custody of the marshal, in order

that she might be discharged on the ground that she had been improperly apprehended in a foreign country.

It appeared on the return that an indictment for perjury has been found against her in London; that a warrant for her arrest to appear and plead had been granted; that the police officer having the warrants went beyond his jurisdiction, and followed her to Brussels and then arrested her, conveyed her to Ostend against her will, and thence back to England. Chief Justice Tenterden, on discharging the rule, said: "The question is this, whether if a person charged with a crime is found in his country it is the duty of the court to take care that such a party shall be answerable to justice, or whether we have to consider the circumstances under which she was brought here." I thought, and still continue to think, that we cannot inquire into them.

The courts of South Carolina in the same year were considering the same question, as appears in the case of *The State v. Smith*, reported in 1 Bailey, 288.

In the case of *The State v. Brewster*, 7 Vt. 118, before the Supreme Court of Vermont, in 1835, an attempt had been made in the court below to have the proceedings in an indictment against the defendant dismissed on the ground that he was forcibly and against his will, and without the assent of the authorities of Canada, brought from that province. The court held that the matter set up could not avail the prisoner.

Dow's case, reported in 18 Penn. St. 37, is in many of its features quite similar to the one under consideration, but the illegality of the capture could not be set up by the fugitive.

The case of *State v. Ross*, 21 Iowa, 467, was cited also, and no reference was made to the cases of *United States v. Caldwell*, 8 Blatchf. C. C. R. 131, because they had been fully discussed in the argument, and were not considered pertinent in the present inquiry.

They all turn upon the construction of the treaty between the United States and Great Britain, in regard to the extradition of fugitives from justice, and involve the authority of the courts to hold a surrendered fugitive for trial for any other than extraditable offenses. It may, however, be remarked, in reference to this question, that the 2d clause of the VIth Article of the Constitution of the United States, treaties are declared to be the supreme law of the land, and by the 2d section of the IIIrd Article they are brought as directly within the judicial power, as cases in law and equity, arising under the Constitution and laws of the United States; unless, therefore, there was something in the treaty with Great Britain which required the aid of legislative provisions to give it effect (See 2 Pet. 353), it is somewhat difficult to understand or indorse the reasoning of the learned judge who decided the case of *Caldwell v. Lawrence*, and especially where he asserts that complaints of the abuses of the extradition proceedings do not form a proper subject of investigation in the courts of the United States.

It is the conclusion of the court upon principle and authority that the State court has the right to hold the prisoner for trial for the offense charged against him without reference to the circumstances under which his arrest was made in a foreign jurisdiction.

It necessarily follows that there is no authority here to discharge him on the *habeas corpus*. Neither the Constitution of the United States nor the 753d sec. of the Rev. Stat., makes any provision for the writ in such a case, and the prisoner must be remanded.

USURY BY NATIONAL BANKS.

SUPREME COURT OF OHIO, DECEMBER, 1877.

HADE, Receiver, v. McVAY.*

Jurisdiction of State courts—Set-off against receiver—Penalty cannot be set off.

State courts have jurisdiction of actions against National banks for penalties and forfeiture prescribed by act of Congress for exacting usurious interest.†

A right of set-off, perfect and available against a bank at the time of the appointment of a receiver, may be pleaded in an action by the receiver.

In an action on a note discounted by a National bank the defendant cannot set off the penalty of twice the amount of interest paid on other loans.‡

ACTION by the plaintiff, as receiver of the First National Bank of Mansfield, against the defendants, McVay, Allison & Co., drawers, and Walter Gledhill, acceptor, of a bill of exchange. The bill was drawn for \$3,000, and indorsed by the drawers to the bank. Before the commencement of the action \$1,500 had been paid thereon. The answer, among other things, alleged that McVay, Allison & Co., desirous of obtaining a loan of money, drew said bill, secured its acceptance by Gledhill for their accommodation merely, and then procured its discount by the bank; the officers of the bank having full knowledge that Gledhill was only an accommodation acceptor; that in discounting the bill the bank reserved, in advance, \$93 as interest for ninety days, a rate exceeding that allowed by law.

The answer further alleged, that during the two years then next preceding, McVay, Allison & Co. had borrowed from the bank divers other sums of money, the bank in each case knowingly reserving and receiving a rate of interest greater than that allowed by law, which the borrowers had paid. These alleged usurious transactions were particularly set out in the answer. The defendants prayed that the interest agreed to be paid on the bill in suit be adjudged forfeited, and that they recover by reason of such other usurious loans twice the amount of the interest paid thereon, and that that sum be applied by way of set-off to the plaintiff's claim.

To the matter set up as a set-off the plaintiff demurred. The demurrer was overruled, the interest agreed to be paid on the bill was adjudged forfeited, and the amount of interest paid on said independent loans was ascertained, and twice its amount set off against the plaintiff's claim. The case was taken to the District Court on error, and by that court reserved for decision here.

Geddes, Dickey & Jenner for plaintiff in error.

Diriam & Leyman, for defendants in error.

BOYNTON, J. The rights of the parties became fixed before the approval of the Revised Statutes of the United States; and in so far as the case is affected by the National Banking Act, it is governed by the act of 1864.

Section 30 of that act, among other things, provided that the banking association might take and reserve,

on any loan or discount made, * * * interest at the rate allowed by the laws of the State where the bank was located, and that "the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

The position of the plaintiff is, that the liability created by the provisions of this section was strictly penal, and that an action to enforce it is cognizable only in the courts of the United States. This claim is founded on the provisions of the act of Congress of 1789 (1 Stats. at Large, 77, § 10; see U. S. R. S., § 711), which declares, that the jurisdiction vested in the courts of the United States, in suits for penalties and forfeitures incurred under the laws of the United States, shall be exclusive of the courts of the several States.

If the question of jurisdiction depended for its solution on this provision alone, the position contended for would seem to be well founded. But since its enactment, Congress has, in many instances, professed in direct terms to invest State tribunals with power to enforce penalties incurred exclusively in the violation of the laws of the United States. *Clafin v. Houseman*, 98 U. S. 130. By section 57 of said National Banking Act, it was provided, "that suits, actions and proceedings against any association, under this act, may be had in any Circuit, District or Territorial Court of the United States, held within the district in which such association may be established; or in any State, county or municipal court in the county or city in which such association is located, having jurisdiction in similar cases."

By this provision, the impediment to the exercise of jurisdiction by the State tribunals, created by the act of 1789, was removed, and the consent of Congress expressly given to the exercise of jurisdiction by the State courts, if competent to receive it, concurrent with that of the Federal courts, in suits, actions and proceedings arising under the Banking Act. Whether the same assent was given by section 8, it is unnecessary to consider. But, it is said, if it be held to have been the purpose of Congress to clothe the judicial tribunals of the States with jurisdiction to hear and determine causes arising under the Banking Act, that there still remains lying back of the fact of jurisdiction and upon which the fact depends, the question of capacity or power to take. And many cases are cited affirming the incapacity of State courts to receive and exercise jurisdiction to enforce a forfeiture or penalty imposed for a violation of the laws of the United States. But the doctrine of these cases has been repeatedly disapproved and rejected. *Gilman v. Philadelphia*, 3 Wall. 713; *Ex parte Niel*, 13 id. 240, and *Clafin v. Houseman*, *supra*.

In the case last cited it was held that the statutes of the United States are as much the law of the land in any State as are those of the State, and although exclusive jurisdiction may be given to the Federal courts, yet where it is not so given, either expressly

* From E. L. De Witt, Esq., reporter, and to appear in vol. 31, Ohio State Reports.

† See, also, *Ordway v. Cent. Nat. Bank*, Thomps. Nat. Bank Cas. 559, *sed quare*; *Missouri River Telegraph Co. v. First Nat. Bank*, id. 401; *Newell v. Nat. Bank*, id. 501.

‡ See *Hintermeister v. First Nat. Bank*, Thomps. Nat. Bank Cas. 741; *Brown v. Sec. Nat. Bank*, id. 849; *Wiley v. Starbuck*, id. 436.

or by necessary implication, the State courts, having competent jurisdiction in other respects, may be resorted to.

In delivering the opinion in that case, Mr. Justice Bradley says: "Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights, and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under State laws, may be prosecuted in the State courts, and, also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction. See remarks of Mr. Justice Field, in *The Moses Taylor*, 4 Wall. 429; and Story, J., in *Martin v. Hunter's Lessee*, 1 Wheat. 334; and Mr. Justice Swayne, in *Ex parte Niel*, 13 Wall. 236. This jurisdiction is sometimes exclusive by express enactment and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court." See, also, *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383; *Farmers and Mechanics' National Bank v. Dearing*, 91 U. S. 34.

These cases resolve the question of jurisdiction to enforce the forfeiture, against the plaintiff, and fully settle the right of the State tribunals to entertain the action to recover the penalty given by the act of Congress, if competent by their own Constitution to hear and determine like questions or causes arising under State laws.

It is urged, in the second place, that the court below wrongfully entertained the cross-action of the defendants to recover the penalty, the principal action being brought by a receiver and not by the bank; that the act of Congress, authorizing actions to be brought in State courts under the Banking Act, limits the right to actions against the bank, and that the alleged set-off, if available in an action by the bank, is not, and cannot be made available in an action brought by a receiver appointed by the comptroller of the currency to wind up its affairs.

This objection is not well founded. "When cross-demands have existed between persons under such circumstances, that if one had brought an action against the other a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated so far as they equal each other." Civil Code, § 99. The receiver holds to the bank and its creditors the relation, substantially, of a statutory assignee. A right of set-off, perfect and available against the bank at the time of his appointment as receiver, is not affected by the bank's insolvency. He succeeds only to the rights of the bank existing at the time it goes into liquidation. *American Bank v. Wall*, 56 Me. 167; *Miller v. Receiver of Franklin Bank*, 1 Paige, 444; *Coll v. Brown*, 12 Gray, 233.

This question, however, is relieved of importance in the present controversy by the disposition made of the

question relating to set-off. Was the cause of action to recover back twice the interest paid, one arising upon contract within the meaning of that term as employed in § 97 of the Code of Civil Procedure?

That section is as follows: "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract or ascertained by the decision of the court."

The action to enforce the forfeiture was, by the act authorizing it, denominated "an action of debt."

By the Revised Statutes, § 5198, it is now denominated "an action in the nature of an action of debt." In the division of forms of actions at common law into actions *ex contractu* and *ex delicto*, debt was included in the former class; and, therefore, it is contended that an action of debt is an action necessarily arising upon contract. But this does not follow. Debt was almost uniformly the remedy on statutes, either at the suit of the party aggrieved or of a common informer, and in many actions confessedly not sounding in contract. 1 Chitty's Pl. 125-8 *et seq.*; *C. and A. R. R. Co. v. Howard*, 38 Ill. 414.

It is quite manifest, in the case at bar, that there was no express promise by the bank to pay back any part of the interest received. That express assent was given to pay double the interest is not pretended. If, therefore, a contract or promise exists at all, it is because the law implies it from the circumstances, or imperatively presumes it from the relation shown between the parties. *Hertzog v. Hertzog*, 29 Penn. St. 485; 2 Greenl. Ev., § 102.

It is not denied that there is a large class of contracts which rest merely on construction of law and in which there is, strictly speaking, no agreement of the parties to the terms by which they are bound. 1 Chitty on Cont. 79.

But it is said in Metcalf on Contracts, 5, that, "In sound sense, divested of fiction and technically, the only true ground on which an action upon what is called an implied contract can be maintained is that of justice, duty and legal obligation;" and it is further said, as an instance of the application of the rule, that "if one has another's money, which in equity and good conscience he ought to restore, the law is said to imply a promise to restore it." Ibid.

In many of the States and in England, a borrower having paid usurious interest, can maintain an action to recover it back. The cases holding, that such action is founded on an implied promise of the lender to restore the sum illegally exacted. The principle asserted is, that title to the excess of interest paid never vested in the lender. And having another's money, which he ought in equity to restore, an action for money had and received will lie to recover it. *Williar v. Baltimore Butchers' Loan Association*, 45 Md. 546; *Wheelock v. Lee*, 64 N. Y. 242; *Thomas v. Shoemaker*, 6 W. & S. 179; *Ewing v. Griswold*, 43 Vt. 400; *Basanquette v. Dashwood*, Cas. Temp. Talbot, 38; *Walker v. Chapman*, Loft. 342; *Jones v. Barkley*, Doug. 696; *Browning v. Morris*, Cowp. 792; *Williams v. Hedley*, 8 East, 377.

It is claimed that these cases, in principle, settle the question, that the several causes of action interposed below, as set-offs, respectively arise upon contract. But it is quite obvious that they do not have the effect contended for.

In the first place, the rule thus recognized does not go to the extent claimed, and secondly, it does not

prevail in this State. *Shelton v. Gill*, 11 Ohio, 417; *Commercial Bank of Cincinnati v. Reed*, id. 498; *Baggs v. Loudenback*, 12 id. 153; *Spalding v. The Bank of Muskingum*, id. 545; *Rains v. Scott*, 13 id. 107; *Graham v. Cooper*, 17 id. 605. Whether well or ill-founded, the rule is firmly settled, that the party paying is *in part delicto* with the party receiving, and hence is denied an action at common law to recover back the interest paid in excess of the legal rate.

It may be said, that the rule denying the action in such case does not go to the extent of denying the existence of a cause of action arising upon contract, in favor of the borrower against the lender, but that it merely affects or cuts off the remedy as a punishment of the borrower for participating in the illegal transaction. But if we grant this, the proposition cannot be successfully maintained upon any sound principle, nor is it sanctioned by any authority known to us, that an action upon a statute for twice the entire interest paid is an action arising upon contract. No one of the cases above cited sustains or supports the alleged right to recover upon a promise, implied in law, more than the amount paid in excess of the legal rate. They rest upon the ground that such excess is the money of the borrower in the hands of the lender; but that the borrower's equity, which gives rise to implication of a promise, is fully satisfied when that sum is restored to him, which was wrongfully taken from him, is clearly deducible from the principle adjudged.

The original act of February, 1863 (12 U. S. Stat. 678, § 46), in case illegal interest was taken or reserved, forfeited the entire debt. The act of 1864 reduced the sum to be forfeited to double the interest received. Both provisions were penal, differing only in the sum declared forfeited. Numerous decided cases hold, that the repeal of a statute creating a penalty or forfeiture takes away the right to enforce it. *Oriental Bank v. Freeze*, 6 Shep. (Me.) 109; *Eaton v. Graham*, 11 Ill. 619; *Sumner v. Cummings*, 23 Vt. 427; *Washburn v. Franklin*, 35 Barb. 599; *Engel v. Schurtz*, 1 Mich. 150; *Cummings v. Chandler*, 26 Me. 453.

That this would not be the result from a repeal of the statute creating the liability, if the cause of action arose upon contract, is established by a like uniform current of authorities. *Williar v. Baltimore Butchers' Loan Association*, 45 Md. 548; *Dash v. Van Kleck*, 7 Johns. 477; *Wright v. Hawkins*, 28 Texas, 452.

The principle is clearly illustrated in *Williar v. Baltimore Butchers' Loan Association*. The plaintiff brought an action to recover back usurious interest paid, the statute declaring that a person contracting for usury should forfeit the excess above the legal rate. While the action was pending, an act was passed by the Legislature taking away the right of action for usury in all cases where the same had been paid. It was contended by the defendant, that this act took away the right of the pending action; but the court held that the plaintiff's right in such cause of action was a vested one, which the Legislature was wholly incompetent to take away. The decision was placed on the ground that the excess of interest which the act first mentioned authorized to be recovered back, was not a forfeiture or penalty, but was money belonging to the plaintiff, in the hands of the defendant, the right to recover which existed independently of the statute, and could not be impaired or affected by its repeal. "A vested right of action is property in the same sense in which tangible things are property, and is equally protected from arbitrary interference.

Where it springs from contract, or from the principles of the common law, it is not competent for the Legislature to take it away." *Cooley's Const. Lim.* 362, and note.

In *Oriental Bank v. Freeze*, *supra*, it is said: "Where a party, by statute provisions, becomes entitled to recover a judgment, in the nature of a penalty, for a sum greater than that which is justly due to him, the right to the amount which may be recovered, does not become vested until after judgment." In *Lucas v. Government National Bank*, 78 Penn. St. 228, a case quite nearly in point, where the penalty given by the act creating it was sought to be used as a set-off, the court say: "Technically the latter part of the affidavit of defense is bad, for it claims as a set-off that which the act of Congress imposes as a penalty on the usurious transaction, to wit, double the amount of the interest paid. In this the defendants had no such interest as would enable them to use it by way of defalcation, for it could be acquired only through an action of debt, under the statute, and until the forfeiture was pronounced in their favor, by judgment of the court, they had nothing therein which would be the subject of set-off." To the same effect is *Overholt v. National Bank of Mt. Pleasant*, 82 Penn. St. 490. In *Bank of Chambersburg v. Commonwealth*, 2 Grant, 384, it was held that "a penalty for breach of a statute is not, when sued for, within the defalcation acts, nor subject to any manner of set-off." Without pursuing the subject further, in our opinion the court properly adjudged the interest reserved on the bill in suit forfeited, and improperly held that the penalty imposed by the act of Congress for receiving usurious interest on other and independent loans, was available as a set-off.

Judgment reversed, demurrer to the set-off sustained, and judgment for the plaintiff.

RECENT AMERICAN DECISIONS.

SUPREME JUDICIAL COURT OF MAINE.*

BANKRUPTCY.

Of member of firm.—When a member of a firm files his petition in bankruptcy, giving no schedule of firm debts and assets, nor praying for a discharge from firm liabilities, his discharge, when obtained, will only relieve him from his individual indebtedness and not from partnership liability. *Corey v. Perry*.

HUSBAND AND WIFE.

Liability of husband for necessities for wife: for what not liable.—The husband is liable for necessities furnished a wife, who for good and sufficient cause has left his bed and board. One cannot furnish articles which are not necessities and recover a fraction of their value because they might have answered the purpose of other articles which would have been necessities. The articles furnished must be necessities, suitable and proper, regard being had to the condition of the parties, else no recovery can be had. *Thorpe v. Shapleigh*.

INTEREST.

When statute and not contract governs: note past due.—When a note is given on time, with interest at the

rate of twelve per cent, the holder after maturity receives interest by operation of law and not under the contract, is entitled to six per cent only. *Duran v. Ayer*.

PARTNERSHIP.

1. *When parties part owners, not partners: construction of contract.*—Eames delivered J. S. his horse with this bill of sale: "In consideration of * * * dollars paid me by J. S. I have sold him one-half of my horse. Said J. S. to keep and handle the horse; I to pay one-half the expenses and to receive one-half the profits. My part of keeping to be \$2.50 per week." *Held*, (1) That this bill of sale made them part owners, but not partners. (2) That in addition to the stipulated price for keeping, Eames was liable *pro rata* for the expense of "handling." (3) That neither party had the right to sell the animal, mortgage him or incur expense for his support upon the credit of both, as he might if there had been a partnership. (4) The stipulated sum for keeping was payable absolutely, profits or no profits, and recoverable in assumpsit. *Chapman v. Eames*.

2. *Payment of private debt from funds: effect of.*—A partner has no right to draw a firm order on a debtor to the firm in payment of his own private debt, without the assent, express or implied, of his copartner. But the money received on such order cannot be recovered in the name of the firm. *Blodgett v. Sleeper*.

SALE.

Rights of conditional vendee: mortgage by vendor after sale.—Property, in the possession of a vendee who is not to become the owner of the title until he has fully paid for the same, may, at any time before the price is wholly paid, be mortgaged by the vendor to another person, and such person will acquire a title to the property thereby superior to that of the conditional vendee. *Everett v. Hall*.

SHIPPING.

1. *Rules for avoiding collisions between vessels applied.*—Under the United States statute rules for avoiding collisions between steamships and sailing vessels, if two vessels, one of which is a sail-vessel and the other a steam-vessel, are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel. Every steam-vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse. When by the rules one of two vessels shall keep out of the way, the other shall keep her course. *Lord v. Hazeltine*.

2. *Negligence: common-law rule applied.*—If the collision is the fault of the plaintiff, or of both parties, or of neither, the plaintiff cannot recover. If it happens by the fault of the defendant, and without any contributory fault of the plaintiff, he can recover, provided he sustains the burden of proof which the law imposes on him. *Ib*.

TRESPASS.

Taking possession of premises held over by tenant at will.—Where a tenant at will occupies a house of his own on the land of another and does not remove it within a reasonable time after his tenancy terminates, and after notice and request to do so, the owner of the land will not be a trespasser for entering and taking possession of the house. *Sullivan v. Carberry*.

RECENT BANKRUPTCY DECISIONS.

COMPOSITION.

Fraud in: when not available: laches.—Where, pending proceedings in composition, certain suspicious circumstances appear, showing that the votes of creditors had been purchased, and the creditors entertaining those suspicions do not make any inquiry into the facts, but accept the settlement, they cannot after a lapse of a year or two be heard to set aside the composition because of such fraud. In bankruptcy proceedings, where the question is one of the exercise of discretion, laches, when coupled with injury to innocent parties, are circumstances of controlling weight. U. S. Dist. Ct., S. D. New York. *In re Herman*, 17 Nat. Bankr. Reg. 440.

DISCHARGE.

Debts contracted by fraud.—Debts contracted by fraud are not discharged by composition in bankruptcy. Sup. Ct., New York, 4th Dept. *Libbey v. Strasburger*, 17 Nat. Bankr. Reg. 468.

EXECUTION.

When valid against individual property on firm debt.—Where an execution lien has been obtained in good faith, before bankruptcy, on the individual property of a member of a partnership firm, under a judgment against the firm, the statutory lien will not yield to the equities of the separate creditors of that partner. U. S. Dist. Ct., S. D. Illinois. *In re Sandusky*, 17 Nat. Bankr. Reg. 452.

LEASE.

Assignee in bankruptcy, when not assignee of lease.—The bankrupt corporation occupied a store in Fulton street, New York, under a lease for a term of years, at a yearly rental of \$3,000. A petition was filed against the corporation in August, 1876, and an adjudication was subsequently had and an assignee appointed, who, on the 7th of February, 1877, took possession of the goods and removed them from the store. He never had actual or constructive possession of the store, and no sales were made therein. The goods brought less than \$3,000 upon the sale. The landlord claims for rent of the premises from the time of the filing of the petition to the time of removal by the assignee. *Held*, that the assignee never became assignee of the lease, and that the landlord can only claim as against the estate for the use and occupation of the premises as a place of storage or safe-keeping, and that forty dollars a month was a reasonable sum for such use and occupation under the circumstances. U. S. Dist. Ct., S. D. New York. *In re Luchs Hart Manufacturing Co.*, 17 Nat. Bankr. Reg. 459.

PARTNERSHIP.

1. *Composition by: refusal of member of firm to join in voluntary proceedings.*—A refusal on the part of one of the members of a firm to join in voluntary proceedings instituted by his partners, to sign the composition or to attend and be examined, may well deprive him of all benefit of the composition; but, unless the refusal or neglect is the result of some fraud on the part of those partners who do carry on the proceedings, it is no reason for avoiding those proceedings as to them. U. S. Dist. Ct., S. D. New York. *In re Henry, Curran & Co.*, 17 Nat. Bankr. Reg. 463.

2. *Special partner: fraud.*—The bankrupts included in their schedule of liabilities the special capital of one G., who, under the articles of copartnership, was a

special partner, but who, by reason of failure to comply with the statute requiring the special partner's capital to be paid in in cash, was in fact a general partner. *Held*, not to be a fraudulent statement, as the other partners then supposed him to be a special partner, and though his claim against the assets as such special partner would be postponed to those of other creditors, it was properly described as a liability as they then understood it. *Ib*.

3. *What liabilities should be set down.*—Debtors in preparing their schedules should set down in the schedule of liabilities all the paper that they may be liable on, with proper explanations in regard to them. *Ib*.

4. *Special partner: composition.*—A special partner has no right to vote on the resolutions of composition. *Ib*.

PRIORITY.

Employee not entitled to, for time he does not work.—The claimant had been employed by the bankrupts for the term of one year, but was discharged at the expiration of six months, and for a long time thereafter was unable to procure employment. He was paid for the time he actually worked. The register decided that he was entitled to priority in the payment of the sum claimed as wages for the time he was unemployed. *Held*, that the decision of the register was erroneous. U. S. Dist. Ct., N. D. New York. *In re Pevear & La Croix*, 17 Nat. Bankr. Reg. 461.

RECEIVER.

May prove debt of his estate in bankruptcy.—A receiver of the property of a creditor of the bankrupt is an assignee of the debt due to such creditor and may prove it in the bankruptcy proceedings; but the proof must be supported by the deposition required by General Order No. 34. The deposition may, in the first instance, be *ex parte*, as in Form No. 22. U. S. Dist. Ct., S. D. New York. *In re Mills*, 17 Nat. Bankr. Reg. 472.

COURT OF APPEALS ABSTRACT.

ANIMALS.

1. *Liability of owner of vicious dog: on what based.*—An action for injury from a vicious dog is based upon the keeping of such a dog, and if injury ensues the owner is liable. If negligence is an element of a cause of action at all, it is not so in the ordinary sense of that term, but consists in the act of keeping the dog with knowledge of his disposition. Judgment below affirmed. *Lynch v. McNally*. Opinion by Church, C. J.

2. *Contributory negligence no defense.*—Contributory negligence, as that term is generally understood, is not a defense in such an action. *Ib*.

3. *What is a defense.*—To constitute a defense in such an action it must be established that the person injured did some act from which it may be affirmed that he brought the injury upon himself. *Ib*.

4. *Offering a dog at large candy.*—A dog was loose and plaintiff, who was not shown to have known his vicious qualities, offered him some candy, when he sprang at her and bit her. *Held*, that the act of plaintiff did not constitute a defense to an action for the injury. *Ib*.

[Decided April 16, 1878.]

BOUNDARIES.

1. *When deed governs and when not: fixed line.*—While an island or any other parcel of land having a

well-known designation, conveyed as such, and by name would pass, although misdescribed in the statement of the particular boundaries, or as to quantity, because the intent to convey such a tract of land is evident no such intent can be inferred by a general reference in addition to an accurate description by permanent boundaries capable of being ascertained. Therefore when the intent was to confine the grant within a patent named the grantee cannot claim beyond the patent line. Judgment below affirmed. *Jones v. Smith*. Opinion by Allen, J.

2. *Adverse possession: line fence.*—A temporary division fence built off from the true line for convenience, through uncultivated land, *held*, not sufficient to found a claim by either of the adjoining owners of title up to the fence by adverse possession. *Ib*. [Decided April 2, 1878. Reported below, 3 Hun, 351.]

CONTEMPT.

By attorney: what is not: order in supplementary proceedings: ownership of property.—In 1872 H., who was entitled to a fund in the possession of the New York Chamberlain, assigned his interest and right in the same to A., in trust for certain purposes. A, subsequently transferred his trust to D., who accepted it. Subsequently, upon a judgment against H., M. obtained an order in supplementary proceedings against H., and also an order in the same proceedings forbidding the Chamberlain to transfer or interfere with any property belonging to H. in his hands "until further order in the premises." Subsequently a receiver of the property of H. was appointed in the proceedings, and in the order appointing him, H. and his servants, agents and attorneys, were restrained from interfering with any property belonging to H. In the proceedings one R. appeared in form as attorney for H., but in reality to protect the rights of D., the trustee, and all these orders were known to all the parties named. Thereafter R. obtained an *ex parte* order of the court directing the Chamberlain to pay the fund assigned by H. to D., the trustee. In this he did not bring to the knowledge of the court the supplementary and other proceedings against H. The Chamberlain paid the fund to the trustee. *Held*, (1) that the Chamberlain was not liable for the payment to the trustee; and (2) that R. was not guilty of contempt of court in procuring the order; and (3) that the receiver of H. had no interest in or right to the fund assigned to the trustee by H. Orders below reversed. *People ex rel. Morris v. Randall*. Opinion by Earl, J. [Decided April 23, 1878.]

ESTOPPEL.

1. *When principal bound by representations of agent.*—B, a note broker, was the agent of plaintiff to sell certain notes made by him. Defendant applied to B to purchase business paper. B sold him at twelve per cent discount the notes made by plaintiff, representing them to be business paper. *Held*, that plaintiff was bound by the representations of his agents and was estopped from claiming that the notes were usurious. Judgment below affirmed. *Ahern v. Goodspeed*. Opinion by Folger, J.

2. *Ratification of act done by agent before agency commenced.*—A representation as to the character of one of the notes was made by the broker before the note was in existence. *Held*, that while plaintiff was not originally bound by such representation, a subsequent ratification with a knowledge of the facts would bind him. *Ib*.

[Decided January 15, 1878.]

EVIDENCE.

1. *Parol proof to fix meaning of writing admissible.*—A contract of sale was expressed to be on the "usual terms." *Held*, that parol proof was competent to show what the usual terms were in such sales, and defendants were bound by them whether they knew what they were or not. Judgment below affirmed. *Lawrence v. Gallagher*. Opinion by Earl, J.

2. *Sale of article to arrive: what contract not unlawful.*—By the terms of a contract of sale to defendants by plaintiffs of an article then on the ocean and to arrive, plaintiffs were to sell it for defendant and pay defendants the balance due after such sale, after deducting the purchase-price. If there was a loss defendants were to pay that. *Held*, not an unlawful contract. *Id.*

[Decided April 23, 1878.]

FORECLOSURE.

1. *Parties to: statutory construction: 2 R. S. 191, § 152, etc.*—The provision of 2 R. S. 191, § 154, providing that any other person than the mortgagor, who shall have executed an obligation or other evidence of debt, may be made a party to the bill, has reference to the bill named in § 152. Sections 152, 153 and 154 are in purpose and effect parts of the same enactment. The purpose is to confine all proceedings to recover a mortgage debt to one court. Judgment below affirmed. *Scotfield v. Doscher*. Opinion by Folger, J.

2. *Authority from the court to sue must be proved.*—Where authority from the court to sue is necessary it should be proved by plaintiff. There is no right to sue until the court gives one, and defendant need not set it up as is the case with usury and statutes of limitation. *Id.*

[Decided February 12, 1878. Reported below, 10 Hun, 582.]

NEGLIGENCE.

1. *When question for jury: icy railroad station platform.*—In an action against a railroad company for injury received by a passenger by slipping on an icy platform, *held*, that evidence that the surface of the platform was in a lumpy and uneven condition from the unequal packing of the snow thereupon, which condition was open to the observation of the company's servants, was sufficient evidence of defendant's negligence to go to the jury. *Held*, also, that the fact that defendant provided servants, whose duty it was to clean the platform from snow, and that they neglected their duty, would not excuse defendant. Judgment below affirmed. *Weston v. N. Y. Elevated R. R. Co.* Opinion by Andrews, J.

2. *What is not contributory negligence.*—*Held*, also, that it was not contributory negligence for plaintiff to assume that defendant had done its duty and rendered the platform safe, and go upon the platform and walk cautiously along after he had found that it was slippery. *Id.*

3. *Duty of railroad companies as to keeping ice from station platforms.*—The court below charged that "the defendant was bound to be on the alert during cold weather and see whether there was ice on the platform and remove it or make it safe by sanding it," etc.; and also that "the defendant was not bound to keep its platform in such a condition that it would have been impossible for any passenger to slip, but in such a condition that persons using the ordinary care which people use when not apprised of danger, would not slip." *Held* correct. *Id.*

[Decided March 26, 1878.]

NEW YORK CITY.

Removal from police force: conduct unbecoming an officer, what is not.—Relator was removed from the office of policeman of the city of New York, by the board of police, under the charge of "conduct unbecoming an officer," this being one of the offenses for which, under Laws 1873, chap. 335, a policeman can be removed. The specifications were that he was appointed policeman contrary to law when he was more than 30 years of age, and that he had been appointed after having resigned from the force without a vote by yeas and nays contrary to the requirements of law. *Held*, that these specifications had only reference to relator's title to the office and not to his conduct while an officer, and did not authorize the removal. Judgment below reversed. *People ex rel. Clapp v. Board of Police*. Opinion by Andrews, J.

[Decided February 5, 1878. Reported below, 5 Hun, 457.]

SERVICE.

1. *Proof of service of summons by plaintiff.*—While the statute (old Code, §§ 133, 138) declares that the summons shall be served by some person other than the plaintiff, it does not in terms make him incompetent to prove admission of service. Order below affirmed. *White v. Bogart*. Opinion by Allen, J.

2. *Offer of judgment: irregularity.*—When an offer of judgment is not accepted formally but a judgment is entered, the failure to file an acceptance is an irregularity not affecting the validity of the judgment, and the acceptance may be filed at any time thereafter *nunc pro tunc*.

[Decided April 9, 1878.]

STOLEN SECURITIES.

1. *When purchaser of, protected.*—The purchaser for value of stolen negotiable bonds will be protected unless the circumstances are such that an inference could be fairly and legitimately drawn that the purchase was made with a notice of a defective title in the seller, or in bad faith. It is not sufficient that a prudent man would be put upon inquiry nor that the purchaser was negligent. Judgment below reversed. *Dutchess Co. Mut. Ins. Co. v. Hatchfield*. Opinion by Church, C. J.

2. *Evidence to show intent admissible.*—It was shown in an action to recover stolen negotiable bonds purchased by defendant that he had before purchased of the person from whom he purchased these bonds a bond stolen at the same time. After stating as a witness the circumstances of the purchase of that bond and the explanation made by the seller, he was asked this: "Were you satisfied with the explanation given by Mr. Kendrick of this other stolen bond transaction?" *Held*, that the question was proper. *Id.*

[Decided April 9, 1878.]

COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, May 21, 1878:

Sherwood v. Agricultural Ins. Co., No. 18, order granting new trial affirmed, and judgment absolute for plaintiff on stipulation; opinion by Rapallo, J. — *Merrill v. Agricultural Ins. Co.*, No. 174, judgment affirmed; opinion by Folger, J. — *Dale v. Delaware, L. & West'n R. R. Co.*, No. 176, judgment reversed and new trial granted; opinion by Rapallo, J. — *Goodwin v. Mass. Mutual L. Ins. Co.*, No. 189, judgment

ment affirmed; opinion by Miller, J. — *Grover v. Morris*, No. 143, judgment affirmed; opinion by Andrews, J. — *Smith v. Bodine*, No. 200, judgment affirmed; opinion by Miller, J. — *Boyd v. De La Montagnie*, No. 150, judgment affirmed; opinion by Church, C. J. — *Agate v. Sands*, No. 173, judgment affirmed; opinion by Miller, J. — *White v. Hoyt*, No. 193, judgment affirmed; opinion by Allen, J. — *Meyer v. Knickerbocker L. Ins. Co.*, No. 171, judgment affirmed; opinion by Folger, J. — *Bliss v. Johnson*, No. 182, judgment reversed and new trial granted; opinion by Andrews, J. — *People ex rel. Gilchrist v. Murray*, No. 398, order of General Term reversed and judgment on verdict affirmed; opinion by Earl, J. — *Mott v. Consumers' Ice Co.*, No. 177, judgment reversed and new trial granted; opinion by Allen, J. — *Sayles v. Sims*, No. 196, judgment affirmed; opinion by Church, C. J. — *Wood v. Mayor, etc.*, of New York, No. 156, judgment affirmed; opinion by Andrews, J. — In re application of Department of Public Works of city of New York, No. 403, orders of General and Special Terms reversed and report of referee confirmed, and an order entered directing the payment of the money to Grinnell, with costs to be paid by the city of New York; opinion by Earl, J. — *Haden v. Coleman*, No. 199, judgment reversed and new trial granted; opinion by Church, C. J. — *Whittlesey v. De Laney*, No. 131, judgment affirmed; opinion by Allen, J. — *Ousby v. Jones*, No. 142, judgment affirmed; opinion by Folger, J. — *Murdock v. Prospect Park and Coney Island R. R. Co.*, No. 187, judgment affirmed; opinion by Andrews, J. — *Thomson v. Sweet*, No. 150½, judgment affirmed; opinion by Miller, J. — *Rohrschneider v. Knickerbocker Life Ins. Co.*, No. 184, judgment affirmed; opinion by Earl, J. — *Merrill v. Calkins*, No. 202, judgment affirmed; opinion by Church, C. J. — *Higgins v. Phoenix Mutual Life Ins. Co.*, No. 208, judgment affirmed; opinion by Allen, J. — *Diossy v. Morgan*, No. 212, judgment affirmed; opinion by Rapallo, J. — *Booth v. Cleveland Rolling Mill Co.*, No. 213, judgment affirmed; opinion by Allen, J. — *Nichols v. Voorhis*, No. 138, appeal dismissed; opinion per Curiam.

NEW BOOKS AND NEW EDITIONS.

SLOANE ON LANDLORDS AND TENANTS.

Landlords and Tenants: A summary view of their legal rights and duties, with special reference to the law of the State of New York. To which is added an appendix of forms. By Charles W. Sloane, of the New York Bar. New York: Haven Bros., 1878.

THIS handy little volume will prove of great practical use to those interested in the law governing the relations of landlord and tenant, as it states in a clear and concise manner all the details of that law as it exists in this State. Exclusive of the index, tables of contents, etc., and forms, it contains but 97 small pages, but within that compass is included all the valuable results of larger volumes. The statements of principle appear to be accurate, and they are so expressed that even one unfamiliar with the technical terms of the law can readily understand them. For real estate owners or occupiers we know of nothing as useful as this treatise, and members of the profession will find it convenient to carry with them into court to refresh their recollection of the law in the trial of cases involving the subjects to which it relates.

RORER ON JUDICIAL SALES, SECOND EDITION.

A treatise on the law of judicial and executive sales. By David Rorer, of the Iowa Bar. Second Edition. Chicago: Callaghan & Co., 1878.

This is the second edition of a work which was published in 1873, and which has become familiar to very many members of the bar. It is upon a subject of great practical interest, and one upon which every lawyer frequently needs assistance. The present edition is greatly enlarged and is re-arranged so as to afford a more ready reference to its contents. Of course there has been a very great advance in this department of the law since 1873, and many decisions of importance made. The author seems to have thoroughly examined all these and to have incorporated the principles and rules established in them into his work. The work, as enlarged, probably furnishes the most full and comprehensive treatise extant upon the various kinds and methods of transferring real and personal property under judgments and decrees of courts, and it ought to be in the hands of every lawyer in active practice. It has an excellent index and is well printed and bound.

NOTES.

THE *London Law Journal* introduces a lengthy review of one of Dr. Spear's recent articles on "Extradition," with the following remarks:

"At a time when there is a prospect of this country being involved in war with Russia, it is very satisfactory that our relations with the United States are of a thoroughly friendly character. The good will of the United States toward the mother country has of late been manifested in various ways; and amongst the evidences we may cite the fair and temperate discussion of the extradition question. We think that in the recent contention Lord Derby was on the whole right, and Mr. Fish was wrong; but there is much to be said on both sides, and we are impressed by the judicial impartiality with which the matter has been debated in America. Dr. Spear is contributing a series of learned and exhaustive articles to the ALBANY LAW JOURNAL, and we are glad that the matter is being so fully investigated. The questions that arise as to the construction and application of the treaties and the law of extradition are complex, and should be definitely settled, because differences on such points are always fraught with the peril of international bickering."

At a meeting of the International Code Committee of America, held on the evening of the 16th inst., at the residence of Judge Charles A. Peabody in New York city, the following delegates were elected to the next annual conference of the Association for the Reform and Codification of the Laws of Nations, to be held at Frankfort, August 20, 1878, with power to add to their number: Hon. John Welsh, Minister to England; Hon. Bayard Taylor, Minister to Germany; David Dudley Field, A. P. Sprague, Charles A. Peabody, F. A. P. Barnard, Lieutenant-Governor William Dorsheimer, Judge George F. Comstock, F. R. Couderc, Edward R. Bacon, Dr. J. P. Thompson, Dr. S. I. Prime, Dr. Samuel Osgood, Dr. Henry C. Potter, Dr. Charles Howard Malcolm, Dr. E. A. Washburn and Howard Payson Wilds.

This is the way an English law newspaper describes the sittings of one of the superior courts of its country: "For the last month the sitting chamber judge at the Bear Garden has been Mr. Justice F——d, who really knocked off the work before him in a most expeditious manner. Since, Mr. Justice Slow-pace sits there, and monotonous drags on its slow and weary length."

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, JUNE 1, 1878.

CURRENT TOPICS.

THE House on Tuesday last concurred in the Senate amendment to the bill for the repeal of the bankrupt law, and unless a veto should be interposed, which is very improbable, the law will go out of existence on the 1st of September next. This is a result which the greater portion of the people of the country have been anxious for for the past eight years, but the friends of the law, though weak numerically, have wielded a sufficient influence to prevent a compliance, by the National Legislature, with the wishes of the majority. It was at one time doubtful whether the present Congress would not follow the example of its predecessors, and fail to pass the bill, notwithstanding a very large majority in each house were in favor of it. But the friends of the bill have been active, and it has not failed. The postponement of the time when the act is to go into effect was a concession to a claim which was made by the friends of the existing law, that if it was repealed without notice, a very great number of unfortunate individuals, who were intending to take the benefit of the law, would be disappointed and ruined. Three months' time will enable all who can have any claim to favor in this matter to take such action as they desire, and we anticipate that the bankrupt courts will do more business during that period than they have ever done in the same time.

We imagine that the repeal of this law will be of considerable benefit to those of the profession engaged in general practice. The incoming of the bankrupt law nearly destroyed the collection business; a debtor that could be made to pay only by means of legal process being as a rule on the verge of bankruptcy, and a suit against him liable to be defeated by bankrupt proceedings. Then the law made certain acts, such as the non-payment of negotiable paper, acts of bankruptcy, and debtors were compelled to pay in cases where they would have resisted under other circumstances. In these two ways the statute discouraged litigation, and it was also injurious to the profession for the reason that

the fees and expenses of bankruptcy proceedings were paid out of funds which, under the pre-existing laws, would have very generally been spent in litigation. But the profession will not alone receive advantage from repeal. Vigilant creditors will derive advantage from their vigilance, and distinction can be made by the insolvent between debts of different degrees of merit. In fact we think every one, debtor and creditor alike, will be benefited by the repeal.

The Court of Appeals of this State, in the case of *Sherwood v. Agricultural Insurance Co.*, decided on the 21st ult., an abstract of which appears in our present issue, passes upon the question whether, under a condition in a fire insurance policy, rendering it void in case of a transfer of title, either by the act of the insured, or by operation of law, the death of the insured creates such a change in title as to avoid the policy. The court holds that it does so. The case of *Lappin v. Charter Oak F. Ins. Co.*, 58 Barb. 325, adopts the same doctrine. The principal case is distinguished by the court from those of *Wyman v. Wyman*, 26 N. Y. 253, and *Burbank v. Rockingham Ins. Co.*, 24 N. H. 550. In the latter case the policy provided that it should be void if the property insured should be alienated by sale or otherwise, and the court held the death of the insured did not alienate the property, the decision turning upon the meaning of the word "alienation." See, for an interesting article upon the subject, 4 Alb. L. J. 37, in which the decision in *Lappin v. Charter Oak Insurance Co.* is criticised.

The bill amending the Code of Civil Procedure has not yet been signed by the Governor. In the Supplement issued with this number are given, among others, acts relating to assessments for local improvements in New York, coroners in New York, accidents on railroads, reduction of stock of corporations, payment of counsel employed by the State, trust companies, and certain other moneyed corporations, the supply bill, and the Military Code amendments. Up to the time of going to press, 372 bills have been signed.

The discussion in the United States Senate upon the subject of admitting women to practice as attorneys in the Federal courts showed that there was a strong feeling in that body in favor of abolishing all sex distinctions in this matter. The report of the committee to which the bill for relieving certain legal disabilities of women had been referred, reported that no legislation was required in the matter, as no law existed forbidding women to practice. This is thought by the friends of the measure to be simply

an evasion of the direct issue as, though there is no statute directly forbidding the admission of females, the courts do not admit them, and the United States Supreme Court has refused to entertain any application for admission in behalf of a woman. The situation is this: There is no law to prevent a woman from coming into the bar, so permissive legislation is not required. But the courts, notwithstanding this, will not let her practice. So she is as badly off as if the law expressly excluded her. There are probably not half a dozen women in the whole country who would avail themselves of the privilege to practice if it was given them, and it is probable that they would be of very little advantage to the bar, so that perhaps the course recommended by the committee is the best one that could be taken. We understand that women are allowed to practice in the States of Illinois, Michigan, Minnesota, Missouri, and North Carolina, in the Territories of Wyoming and Utah, and in the District of Columbia. The probabilities are that other States will accord her the same privilege, and the Federal courts cannot remain long closed against her.

NOTES OF CASES.

IN *Connecticut Mut. Life Ins. Co. v. Groom*, decided on the 8th of May by the Supreme Court of Pennsylvania, a policy of insurance contained the provision that if the insured should die by suicide it should be null and void. The court held that the word "suicide" could not properly be applied to the voluntary death of the insured while insane. The opinion states that the preponderance of decisions in England and this country supports the theory that the word "suicide" is synonymous with the expression "death by one's own hand," but that the better and safer rule is the one adopted in the class of cases to which *Mutual Life Ins. Co. v. Terry*, 15 Wall. 580, belongs. The provision mentioned not being a covenant for the performance of a duty under a mutual contract and hardly a condition, but a provision for the absolute forfeiture of the rights of the insured upon the happening of a certain event, it was requisite that the fact upon which the forfeiture depended should be clearly, strictly, and technically made out, and the party against whom it was sought to be enforced was entitled to have a construction put upon it in his favor, because the words were not his, but those of the other party. *Mayor v. Isaac*, 6 M. & W. 612. Where there is any ambiguity in an instrument of this character it must be taken most strongly against the company which prepared it. *Notman v. Anchor Ass. Co.*, 4 C. B. (N. S.) 481. The decision is in harmony with the rule adopted by the Court of Appeals of this State, and by the United States Supreme Court. But it is held by the former court

in *Weed v. Mutual Benefit Life Ins. Co.*, 16 Alb. L. J. 414, that under a condition in a policy making it void if the assured should die by his own hand, that the policy is avoided by suicide unless the mind of the insured at the time was so impaired that he did not understand the consequences of his action, and that death would ensue. See, also, *Van Zandt v. Mut. Benefit Life Ins. Co.*, 55 N. Y. 169; *McClure v. Mut. Benefit Life Ins. Co.*, id. 651. A similar doctrine was held by the Federal Supreme Court in *Charter Oak Life Ins. Co. v. Rodol*, 16 Alb. L. J. 415, it being said that it is not every kind or degree of insanity that will excuse the party taking his own life so as to render the company liable. If the deceased in the exercise of his reasoning faculties formed a determination to take his life because he preferred death to life, the company would be relieved.

The Supreme Judicial Court of Massachusetts, in the recent case of *Taintor v. City of Worcester*, holds that a city by accepting a statute which authorizes it to provide and maintain fire engines, reservoir and hydrants for the extinguishment of fires and building works under it, does not enter into a contract with or assume any liability to owners of property to furnish means or water for the extinguishment of fires upon which an action can be maintained, and it will not be liable for a loss by fire occurring by reason of the absence of water which it is able to furnish. In *Atkinson v. Newcastle Water Works*, L. R., 6 Ex. 404, an action was maintained against a water company for not keeping pipes, in which fire plugs were fixed, charged with water at a certain pressure as required by its act of incorporation, whereby the plaintiff's property was destroyed, but the decision was reversed on appeal. See L. R., 2 Ex. D. 441. In *Fisher v. City of Boston*, 104 Mass. 87; 6 Am. Rep. 196, it is held that in the absence of express statute municipal corporations are not liable for personal injuries occasioned by reason of the negligence of the fire department in using or keeping in repair their fire apparatus. In *Wheeler v. City of Cincinnati*, 19 Ohio St. 19; 2 Am. Rep. 368, it is held that a city authorized by statute to establish a fire department and procure engines, etc., necessary to extinguish fires, is not liable to an individual whose house has been burned for any defect in the execution of such power, nor for a neglect of duty on the part of the fire department, or any of its officers. The court in that case says that "the power of the city over the subject is that of a delegated quasi-sovereignty, which excludes responsibility to individuals for the neglect or non-feasance of an officer or agent charged with the performance of duties. The case differs from that where a corporation is charged by law with the performance of a duty purely ministerial in its character." See,

also, *Brinkmeyer v. Evansville*, 29 Ind. 187; *Western College of Medicine v. Cleveland*, 12 Ohio St. 375; *Hill v. Boston*, 122 Mass. 344.

In *Attorney-General ex rel. Haight v. Love*, 10 Vroom, 476, the Court of Errors and Appeals of New Jersey holds that when no term is fixed by law for the commencement of an official term, it begins to run from the date of the appointment. In *State v. Constable*, 7 Ohio, 7, it was held in reference to an elective office that when no time is mentioned in the law from which the term shall commence it must begin to run from the day of election. In *Marbury v. Madison*, 1 Cranch, 137, it is said that when a person appointed to any office refuses to accept, the successor is appointed in the place of the one who declined to accept, and not in the place of the person who had previously been in office, which indicates that the term of office in such case begins to run from the appointment even before acceptance. And the general rule that the term of an officer begins to run from the date of his election is recognized in *Marshall v. Harwood*, 5 Md. 423, and in *Hughes v. Buckingham*, 5 S. & M. 632. In the case of *Jump v. Spence*, 88 Md. 1, which may be claimed to be contrary to this rule, it is held simply that the person elected could not perform the duties of his office until he had complied with the provision of the State Constitution requiring him to take an official oath. See, however, *Brodie v. Campbell*, 17 Cal. 11, which appears to be in conflict with the doctrine of the principal case.

In *French v. Stone*, 6 Cent. L. J. 405, the Supreme Court of Michigan holds that where a mortgagee has discharged his mortgages of record, receiving in satisfaction a conveyance of part of the mortgaged lands, he is entitled in equity to have his mortgages reinstated as against a lien acquired on all the lands subsequent to the mortgages, and of which he, when giving the discharge, had neither actual nor constructive notice. The questions were raised whether the subsequent incumbrancer acquired by the discharge a vested right which was entitled to constitutional protection, and whether equity could create a lien upon lands. The court answered the first question in the negative, holding that the subsequent incumbrancer had no vested right that was entitled to protection. As to the power to create a lien it says that a lien discharged by mistake is in contemplation of equity still in existence, and the decree only declares and enforces it. It has been said that "courts do not regard rights as vested contrary to the justice and equity of the case." See *State v. Newark*, 25 N. J. 197. Although the Legislature cannot take away a statutory lien (*Gunn v. Barry*, 15 Wall. 610), where through a mistake of fact a party holding a prior lien divests himself of such lien, it would

be contrary to equity for the subsequent incumbrancer to take advantage of the mistake. In such a case the action of the court in restoring the lien cannot be called depriving the other lienor of his rights. All the court does, or assumes to do, is to adjust between the parties their respective equities, and this it can do in the exercise of an undoubted jurisdiction, and without in the least venturing upon doubtful ground. See *Columbia Bank v. Jacobs*, 10 Mich. 349; *Bennett v. Nichols*, 12 id. 22.

In *Hardman's Appeal*, 5 W. N. Cas. 347, the Supreme Court of Pennsylvania passes upon the question of domicile. The definition of Vattel that a domicile is a fixed place of residence with an intention of always remaining there is said to be too limited to apply to the migratory habits of the people of this country. So narrow a construction would deprive a large proportion of our people of a domicile. The definition best adapted to our habits is that it is that place in which a person has fixed his habitation without any present intention of removing therefrom. In this case a decedent, a bachelor who was born in another State and lived there until 1871, sold all his land there, and taking his movable property with him, went to live with his brother-in-law in Pennsylvania, where he remained until the time of his death in June, 1872. When he went to Pennsylvania he told his brother-in-law that he intended to buy another farm in the State he came from, and that he wished to remain with the brother-in-law until he could suit himself. He refused to be assessed for taxation in Pennsylvania, saying that he did not wish to become a citizen of that State. He, however, made no purchase of land in the other State. The court held, however, that the decedent had a domicile in Pennsylvania, and that his property must be distributed according to the laws of that State. The court says that a mere intention to remove permanently without an actual removal works no change of domicile, nor does a mere removal from the State, without an intention to reside elsewhere. But when a person sells all his land, gives up all his business in the State in which he has lived, takes his movable property with him, and establishes his home in another State, such acts *prima facie* prove a change of domicile. Vague and uncertain evidence cannot remove the legal presumption thus created. The case follows *Abington v. North Bridgewater*, 23 Pick. 170 where it is said that "it depends not upon proving particular facts, but whether all the facts and circumstances taken together, tending to show that a man has his home or domicile in one place, overbalance all the like proofs tending to establish it in another." See, also, *Wilbraham v. Ludlow*, 99 Mass. 587; *Harris v. Firth*, 4 Cranch, 710; *North Yarmouth v. West Gardiner*, 58 Me. 207; 4 Am. Rep. 279.

EVIDENCE OF ACCOMPLICES.

IT has been observed in many of the celebrated criminal trials that have taken place in this country during the last few years, that the testimony of an accomplice has played an important part, and some of the most hardened criminals charged with high crimes could not have been convicted but for such testimony. But we cannot say that all convictions by the aid of such testimony are just, or that by its assistance the innocent may not sometimes suffer. Yet it is thought the stern necessities of good government demand the policy in the administration of Criminal Law, for without such testimony it is sometimes impossible to detect many crimes the most detrimental to society, and therefore the evidence of accomplices has at all times been admitted either from a principle of public policy, or from judicial necessity, or from both. They are no doubt requisite as witnesses in particular cases; but it has been well observed that in a regular system of administrative justice they are liable to great objections. "The law," says one of the ablest and most useful modern writers (Chitty) upon criminal jurisprudence, "confesses its weakness by calling in the assistance of those by whom it has been broken. It offers a premium to treachery and destroys the last virtue which clings to the degraded transgressor. On the other hand it tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate." *People v. Whipple*, 9 Cowen, 709.

Who are accomplices: The definition of the term "accomplice" in legal phraseology has not been the same in different cases.

In *Lindsey v. People*, 63 N. Y. 143, an accomplice is defined "as one of many equally concerned, or a copartner in the commission of a crime. The term includes all the *particeps criminis* whether considered in strict legal phraseology as principals or accessories." Bishop gives the following definition: "A person to be technically an accomplice must, it appears, sustain a relation to the criminal act that he could be indicted jointly with the others for the offense." 1 Bishop on Cr. Pro., § 1084; *Drum v. People*, 29 N. Y. 523-527. To constitute an accomplice, the person charged as such must have an intention of committing the crime, mere apparent concurrence is not enough. *United States v. Henry*, 4 Wash. C. C. Rep. 428. One who purchases intoxicating liquor sold contrary to law, for the purpose of prosecuting the seller for an unlawful sale, is not an accomplice. *Commonwealth v. Downing*, 4 Gray, 29. A detective who acts without any felonious intent but solely with the view of discovering the

perpetrators of the crime is not an accomplice. *State v. McKean*, 86 Iowa, 343. So likewise a person who has no knowledge of a larceny until after its commission, and who buys the stolen goods by direction of an officer with funds supplied by an officer in order to detect the thief, is not an accomplice whose testimony needs corroboration. *People v. Barrie*, 49 Cal. 342.

In Alabama a partner of one of the players in his winnings or losses in the game in which the defendant played and who advanced money to the defendant, which was used by him in betting on the game, is an accomplice within the Statute (Code, § 3600) which forbids a conviction on the uncorroborated testimony of an accomplice. *English v. State*, 35 Ala. 428.

A bystander does not become an accomplice by mere approval of a murder committed in his presence, and the charging of the jury that if the defendant was "present aiding, or abetting, or counseling, or inciting, or encouraging, or approving" the act; he was an accomplice is an error, and the court must reverse and order a new trial. *State v. Cox*, 65 Mo. It is for the jury to determine whether or not a witness jointly indicted with the defendant is an accomplice. *State v. Schlagel*, 19 Iowa, 169.

The practice now adopted in England is for the magistrate before whom the accomplice is examined, or the court before which the trial is had, to direct that he shall be examined, upon an understanding that if he gives his evidence in an unexceptionable manner, he shall be recommended for a pardon. Roscoe's Cr. Ev. 124. In Scotland the course pursued with regard to an accomplice who has been admitted against his confederate, differs from that adopted by the English law, and seems better calculated to further the ends of justice. There by the very act of calling the accomplice and putting him on the witness stand the prosecutor debars himself from all right to molest him for the future with relation to the offense charged.

"This privilege is absolute and altogether independent of the prevarication or unwillingness with which the witness may give his testimony. Justice, indeed, may often be defeated by a witness retracting his previous disclosures, or refusing to make any confession after he is on the witness stand; but it would be much more put in hazard if the witness was sensible that his future safety depended on the extent to which he spoke out against his associates at the bar." Alison's Prac. Cr. Law of Scot. 453. But in the United States an accomplice, by turning informer and testifying for the prosecution, acts under the implied condition that he earns an exemption from punishment by declaring the whole truth; but how are we always to know he tells the

truth, especially when it is not an absolute requirement that he must be corroborated?

If testifying to an untruth would, in the opinion of the accomplice, be more likely to bring him exemption from punishment — which is generally the question of greatest importance with persons of such character — would it not be a most powerful incentive for him to do so? But is he not more likely to tell the truth than otherwise, even though he is conscious there is no evidence to corroborate him? These are speculative questions, but under the caution exercised by a prudent court, in its instructions to the jury, no great harm need be feared. Still, we believe that if, after having made his confession to the prosecuting attorney, he should be sworn on behalf of the prosecution, with the full understanding that in any event he could never be punished for the offense charged, it would be much the safer rule.

In England the court usually considers not only whether the prisoners can be convicted *without* the evidence of the accomplice, but also whether they can be convicted *with* his evidence. If therefore there be sufficient evidence to convict without his testimony the court will refuse to allow him to be admitted as a witness. *Roscoe's Cr. Ev.* 120. Accomplices may in all cases by permission of the court be used by the government as witnesses in bringing their associates to punishment. *Lindsay v. People*, 63 N. Y. 143. And although it is in the discretion of the court to admit or refuse, yet in practice this matter is left almost entirely to the discretion of the prosecuting attorney. This at least is the practice in the State of New York, and the court is not likely to interfere except in a case where under *all the surrounding circumstances* it seems to be necessary, as in the case of *People v. Whipple*, 9 Cowen, 708 (1827). In that case the district attorney moved the court that Jesse Strang, who had just been convicted by the verdict of a jury, as a principal, in the murder of which Mrs. Whipple stood charged as accessory before the fact, should be brought up and examined as a witness on the part of the prosecution. This was objected to by the prisoner's counsel, and the court, in a very elaborate opinion discussing the circumstances fully, denied the motion. The main ground for the denial of the motion seems to have been that Strang was the greater criminal of the two, even conceding Mrs. Whipple to be guilty of the charge brought against her, and that by allowing him to testify there would be an implied condition of recommendation of pardon if he told the truth. The court propounded the following significant question: "Why then should we select her for punishment in preference to him?" So in a later case where it was sought to make an accomplice a witness for the government upon an implied promise of pardon, the court held "that it

rested upon judicial discretion and is not at the pleasure of the public prosecutor. An accomplice under an indictment for another offense, as a general rule, will not be admitted as a witness when such fact is known to the court, although he testify in good faith against his accomplice on the trial upon one indictment, he may be tried upon the other, and upon conviction punished. It would be a fraud upon the court and an obstruction of public justice if the public prosecutor should enter into an agreement unsanctioned by the court (if such sanction could be given in such a case) offering immunity or clemency to several defendants in several indictments upon the condition that one of them became a witness for the prosecution upon still other indictments. *Wright v. Rindskoff*, 13 Wis.

The court would also undoubtedly interfere by refusing to try a prisoner who had testified as State's evidence against another if it should appear that the prosecuting officer was pursuing him in violation of the express or implied understanding. *Bishop's Cr. Pro.*, § 1076, note.

"There is no practice in this State requiring a previous application or a formal order of the court to permit an accomplice to become a witness for the State." 68 N. Y. 143; 12 Hun, 215. It is not to be understood, however, that in all conceivable situations of an accomplice before the court that it is in the discretion of the court to allow him to testify for the People. The true rule as to competency seems to be, When the persons indicted are all put on trial together, neither can be a witness for or against the others; but when they are tried separately, though jointly indicted, the People may call those not on trial, though not convicted or acquitted or otherwise discharged, with the permission of the court; but they cannot be called as witnesses for each other though separately tried, while the indictment is pending against them. If acquitted they may be examined, and even if convicted, unless it be for a crime which disqualifies, and then sentence must have followed the conviction. When all are *tried together* if the People desire to swear an accomplice, he must in some way be first discharged from the record. *Wixon v. The People*, 5 Park. Cr. 126; *Taylor v. People*, 12 Hun, 218-214.

When the accomplice is indicted separately from the rest he is of course a competent witness for the prosecution, though no disposition has been made against him.

In fact, with reference to his competency, an accomplice jointly indicted and separately tried is in the same condition as one separately indicted or one not indicted at all. 1 Bish. on Cr. Pro., §§ 1079, 1080. One of several persons indicted, although he have pleaded and defended separately, is not a competent witness for his co-defendants unless immediately acquitted by a jury, or a *nolle prosequi* en-

tered, or convicted and sentenced for an offense which would not disqualify. *McIntyre v. People*, 9 N. Y. 89.

If a witness who has become State's evidence testifies corruptly, or makes only partial disclosures, he may then, having failed to perform the condition on which he was admitted, be proceeded against for his own crime; but he is not thus liable simply because of a failure by the jury to convict his associates. "It rests," said Lord Mansfield, "on usage, and on the offender's own good behavior, whether he shall be prosecuted or not." And where an accomplice, after making a confession on the usual understanding, refuses to testify, this confession may be given in evidence against him on his trial. *Commonwealth v. Knapp*, 10 Pick. 477.

As the accomplice is entitled to no protection in respect to other offenses, he is not bound to answer questions relative to such offenses on his cross-examination. It is not usual to admit accomplices who are charged with other felonies. In the earlier State trials of England, the protection and countenance afforded by the courts to accomplices, spies and informers, was often carried to great lengths; but in modern times a closer scrutiny of the evidence from such a source is required, and more safeguards for the protection of the innocent established, so that the conviction of a prisoner by the aid of an accomplice at the present time, upon such weak and insufficient evidence as brought Algeron Sidney to the block, is almost an impossibility.

DROIT D'AUBAINE AND THE CONDITION OF ALIENS IN FRANCE.

II.

M. MOURLON, whose *Repetitions du Code Civil*, upon which the first examination for the baccalaureate is based, points out, at the opening of his chapter on the enjoyment of civil rights, that these rights are of three kinds: *civil* properly so called, *political*, and *public*. Civil rights, as contra-distinguished from political rights, flow out of private law, and may be defined as those "faculties which persons are called upon to exercise in their relations with other persons." Such are the rights of property, and the rights springing out of domestic relations. Political rights, on the other hand, are such as flow necessarily from the constitutional law, or the law regulating the relations between the government and the governor. Of these the elective franchise is the best example. But there are rights which, properly speaking, are neither civil nor political, such as the right to freedom of speech and liberty of conscience. They are not civil because they do not go to constitute relations between individuals. No more are they political, for they are exercised outside of all relations to the government. Mourlon, with other civilians, classes these as public rights.

Now, to somewhat forestall the sequel, every one without distinction of age, sex or nationality, is, un-

der the French law, in full enjoyment and possession of all public rights. Political rights are so wholly different in their nature that not only do aliens have no part in them, but French citizens themselves enjoy them only upon certain conditions. As with us, citizenship alone does not entitle any one to the exercise of political functions, although citizenship is the fundamental prerequisite. In the enjoyment of civil rights, nationality is the controlling element, and whoever is French is entitled to the exercise of them all. Thus, as to *public* rights we find absolute equality between native and alien, and as to *political* rights insuperable inequality. In considering how far *civil* rights may be availed of by aliens, we have to distinguish between the several classes of aliens. First, those who reside in France without special authority of the French government, *ordinary aliens*, and second, those who have acquired the benefits of a special authorization, *privileged aliens*.

Let us consider first the case of the ordinary alien, and we may now turn to that article in the Civil Code by which the codifiers hoped to remedy the errors of the revolutionary system. Article 11, the one referred to, permits aliens to enjoy the same civil rights in France as are accorded to the French by the treaties with the nation to which the alien belongs. We find, in two articles of the Code, an application of this system as its authors intended it. By the provisions of Article 726, in default of a treaty, an alien would be incapable of acquiring, by succession, the law not permitting him to become the heir even of a Frenchman. But he was not prohibited from transmitting his property, although only his kinsmen, who were French, would be called to the succession, for according to the article aliens could not succeed. By the terms of Article 912, an alien, in the absence of a treaty, might acquire neither by testament nor by donation, but this did not prevent his disposing of his property so long as he did so only in favor of Frenchmen. Thus, according to the Code, aliens could acquire neither by succession, by testament, or by donation, except where it was made possible by treaty reciprocity.

However, this triple incapacity no longer exists. It was finally removed by the law of 1819, which is still in force. This law is as liberal as was that of the Constitutional Assembly, but proceeded from wholly different motives on the part of its authors. France was in need of capital to supply its financial and industrial wants, and the rigor of the Code being considered as working a serious disadvantage to the nation, Articles 726 and 912 were formally repealed. Since then aliens have been able to succeed and take, the same as Frenchmen, and independent of all treaties. But, says Mourlon, by the abrogation of Articles 726 and 912, the law of 1819 did not wholly do away with the system of reciprocity established by Article 11. Articles 726 and 912, in effect, did not alone constitute the entire system. They were only applications of it. The principle remains then so far as all other civil rights are concerned."

Passing for the present certain incapacities of aliens expressly mentioned in the Code, we are called upon to consider shortly a controversy of long standing among French lawyers. It is held by one school that aliens enjoy only those civil rights which are conceded to them either by treaty between France and their own governments or by the express or implicit provision of the French law; incapacity being the rule,

capacity the exception. It is claimed that if this theory were true, in default of a treaty, an alien not authorized to reside in France could be neither proprietor nor creditor; could neither marry nor sue; but the advocates of the theory meet this objection by the introduction of the element of *natural law*. They claim that the rights of property, family, and action, being *natural* rights, it is not requisite that they should be expressly conceded, since it is *civil* rights only which require such explicit concession. The second theory is that aliens enjoy the same civil rights as French citizens, except such as are exclusively accorded to the latter, and certain exceptional rights not appertaining to ordinary aliens, except where accorded by treaty conformably with the reciprocity principle of Article 11; capacity thus being the rule, and incapacity the exception. Without discussing the merits of this controversy, it may be said that the latter theory is the prevailing one. The practical results of the two theories are almost indistinguishable, and it is a condemnable feature of the first, that to justify its practical value it has to have recourse to the vague and unscientific dogma of the law of nature.

Mourlon thus sums up the rights of ordinary (not especially privileged) aliens in France:

1st. They enjoy all *public* rights; but,

2d. They are excluded from all *political* rights.

3d. They are possessed of all *civil* rights which the law has not withheld from them. It prohibits to them neither the right of property nor the right of marriage; the right of creditorship; the right of action, either as defendant or as plaintiff—except that in the latter case they are under an obligation to furnish an undertaking for costs, etc. (*judicatum solvi*) the right of standing *in loco parentis* (*droit de tutelle*); nor, finally, the right of adoption. Consequently they may marry; sue in their own name and without the intermediation of a special curator; acquire and dispose of property by the modes of acquisition and disposition provided by French law and not expressly omitted from them; be either obligors or obligees in contracts with French citizens; be guardians (*tuteurs*), or have guardians appointed over them; and adopt or be adopted.

The result of this is that the law stands practically where it did after the reforms of the constituent assembly, and is essentially as liberal. But by summarizing the rights, other than political, which aliens are not permitted to enjoy, and remembering that they enjoy all civil rights save these, we may get a more adequate and exact notion of the state of the law.

First. They have no benefit of the privilege *actor sequitur forum rei*.

Second. They can appear as plaintiffs in an action only upon condition of giving the *judicatum solvi*.

Third. They cannot take advantage of a general assignment to their creditors.

Fourth. Their *status* and capacity are governed not by the French law but by that of their own country.

Prior to 1867, they were subject to arrest in civil actions where in like circumstances citizens were exempt; but this is no longer the case.

Article 11 being still operative to the extent already pointed out, and requiring treaty reciprocity for certain purposes, to acquire knowledge of the measure of the civil rights of an American in France, it would ap-

pear to require an examination of the treaty of 1853, by which it was undertaken to regulate this matter so far as the relations between citizens of France and the United States were concerned, but such examination would disclose the existence of no exceptional right or privilege in favor of Americans, and not existing under the general law.

Allusion has been already made to a second or *privileged* class of aliens, those authorized by government to fix their domicile in France. So far as the enjoyment of civil rights is concerned, this class of aliens are on an equality, to all intents and purposes, with French citizens, but the equality is not quite perfect. Thus their legal *status* is still governed by the law of their own country, if they have any, otherwise by French law. And again, French citizens, deriving their rights from the law, can only be deprived of them by process of law; but all such exceptional rights as accrue to aliens because of a special authority to establish a residence in France may be withdrawn by the governmental power which has granted them. Further, French citizens enjoy their civil rights always, in or out of France; aliens only upon condition of residence in France.

Authority to become domiciled in France may be solicited by any alien, even by those who without desiring to be naturalized wish to settle in the country for a longer or shorter time, and it is for the government to determine whether such privilege shall be granted. In this respect the French law is more liberal than our own under which all special privileges look toward ultimate naturalization. As for the rules and principles of naturalization in France, they are not within the scope of this essay. Suffice it to say that aliens may acquire citizenship by *benefit of law*, as by birth, marriage, etc.; by *naturalization*, as after a residence of three years after authorization; or by the *annexation of territory* to France.

Such, then, is the spirit of the French law. The alien may never participate directly in those rights which flow out of the personal law, by which law personal capacity, the peculiar constitution of the family, minority and majority, the legitimacy of children, marital authority and parental power, are regulated and controlled; but in this respect continues to be governed by the particular laws of his own nation. "But," in the words of M. Laferrière, "the right to contract, to sell, to acquire property, movable and immovable, to succeed to his next of kin, to transmit by way of succession, donation, testament, and generally all the rights which are inclosed in the vast circle of commerce and of prosperity," are placed at the disposal of "foreigners and of the great human family," but to be exercised by them conformably to the territorial laws of France.

In respect to liberality toward strangers, France, today, stands in advance of the rest of Europe. But throughout christendom the principle of isolation, which dominated in ancient societies, has given way to that of intercommunion and interdependency. If there are in our laws, and in those of the great European States, survivals of principles inherited from the old time when all beyond the borders were enemies, we may still rest confident that being opposed to the fundamental laws of social progress as defined by our legists and sociologists, these lingering relics of barbarism will be outgrown, and laws of alienage be practically regarded as mere legal archaisms.

COMMUTATION OF PUNISHMENT FOR CRIME
VALID WITHOUT ACCEPTANCE BY
CONVICT.

SUPREME COURT OF OHIO, DECEMBER, 1877.*

IN THE MATTER OF SARAH M. VICTOR.

A commutation, by the governor, of the punishment of a lunatic convict, who was sentenced to be hung, to imprisonment for life, held to be valid and to take effect without the acceptance or assent of the convict, and it could not be defeated or invalidated by the convict's rejection or refusal of it when restored to reason. Commutation is not a conditional pardon, but the substitution of a lower for a higher grade of punishment, and is presumed to be for the culprit's benefit.

ERROR to the Court of Common Pleas of Franklin county.

At the May term, 1868, of the Court of Common Pleas of Cuyahoga county, Sarah M. Victor was convicted of murder in the first degree, and sentenced to be executed on the 20th of August of the same year. On the 15th of July, 1868, the convict having become insane, the governor suspended the execution of her sentence until the 20th of November, 1868, and, by his order, she was confined in the Northern Lunatic Asylum. On the 12th of November, 1868, the prisoner still being insane, the governor commuted her punishment to imprisonment in the penitentiary in solitary confinement for life. The governor's warrant of commutation was directed and delivered to the sheriff of Cuyahoga county. In pursuance of the command of the warrant, the prisoner was taken from the asylum and committed to the penitentiary. She has never accepted or given her consent to the commutation. She remained in the penitentiary until the 8th day of January, 1876, when, her reason having been restored, she refused to assent to the commutation of her punishment, and procured from the Court of Common Pleas of Franklin county a writ of *habeas corpus* against the warden of the penitentiary, claiming that she was entitled to be set at liberty. Upon the hearing of the matter, the facts above recited having been shown, the court held that the prisoner never having accepted the commutation, she was retained in the penitentiary without warrant of law; but that she was not entitled to be set at liberty, because she was, "in law, an escaped prisoner, after conviction." And thereupon, the court ordered that she be discharged from confinement in the penitentiary, and that "she be delivered to the sheriff of Cuyahoga county, to be further dealt with by the Court of Common Pleas of that county, according to law."

To reverse this judgment and order of the Court of Common Pleas of Franklin county, and have the prisoner remanded to the penitentiary, the present warden of the penitentiary, who is the successor of the officer from whose custody she was taken, has filed his petition in error here.

A. H. Fritchey and Converse, Woodbury & Booth, for Mrs. Victor.

John Little, Attorney-General, for the State.

WELCH, C. J. The only question involved in the case is whether the prisoner's acceptance of the commutation is essential to its validity. Or, to state the question more generally, has the governor of Ohio, under our present Constitution and laws, power to

commute the sentence of a lunatic, without her consent? We have no hesitation in answering this question in the affirmative.

A commutation is not a conditional pardon; nor is it simply the substitution of one punishment for another. In its legal acceptance, it is a change of punishment from a higher to a lower degree, in the scale of crimes and penalties fixed by the law, and is presumed, therefore, to be beneficial to the convict. It is an act of executive clemency, equally as a pardon, only in a less degree.

In England, the pardoning power could be exercised by Parliament; and a pardon granted by Parliament needed not to be accepted by the culprit in order to render it effective. In the absence of constitutional provision, it seems, therefore, to be a power belonging to the legislative department. By our Constitution, this power is vested exclusively in the governor of the State. Whether, under this constitutional provision, and in the absence of any legislation on the subject, a pardon or commutation of punishment, by the governor, would be operative without the assent or acceptance of the convict, is a question not involved in the present case. This constitutional provision vests the whole pardoning power in the governor, and I see now no good reason why the power should not be held to be as effective and plenary in his hands, as it would have been if left to the legislative department. But we need not, and do not, now undertake to decide this question.

The case is amply provided for by statute. The fifty-eighth section of the act of April 7, 1856 (S. & C. 850), which was in force at the date of the commutation, provides: "That if any person, after being convicted of any crime or misdemeanor, and before the execution, in whole or in part, of the sentence of the court, becomes insane, it shall be the duty of the governor of the State to inquire into the facts, and he may pardon such lunatic, or commute, or suspend, for the time being, the execution, in such manner and for such period as he may think proper."

Here is absolute power given the governor to commute the punishment of a lunatic, uncoupled with any condition requiring assent. A lunatic is incapable of giving assent, and the power to pardon or commute his punishment is necessarily a power to do so without the consent of the lunatic. The Legislature has plenary power to prescribe the punishment of crimes and offenses, and can exercise that power without consulting the offender. Where the punishment of a lunatic is commuted under this statute, the substituted punishment is a punishment prescribed by law, equally as if it had been the only punishment provided for the offense, or the punishment inflicted by the sentence of the court. In substance and effect, the law declares that any person convicted of murder in the first degree, and afterward becoming a lunatic, shall be imprisoned in the penitentiary for life, if the governor, by his warrant, shall substitute that punishment for the death penalty. As soon as the commutation is made, the new penalty becomes the one fixed by law, and the original penalty cannot be restored. The words "for the time being," in the section of the statute referred to, do not relate to commutations or pardons, but merely to cases where the execution is suspended.

The judgment must be reversed, and the prisoner remanded to the warden of the penitentiary.

* To appear in 31 Ohio St. Rep.

LIABILITIES OF HOLDERS OF CORPORATE STOCK AS COLLATERAL SECURITY.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

PULLMAN, plaintiff in error, v. UPTON.

An assignee of corporate stock who has caused it to be transferred to himself on the books of the company and holds it as collateral security for a debt due from his assignor, is liable for unpaid balances thereon to the company or to the creditors of the company after it has become bankrupt.

IN error to the Circuit Court of the United States for the Northern District of Illinois. Action by Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, against Albert B. Pullman, a stockholder, to enforce payment of unpaid balance on stock. Pullman held the stock as collateral security for a debt. The facts appear in the opinion.

Mr. Justice STRONG delivered the opinion of the court.

The evidence to which the defendant below objected, and to the admission of which he took exception, was quite unimportant. Its object was to prove the existence of the corporation and the increase of the corporate stock. But the existence of the corporation was admitted by the defendant's plea of non-assumpsit, and whether the corporate stock had been properly increased was a question the State only could raise. It is well settled that in a suit by a corporation a plea of the general issue admits the competency of the plaintiff to sue as such. *Society for the Propagation of the Gospel v. The Town of Pauslet*, 4 Pet. 480. The first three assignments of error may, therefore, be dismissed without further consideration.

That the fourth and fifth assignments are without merit, plainly appears in the report of *Sanger v. Upton*, 91 U. S. 56, where a similar order and notice to the stockholders was held, not merely sufficient, but conclusive as to the right of the assignee to bring suit to enforce the payment of unpaid balances due for the corporate stock.

The only question remaining is whether an assignee of corporate stock, who has caused it to be transferred to himself on the books of the company, and holds it as collateral security for a debt due from his assignor, is liable for unpaid balances thereon to the company, or to the creditors of the company, after it has become bankrupt.

That the original holders and the transferees of the stock are thus liable we held in *Upton v. Tybirkcock*, *Sawyer v. Upton*, and *Master v. Upton*, 91 U. S. 45, 56, and 65, and the reasons that controlled our judgment in those cases are of equal force in the present. The creditors of the bankrupt company are entitled to the whole capital of the bankrupt, as a fund for the payment of the debts due them. This they cannot have if the transferee of the shares is not responsible for what ever remains unpaid upon his shares, for by the transfer on the books of the corporation the former owner is discharged. It makes no difference that the legal owner, that is, the one in whose name the stock stands on the books of the corporation, is in fact only, as be-

tween himself and his debtor, a holder for security of the debt, or even that he has no beneficial interest therein. This was ruled in *The Newry, etc., Railway Company v. Moss & Co.*, 14 Beav. 64. In that case it was said that only those persons who appear to be shareholders on the register of the company are liable to pay calls. In *re Phoenix Life Ins. Co., Hoare's Case*, 2 Johns. & Heming, 229, it appeared that certain shares had been settled upon Hoare and others as trustees in a marriage settlement. The trustees had no beneficial interest, but they were registered as shareholders, with the word "trustees" added in the margin of the register, and they received for dividends as trustees. It was held by Vice-Chancellor Wood that they were liable as contributories to the full extent, and not merely to the extent of the trust estate. It was said "a person who is a shareholder is absolutely liable, although he may be bound to apply the proceeds of the shares upon a trust." In the case of *The Emptre City Bank*, 8 Abb. Pr. (N. Y.) 192, reported also in 18 N. Y. 200, the Court of Appeals held persons responsible as stockholders in respect to the stock standing in their names on the books of the bank, though they held the stock only by way of hypothecation as collateral security for money loaned, and they were held liable for an amount equal to their stock for the unsatisfied debts of the bank. In *Adlerly v. Storm et al.*, 6 Hill, 624, it appeared that one Bush, in 1837, being indebted to the defendants, transferred to them on the books of a company certain shares of stock and delivered to them the usual certificates. On receiving the certificates the defendants gave Bush a receipt, stating they had received the stock, which they were to dispose of at any time for \$200 per share, applying the proceeds to the payment of the notes which Bush owed them, or if not sold when the notes should be paid, to return the scrip to Bush or account for it. The last of the notes was paid in September, 1838, and the defendants returned the scrip to Bush, giving also a power of attorney for the transfer of the stock. The retransfer was not made, however, until March 2, 1840, and the defendants were held liable as stockholders for a debt of the company contracted in January, 1840, and this, it was said, would be the law though the plaintiff may not have known at the time he trusted the company that the defendants could be reached. So in *Holyoke Bank v. Burnham*, 11 Cush. 183, it was decided that a transfer of stock on the books of the bank, intended merely to be held as collateral security, makes the holder liable for the bank debts. It was said the creditor is to be considered the absolute owner, and that his arrangement with his debtor cannot change the character of the ownership. And in *Wheelock v. Kort et al.*, 77 Ill. 296, the doctrine was asserted that when shares of stock in a banking corporation have been hypothecated and placed in the hands of the transferee, he will be subjected to all the liabilities of ordinary owners, for the reason that the property is in his name, and the legal ownership appears to be in him.

These decisions are sufficient to vindicate the judgment of the court below. The case of the plaintiff in error is a hard one, but he cannot be relieved consistently with due observance of well-established law.

The judgment of the Circuit Court is affirmed.

LOANS MADE BY CORPORATION IN VIOLATION OF CHARTER.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS, APRIL 27, 1878.

MUTUAL LIFE INSURANCE COMPANY V. WILCOX.

A New York life insurance company was required by its charter to invest its capital and income in mortgages on real estate in New York State, or in United States or New York State stocks. It loaned money on an individual note. *Held*, that the maker of the note could not set up that the note was invalid, by reason of the company having no authority under its charter to make the loan.

ACTION on promissory note. The facts appear in the opinion.

BLODGETT, J. This is a suit upon a promissory note executed by Mr. Cronkhite, payable to Merrill and Ferguson, and guaranteed by Wilcox. The note bears date June 29, 1875, for the sum of \$10,000. The facts surrounding the transaction are these: The Mutual Life Insurance Company is a corporation created in the State of New York, and deriving its powers from the charter granted by the State of New York, and certain of the general laws of that State.

The provisions of its charter applicable to this case are sections 9, 10 and 11.

§ 9. It shall be lawful for the said corporation to invest the said premiums in the securities designated in the two following sections * * *

§ 10. The whole of the premiums received for insurance by said corporation, * * * shall be invested in bonds and mortgages on unincumbered real estate within the State of New York; the real property to secure such investment of capital shall, in every case, be worth twice the amount loaned thereon.

§ 11. The trustees shall have power to invest a certain portion of the premiums received, not to exceed one-half thereof, in public stocks of the United States, or of this State, or of any incorporated city in this State.

Mr. Cronkhite was the agent of the plaintiff in this city. In the month of June, 1875, he applied to the plaintiff for a loan of money, stating to them that his interests required that he should raise the sum of \$10,000; that it was very difficult for him to attend to other business here, as their agent, and at the same time make necessary changes in his own affairs. Considerable discussion and correspondence took place between the parties in regard to this matter; and finally the company concluded to let him have the money. But they directed Merrill and Ferguson, who were the general agents in the north-west, of the plaintiff, to advance the money, and the note was taken by Merrill and Ferguson, and assigned by them to the company. This note was guaranteed by Mr. Wilcox, in due form; and at the same time, and simultaneously with giving the notes, Cronkhite gave to the company an assignment of all his interests in the renewals, as they are called. It was claimed on the part of the defendant, that Cronkhite, as the agent of the company, had a vested right in the commissions upon the premiums, which should be paid upon certain policies which he had placed as the agent of the company.

Shortly after this note was given, or perhaps simultaneously with giving it, the money was remitted to Mr. Cronkhite by Merrill and Ferguson; but Cronk-

hite continued to collect these premiums and receive them; did not remit to the company, but retained in his own hands all the premiums to which he was entitled as the agent of the company, from that time on until January, when his defalcation was discovered.

It is claimed *first*, that this note is *ultra vires*; that this company had no right to loan this money to Cronkhite on the security of this note; and

Secondly, That the company has been reimbursed by the collection of the premiums upon policies which Cronkhite had placed, and upon which he was entitled to commissions.

With reference to the *first* question—that of the power of the company—there is a class of old cases in the State of New York, which, perhaps, go to the extreme extent of holding that this company, being by its charter directed to invest its funds in a certain manner, all other methods of investing its funds are excluded; and even securities given for such investments are void. But there is no case that is just parallel with this that is cited by counsel, and none which I have found. The later New York cases, and the later cases all through the United States, do not go to the extent of the New York cases, which were cited by the defendant, and I think the settled rule now is, that the question of how this company shall invest its funds is a question between itself and the sovereignty that created it, and not a question between the borrowers and the company. That it does not lie—in other words—in the mouth of this defendant, to charge that this security is void.

The money was advanced upon the faith of this security. But whether the company had the power to take this security or not, is a question the defendant has no right to raise.

There is a large number of cases that have arisen lately, under the United States National Bank Act, that are very analogous to this; where the bank is positively prohibited by the act from loaning more than ten per cent of its capital to any one person, and yet the courts have held that securities given on such loans, in excess of ten per cent, were valid, and that it does not lie in the mouth of the party who borrowed the money of the company to object to a violation of this rule. Any other rule than this would make the policy-holders and parties interested in the funds of this company entirely remediless. Suppose that the directors of this corporation, induced by the larger rate of interest which is usually proffered in the western States, or outside of New York, had, instead of loaning their money upon New York State security, seen fit to invest largely in securities in the State of Illinois, would the stockholders have to lose it all simply because their directors had violated the charter? It would seem to me a very harsh rule to say that the parties interested in this fund should be the losers simply from this violation of the company's charter; a question simply between the sovereignty and the corporation itself.

Some force may also be given to the suggestion that this was an isolated transaction made between the company and its agent, and not a general change in the policy or business of the company.

But the same section which I have just read, for instance, requires that the funds of the company shall be invested on unincumbered real estate. Suppose that the directors had made loans to a man in the State of New York, upon incumbered real estate, would it lie in his mouth to say that that loan was

void because there was a mortgage on the property prior to the mortgage of the company for the debt?

The same section also provides that the real estate shall be at least double the value of the amount loaned.

Now, the same rule that is invoked here on the part of the defense would entitle a man in the State of New York, who has borrowed this fund, to say that the security for the loan was void because the property was not of double the value; that the directors had exceeded their power, and the note or obligation was *ultra vires*. I, therefore, conclude that the defense of want of power to make this loan here, and consequent invalidity of the note, is not well taken.

The next objection is, that the company has been paid by the collections of commissions which ought to have gone to Cronkhite, and which should be applied in liquidation of this note.

As I have already said in stating the facts, Cronkhite, during the time he remained the company's agent, after the giving of this note, retained all the commissions in his hands, and the company received no commissions from him while he remained the company's agent. It may be a very important question whether Mr. Cronkhite is entitled to draw any commissions after his agency ceased.

On general principles I would be inclined to hold that the insurance company would certainly have made a very improvident and unbusiness-like contract to agree to pay an agent commissions on collections after he had ceased to be worthy of their confidence as an agent to make collections.

But whether that is so or not, I am satisfied that this defense, if available at all, can only be made in a court of equity where an account can be stated, and it can be ascertained how much this company has collected that ought to be applied upon this claim.

I do not intend to commit myself by saying that the defense could be made applicable even in equity; but, if at all available it must be maintained in equity.

I shall, therefore, find the issues in this case for the plaintiff, and assess the damages at the amount of the note.

JURISDICTION OF UNITED STATES CIRCUIT COURTS.

UNITED STATES SUPREME COURT, OCTOBER TERM, 1878.

EX PARTE SCHOLLENBERGER.

A statute of Pennsylvania requires every insurance company from without the State, as a condition for doing business therein, to stipulate that any legal process affecting it may be served on a designated agent within the State or on the insurance commissioner, and that such service shall have the same effect as if served personally within the State. *Held*, that original process from the United States Circuit Court served in Pennsylvania upon the designated agent of a non-resident insurance company, giving the stipulation mentioned, would give jurisdiction to the court under the act of 1875 (18 Stat. 470), the company being "found" within the district.

PETITION for a writ of mandamus. The facts appear in the opinion.

Mr. Chief Justice WAITE delivered the opinion of the court.

This is a petition for a writ of mandamus, requiring the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania to hear and determine certain suits brought in that court in favor

of the relators against a number of insurance companies incorporated by the laws of other States, but doing business in that State under a license granted pursuant to a statute regulating that subject. The Circuit Court declines to entertain jurisdiction of the causes for the reason, as is alleged, that the defendant companies were not, "at the commencement of the respective suits, or at any time, inhabitants of or found in the said district." This presents the only question in the case, as it is conceded that the citizenship of the parties is such as to give the court jurisdiction if the several defendants can be sued in the district without their consent.

A statute of Pennsylvania provides that "no insurance company not of this State, nor its agents, shall do business in this State until he has filed with the insurance commissioner of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company served on the insurance commissioner, or the party designated by him, or the agent specified by said company to receive service of process for the said company, shall have the same effect as if served personally on the company within this State, and if such company should cease to maintain such agent in this State so designated, such process may thereafter be served on the insurance commissioner; but so long as any liability of the stipulating company to any resident of this State continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with the service at the office of said company within this State, and that such service of process according to this stipulation shall be sufficient personal service on the company. The term 'process' includes any writ of summons, subpoena, or order whereby any action, suit, or proceedings shall be commenced, or which shall be issued in or upon any action, suit, or proceedings brought in any court of this Commonwealth having jurisdiction of the subject-matter."—(Laws of Penn., 1873, p. 27, § 13.)

The return to the rule to show cause admits that all the defendant companies were doing business in the State under this statute, and that their designated agents were duly served with process in each of the suits. For the purposes of this hearing the fact of due service upon the agents must be considered as established. If in reality it is not so, the court below will not be precluded by any thing in this proceeding from inquiring into the truth and acting upon the facts as they are found to exist.

The act of 1875, determining the jurisdiction of the Circuit Courts (18 Stat. 470), and which in this particular is substantially a re-enactment of the act of 1789 (1 Stat. 79, § 11), provides that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings, except," etc.

It is unnecessary to inquire whether these several companies were *inhabitants* of the district. The requirements of the law, for all the purposes of this case, are satisfied if they were *found* there at the time of the commencement of the suits, and that question we think was settled in *R. R. v. Harris*, 12 Wall. 81. In that case it appears that when the suit was commenced the statutes defining the jurisdiction of the courts of the District of Columbia provided that "no

action or suit shall be brought * * by any original process against any person who shall not be an inhabitant of or found within the district at the time of serving the writ."—(2 Stat. 106, § 6.) Afterward, in 1867, the law was changed in respect to foreign corporations doing business in the district, and service allowed upon the agent (14 Stat. 404, § 11), but when the suit was begun and the process served the old law was in force. The Baltimore and Ohio Railroad Company, a Maryland corporation, was authorized by Congress to construct and extend its railroad into the District of Columbia. Harris having been injured while traveling as a passenger upon the railroad outside of the district, sued the company in the Supreme Court of the district, and caused the writ to be served upon the president of the company within the district. The company objected to the jurisdiction of the court, and insisted that it was neither an inhabitant of nor found within the district. In ruling upon this objection we held that although the company was a foreign corporation, it was suable in the district, because it had in effect consented to be sued there in consideration of its being permitted by Congress to exercise therein its corporate powers and privileges. The language of the court, speaking through Mr. Justice Swayne, is: "It (a corporation) cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented, and will be bound accordingly." Then, after an examination of the statute granting the right to extend the road, it was said (p. 84): "We entertain no doubt that it made the company liable to suit where this suit was brought in all respects as if it had been an independent corporation of the same locality." This language was cited with approbation and adopted as a correct exposition of the law by Mr. Justice Field, speaking for the court, in *R. R. v. Whittton*, 13 Wall. 285.

Applying these principles to the present case there cannot be any doubt, as it seems to us, of the jurisdiction of the Circuit Court over these defendant companies. They have in express terms, in consideration of a grant of the privilege of doing business within the State, agreed that they may be sued there, that is to say, that they may be found there for the purposes of the service of process issued "by any court of the Commonwealth having jurisdiction of the subject-matter." This was a condition imposed by the State upon the privilege granted, and it was not unreasonable. *La Fayette Ins. Co. v. French*, 18 How. 407. It was insisted in argument that the statute confines the right of suit to the courts of the State, but we cannot so construe it. There is nothing to manifest such an intention, and as the object of the Legislature evidently was to relieve the citizens of Pennsylvania from the necessity of going outside of the State to seek judicial redress upon their contracts made with foreign insurance companies, it is but reasonable to suppose that they were entirely at liberty to select the court in the State having jurisdiction of the subject-matter, which, in their judgment, was the most convenient or desirable. As the company, if sued in a State court, could remove the cause to the Circuit Court, and thus compel a citizen of the State to submit to that jurisdiction, we see no reason why the citizen may not, if he desires it, bring the company into the same jurisdiction at the outset. While the

Circuit Court may not be technically a court of the Commonwealth, it is a court *within* it, and that, as we think, is all the Legislature intended to provide for.

States cannot by their legislation confer jurisdiction upon the courts of the United States, neither can consent of parties give jurisdiction, when the facts do not; but both State legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case. *Ex parte McNeill*, 13 Wall. 243. Thus, if the parties to a suit, both plaintiff and defendant, are in fact citizens of the same State, an agreement upon the record that they are citizens of different States will not give jurisdiction. But if the two agree that one shall move into and become a citizen of another State, in order that jurisdiction may be given, and he actually does so in good faith, the court cannot refuse to entertain the suit. So, as in this case, if the Legislature of a State requires a foreign corporation to consent to be "found" within its territory for the purpose of the service of process in a suit, as a condition to doing business in the State, and the corporation does so consent, the fact that it is found gives the jurisdiction, notwithstanding the finding was procured by consent. The essential fact is the finding beyond which the court will not ordinarily look.

A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter, but it may by its agents transact business anywhere, unless prohibited by its charter or excluded by local laws. Under such circumstances it seems clear that it may, for the purpose of securing business, consent to be "found" away from home for the purposes of suit as to matters growing out of its transactions. The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented. Here the defendant companies have provided that they can be found in a district other than that in which they reside, if a particular mode of proceeding is adopted, and they have been so found. In our opinion, therefore, the Circuit Court has jurisdiction of the causes, and should proceed to hear and decide them.

We are aware that the practice in the Circuit Courts generally has been to decline jurisdiction in this class of suits. Upon an examination of the reported cases in which this question has been decided, we find that in almost every instance the ruling was made upon the authority of the late Mr. Justice Nelson, in *Day v. Rubber Co.*, 1 Blatchf. 628, and *Pomeroy v. R. R. Co.*, 4 id. 120. These cases were decided by that learned justice, the one in 1850, and the other in 1857, long before our decision in *R. R. v. Harris*, *supra*, which was not until 1870, and are, as we think, in conflict with the rule we there established. It may also be remarked that Mr. Justice Nelson, as a member of this court, concurred in that decision.

Judge Woods, of the fifth circuit, has already decided in favor of the jurisdiction (*Knott v. Ins. Co.*, 2 Woods, 479), and Judge Dillon, of the eighth circuit, declined to take it only because he felt himself foreclosed by the rulings of other judges, and especially

of Mr. Justice Nelson. *Stillwell v. Ins. Co.*, 4 Cent. Law Jour. 463.

The writ of mandamus is granted.

COSTS TAXABLE IN FORECLOSURE CASES.

IN a motion made in the case of *Armstrong v. Murdock*, which was heard at the April, 1878, Special Term of the Supreme Court of New York, at Utica, the question arose as to costs to be allowed in the foreclosure of mortgages, where decree is taken in default. The following is taken from the opinion of Noxon, Justice, on deciding the motion in the case:

The question arising in this case is an important one in relation to the items of costs to which the plaintiff is entitled, and which the clerk is authorized to tax, in actions for the foreclosure of mortgages in cases where a decree is taken by default. The law in relation to taxation of costs in such cases is general, and applies alike in all parts of the State. There seems, however, to be a diversity of opinion in the profession as to the items properly taxable. The clerks of the courts in many cases are unable to tax such costs properly, and frequently fall into error without design. The statute itself is plain and simple. Although the statutes which formerly regulated the costs and fees of attorneys and counsel have been repealed, certain items are now allowed to the prevailing party to indemnify him for his expenses in the action, and these allowances are termed costs. In a foreclosure case, where judgment is taken by default, the plaintiff is entitled on application for judgment to..... \$25 00

For each defendant served with process not exceeding ten defendants.....	1 00
For each defendant exceeding ten defendants..	2 00
For attending and taking deposition of a witness, conditionally or to perpetuate his testimony.....	10 00
For drawing interrogatories to answer to a commission for taking testimony.....	10 00
For attending examination of a party before trial.....	10 00
For appointment of a guardian for an infant defendant (but only one in any one action).....	10 00
For procuring an injunction order.....	10 00
The plaintiff is also entitled to ten per cent on the recovery for any amount not exceeding \$200.....	20 00
For any additional amount not exceeding \$400 five per cent.....	20 00
For any additional amount not exceeding \$1,000 two per cent.....	20 00

If the action is settled before payment, the same allowances upon the amount paid or secured upon settlement is to be allowed at one-half of the above rates.

I am not aware that the clerk is authorized to tax any other items to be included in a bill of costs for the foreclosure of a mortgage (exclusive of disbursements) in cases of default. No trial fee is allowed, and no costs of motion are allowed from the commencement of the proceedings in the action to the entry of the decree or judgment. The services performed are all *ex parte*, and the costs and allowances above provided are such costs and allowances as the statute has provided to cover the plaintiff's expenses for the services performed. If the services in any case are worth more to the attorney who performs them, he must look to the party who employs him.

The necessary disbursements in the action are to be adjusted by the clerk, and shall be stated in detail and verified by affidavit. This includes fees allowed by law to sheriffs, clerks, and other officers, witnesses' fees, referees' fees, expenses of publication of summons and notice, compensation of commissioners in taking depositions, expenses paid for affidavits and postage.

LAW LEGISLATION IN ENGLAND.

LONDON, May 16, 1878.

ON Tuesday night Sir John Holker, the Attorney-General, introduced in the House of Commons, his "bill for modifying and amending the law relating to indictable offenses," otherwise known as the Criminal Code. The bill has been drawn up mainly by Sir James Stephen. The Attorney-General explained its provisions at some length, dwelling chiefly on the alterations it proposes to make in the law. It abolishes the distinction between felony and misdemeanor, and substitutes for them the term "indictable offense." Accessories before the fact are done away with, and accessories and criminals are dealt with on the same footing. There is a large diminution in the number of *maximum* punishments, with a provision against accumulated penalties of hard labor. The term "malice" is entirely omitted from the law, constructive murder is done away with, and a more reasonable and intelligible definition of provocation is introduced. The definitions of larceny and theft are greatly simplified by sweeping away the present refinements, and the law of forgery is placed on a more definite and consistent footing. This part of the bill will supersede dozens of text-books, scores of acts of Parliament, and piles of legal decisions.

The second part of the bill refers to procedure, and among the principal alterations under this head are the entire abolition of the subtleties of the law of *venue*; securities that ample notice shall be given to an accused person when proceedings are taken by indictment in the first instance; and provisions not only for changing the place of trial, but for conducting trials on the model of civil instead of criminal procedure. Right of appeal and power to grant new trials in criminal cases are given under certain conditions, and an improvement in criminal pleading is proposed which will sweep away the present system of verbose and technical indictments.

Though the bill has been launched under government patronage, it is improbable that it will become law this year.

On the motion of Mr. Osborne Morgan, a select committee of the House of Commons has been appointed to inquire what steps ought to be taken for simplifying the title and facilitating the transfer of land. In submitting his motion, Mr. Morgan called attention to the recent frauds of Dimsdale and others, and showed that they would have been prevented by even the rudest form of registration. He pointed out how each measure heretofore adopted with this view had failed from some defect in drafting, and said that as it was necessary to start afresh on entirely new lines, he would recommend a registration of deeds, a cadastral survey for purposes of identification and power of sale for every acre of land in the country, however held, and a registry of sales.

RECENT AMERICAN DECISIONS.

SUPREME COURT OF WISCONSIN, MAY, 1878.*

AGENCY.

When principal liable for acts of agent.—A principal is responsible for the act of his agent when he has either given the agent authority to do the act, or justified the party dealing with the agent in believing that the latter had such authority. *Kasson v. Noltner*.

PAYMENT.

Payments on note not indorsed allowed, notwithstanding stipulation to contrary.—A stipulation in the note that no credit should be allowed on it, unless indorsed upon it by the payees, will not prevent the allowance, in an action upon the note, of any authorized payment actually made, but not indorsed. *Kasson v. Noltner*.

RAILROAD.

Neglect to fence: contributory negligence: defense in action for animal killed.—In an action against a railroad company for injury occasioned by failure to erect or to maintain fences on the line of its road, as in other actions for negligence, contributory negligence of the plaintiff is a defense. The cases in this court on the subject reviewed. Plaintiff, living about three-fourths of a mile from defendant's track, which he knew to be unfenced, permitted his cow to pasture, in summer (presumably with other cattle), on a large tract of uninclosed grass land, extending from the neighborhood of his residence to the track; and she passed upon the track from said land, and was injured. *Held*, that upon these facts the question of contributory negligence, being open to doubt and debate, was for the jury. (*Lawrence v. Railway Co.*, 42 Wis. 322, distinguished.) *Curry v. Ch. & N. W. Ry. Co.*

WILL.

1. *Will signed by mark or by another person.*—Under our statute of wills, if the testator's name is, in his presence and by his express direction, signed to the will by another person, or if the testator affixes his mark thereto, that is a sufficient signing. *Will of Susan Jenkins*.

2. *Will supported against testimony of subscribing witness.*—A will may be supported against the testimony of some, or even all, of the subscribing witnesses, if their testimony is overborne by other evidence. Where probate of a will was refused merely on the ground that the two attesting witnesses did not concur in testifying to its having been executed and attested in the manner required by the statute, no other fact being found, the judgment is reversed, and the cause remanded for a new trial. *Ib.*

RECENT BANKRUPTCY DECISIONS.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

When not void: execution, lien of.—The bankrupt made a voluntary assignment for the benefit of his creditors. Within thirty days thereafter certain creditors obtained judgment against him and issued an execution to the sheriff, under which a levy was made

on the property embraced in the assignment. Bankruptcy proceedings were instituted a few days thereafter and an assignee appointed, who subsequently obtained possession of the property. On motion by the sheriff to have the execution declared a lien on the property, on the ground that, because of the non-filing of the inventory required by the statute within thirty days, the assignment was void. *Held*, that under the New York Insolvent Act of 1877 (chap. 466), the failure to file the inventory does not render the assignment void *ab initio*; and that at the time the execution was issued the bankrupt had no leviable interest in the property to which it could attach. U. S. Dist. Ct., S. D. New York. *In re Croughwell*, 17 Nat. Bankr. Reg. 337.

CONTEMPT.

When order cannot be enforced by imprisonment: attachment.—Where an order is in effect a final judgment for the payment of money, whether the proceeding in which it is made is of equitable or legal cognizance, it cannot be enforced by imprisonment upon the theory of a contempt. The Atlantic Mutual Life Insurance Company was adjudicated bankrupt upon the petition of one of its officers. The adjudication was subsequently set aside and the proceedings vacated. Upon application of the marshal for an order requiring the petitioner to pay the marshal's fees for serving the notices, and that such order be enforced by attachment. *Held*, that the court had no power to grant an attachment in such a case; that the marshal had an adequate remedy by action, to which he must resort. U. S. Dist. Ct., N. D. New York. *In re Atlantic Mut. Life Ins. Co.*, 17 Nat. Bankr. Reg. 368.

ESTOPPEL.

1. *Debtor failing to give information.*—A merchant is under obligation to his creditors to exhibit a statement of his accounts when demanded, and if he fails to do so he cannot complain of proceedings in bankruptcy commenced against him without the requisite number of creditors joining in the petition, provided a sufficient number join before the trial. U. S. Dist. Ct., S. D. Mississippi. *Pertin & Gaff Manuf. Co. v. Peale*, 17 Nat. Bankr. Reg. 377.

2. *Jurisdiction: what petition should contain.*—The petition should contain an averment that the petitioners believe that they constitute one-fourth in number of the creditors, and that the amount due them constitutes one-third of the unsecured provable debts; it is not required that they should know such to be the fact. *Ib.*

3. *Negotiable paper: what is.*—An agreement, on the maturity of a note, given in the course of commercial business, that it may lay over for that day, is only a forbearance to sue, and does not destroy the character of the note as commercial paper. Its non-payment is a suspension and non-resumption of payment, and when continued for forty days constitutes an act of bankruptcy. *Ib.*

FEES.

When distinct fees not allowable: marshal's fees.—The order to show cause and the copy of the involuntary petition constitute but one writ or process, and the marshal is not authorized to charge a distinct fee for the service of each. When the marshal makes a charge for personal attention in taking care of the

* To appear in 43 Wisconsin Reports. From O. M. Conover, Esq., State Reporter.

bankrupt property, he must show by his oath that such services were actually rendered, and the necessity for them. He is not entitled to compensation of one dollar per hour for the services of persons employed to assist him in making an inventory. When he makes a charge for time necessarily employed in making an inventory he must support it by his oath as to the fact of the service and the necessity for it. U. S. Dist. Ct., Oregon. *In re Hellmar*, 17 Nat. Bankr. Reg. 362.

JURISDICTION.

1. *The required number and amount joining in petition gives.*—Where, upon the return of the order to show cause or upon the adjourned day, the petitioning creditors fail to appear or to proceed, any other creditor to the required amount may intervene and pray an adjudication upon the original petition. Such intervening creditor or creditors need not constitute one-fourth in number and one-third in value of all the creditors. U. S. Dist. Ct., California. *In re Sheffer*, 17 Nat. Bankr. Reg. 369.

2. *Dismissal of proceedings.*—The dismissal of the proceedings, *in invitum*, is regulated by the provisions of the 1st section of the act (R. S., § 5026). Permission to withdraw will be withheld whenever the object and policy of the act would otherwise be defeated. Where a motion to dismiss has been denied and the petitioning creditors decline or omit to proceed, any other creditor to the required amount may continue the proceeding. *Ib.*

PARTNERSHIP.

1. *When adjudication against void: dissolution.*—An adjudication against a firm, obtained by one member thereof on his voluntary petition, without giving notice to his copartner, as required by rule 18, is void. A partnership dissolved by the death of one of its members cannot be treated as still subsisting so as to be subject to the provisions of the bankrupt laws; but, upon the surviving partner being adjudged bankrupt individually and as such surviving partner, his assignee is entitled to the possession of the firm assets. U. S. Dist. Ct., California. *In re Temple*, 17 Nat. Bankr. Reg. 345.

2. *General assignment.*—A general assignment made in fraud of the Bankrupt Act may be set aside if proceedings are commenced within six months from its date. *Ib.*

SALE.

Of goods: agreement as to title: resale: fraud: presumption.—Where a sale of goods is made on condition that the title of the vendor is not to pass until the purchase-money shall be paid, and the goods are delivered to the vendee, *held*, that such a stipulation is valid; and, if all taint of fraud is disproved, a sub-sale of the goods by the vendee, before payment in full to the vendor, will not affect the title of the original vendor. The possession of goods does not of itself carry along with it the property in them, nor of itself identify the real owner of them. In Virginia the possession of the fixtures and outfit of a tobacco manufactory does not create the presumption that the title to them is in the person using them. U. S. Dist. Ct., E. D. Virginia. *In re Linford*, 17 Nat. Bankr. Reg. 353.

UNITED STATES SUPREME COURT ABSTRACT,
OCTOBER TERM, 1877.

CONSTITUTIONAL LAW.

1. *Act impairing obligation of contract: statutory construction: privilege of manufacturing malt liquor: prohibitory liquor law.*—A statute of Massachusetts passed in 1809 providing for the chartering of manufacturing corporations contained this: "Provided always that the Legislature may from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly repeal any act or part thereof establishing any corporation, as shall be deemed expedient." In 1828 the Boston Beer Company was incorporated "for the purpose of manufacturing malt liquors in all their varieties in the city of Boston," and the act of incorporation which was passed by the Legislature of Massachusetts provided that said company "for that purpose shall have all the powers and privileges and be subject to all the duties and requirements contained in" the act of 1809 mentioned. In 1829 the act of 1809 was repealed with this provision: "But this repeal shall not affect the existing rights of any person or the existing or future liabilities of any corporation, or any members of any corporation now established, until such corporation shall have adopted this act and complied with the provisions herein contained." *Held*, that the repeal of the act of 1809 by the act of 1829 was not a revocation or surrender by the State of Massachusetts of the reserved power to repeal the charters of corporations, and the passage of an act forbidding the manufacture or sale of malt liquors was not an act impairing an obligation of a contract with the company mentioned and was not in violation of the Federal Constitution. Judgment of Superior Court of Massachusetts affirmed. *Boston Beer Co., plaintiff in error, v. Commonwealth of Massachusetts.* Opinion by Bradley, J.

2. *Police power would authorize act to forbid sale of malt liquor.*—*Held*, also, that even if a right to manufacture malt liquor had been granted by charter without the reservation of a right of repeal, it was within the police power of the State to require such manufacture to cease. *Ib.*

CRIMINAL LAW.

Issue of notes for less than one dollar: statutory construction.—The act of Congress of July 17, 1872, section 2 (12 Stat. 592; Rev. Stat. 711, § 3583), declares that "no private corporation, banking association, firm or individual shall make, issue, circulate or pay out any note, check, memorandum, token or other obligation for a less sum than one dollar intended to circulate as money, or to be received or used in lieu of lawful money of United States," and provided a penalty for a violation of the act. Defendant was indicted for circulating an instrument reading as follows: "The Bangor Furnace Company will pay the bearer on demand fifty cents, in goods at their store in Bangor, Mich." *Held*, that the instrument not being payable in lawful money the issue and circulation thereof was not in violation of the act in question. Demurrer on certificate of division from U. S. Circ. Ct., W. D. Michigan, sustained. *United States v. Van Auken.* Opinion by Swayne, J.

PUBLIC LANDS.

1. *Patent of, passes title free from control of government.*—A patent for any part of the public lands, when issued by the land department acting within the scope of its authority, carries with it, when delivered and accepted by the grantee, the legal title to the land, and with it passes all control of the executive department of the government over the title. Decree of Supreme Court of Illinois reversed. *Moore, plaintiff in error, v. Robbins.* Opinion by Miller, J.

2. *Patent improperly granted can be canceled only by court.*—If any lawful reason exists why the patent should be canceled or rescinded, the appropriate and only remedy is by bill in chancery, in a court of competent jurisdiction, brought by the government, and there exists no power in the Secretary of the Interior or any other officer of the government to reconsider the facts on which the patent issued, and to recall or rescind it, or to issue another for the same land. *Id.*

3. *Fraud or mistake ground for relief.*—But when fraud or mistake or misconstruction of the law of the case exists, the United States, or any contesting claimant for the land, may have appropriate relief in a court of equity. *Id.*

4. *Pre-emption: pre-emptor must prove settlement.*—Under the 14th section of the act of 1841 (5 Stat. 457), and the act of March 3, 1853 (10 Stat. 744), no pre-emption was of any avail against a purchaser of the land at the public land sales, unless the pre-emptor had proved up his settlement and paid for the land before the commencement of the public sales as ordered by the President's proclamation. *Id.*

5. *Decision of Secretary of Interior: effect of.*—The decision of the Secretary of the Interior in favor of a pre-emption claimant under such circumstances against a purchaser at the public sales, held to be erroneous as a misconception of the law, and the equitable title decreed to belong to the latter. *Id.*

STATUTE OF FRAUDS.

1. *Contract not to be performed within a year.*—To make a parol contract void within the statute of frauds, it must appear affirmatively that it was not to be performed within a year. If performance by defendant could have been required by plaintiff within a year the contract is valid. *McPherson v. Cox*, 96 U. S. Judgment of U. S. Circ. Ct., N. D. Illinois, affirmed. *Walker, plaintiff in error, v. Johnson.* Opinion by Miller, J.

2. *Subsequent verbal agreement.*—When a contract for the delivery of stone exists only in parol, a subsequent verbal agreement varying the manner of delivery is binding. *Id.*

3. *Trial: comments of judge on charge to jury.*—The comments of the judge in his charge to the jury as to the circumstances under which the defendant might be entitled to damages against plaintiff, cannot be a ground of error when there was no such issue, and when the remarks could not have prejudiced the defendant. *Id.*

4. *What instructions court not bound to give.*—The court is not bound at the request of counsel to give as instructions philosophical remarks copied from text-books, however wise they may be in the abstract, or however high the source from which they come. *Id.*

COURT OF APPEALS ABSTRACT.

ACTION.

For money paid on an erroneous judgment: demand.—The surrogate in a proceeding before him in which plaintiff and defendants were parties decided that the defendants were entitled to certain commissions. While the decision was in full force plaintiff paid defendants the commissions. Afterward the decision was reversed as being erroneous. *Held*, that plaintiff was entitled to recover back the commissions paid, but a demand was necessary before bringing suit. Judgment below affirmed. *Scholey v. Halsey.* Opinion by Andrews, J.

[Decided February 12, 1878.]

CORPORATION.

1. *Liability of stockholder: stockholder also creditor, when not liable.*—An action by a creditor of an incorporated company against a stockholder under section 10, Laws 1848, chapter 40, cannot be maintained when the stockholder is also a creditor to an amount equal to his stock. The debt due the stockholder is a defense to this form of action in the nature of an equitable offset. Accordingly when defendant, who was a stockholder, had purchased notes against the company and advanced moneys for its use to an amount in excess of his stock, *held*, that he was not liable in an action brought against him individually by a creditor of the company. Judgment below affirmed. *Mathes v. Neideg.* Opinion by Church, C. J. [Decided January 15, 1878.]

CRIMINAL LAW.

1. *Practice: what writ of error reaches.*—A writ of error reaches only errors in the record, and proceedings subsequent to judgment forming no part of the record are not brought before the court by it. Conviction affirmed. *People v. Carey, plaintiff in error.* Opinion by Earl, J.

2. *Assault with dangerous weapon: what sufficient indictment: duplicity.*—An indictment for an assault with a dangerous weapon, alleged that the instrument was "sharp, dangerous;" that the assault was made with intent "to do bodily harm," and that it was "without justifiable or excusable cause." *Held*, that the indictment was under Laws 1854, chapter 74, and not under Laws 1866, chapter 716, and was not open to the charge of duplicity, as charging two distinct offenses. *Id.*

3. *Witness: prisoner in his own behalf: questions tending to impair credit.*—When a prisoner offers himself as a witness in his own behalf he is subject to the same rules upon cross-examination as any other witness. He may be asked questions disclosing his past life and impairing his credibility; and questions which may tend to show that he has before been guilty of the same crime as that for which he is on trial, are not incompetent. *Id.*

[Decided February 5, 1878.]

4. *Joinder of several distinct misdemeanors in one indictment.*—The joinder of several distinct misdemeanors in the same indictment is not a cause for the reversal of the judgment on a writ of error when the sentence is single and is appropriate to either of the counts upon which the conviction was had. Consequently where a prisoner was convicted on an indictment charging him with an offense punishable by fine,

and also with one punishable by imprisonment, *held*, that there was no legal objection to a sentence of fine and imprisonment. Conviction affirmed. *Polinsky, plaintiff in error, v. People*. Opinion by Andrews, J.

5. *Selling adulterated milk: city ordinance*.—An ordinance of the board of health of the city of New York provides against bringing adulterated milk into the city of New York for sale. *Held*, not to cover the same ground as Laws 1862, chap. 467, sec. 1 (amended by Laws 1864, chap. 544), that statute relating only to selling or exposing impure, etc., milk for sale. *Ib*.

6. *Authority of board of health of New York to pass ordinance as to adulterated milk*.—*Held*, also, that Laws 1873, chap. 335, conferred upon the board of health of New York power to make ordinances in relation to the adulteration of milk, in addition to the general law in relation to that subject, and an ordinance passed by them making certain acts misdemeanors held valid. *Ib*.

7. *Constitutional law: power of Legislature*.—*Held*, also, that it was within the power of the Legislature to confer authority on the board of health to pass the ordinance.

[Decided March 19, 1878. Reported below, 11 Hun, 390.]

EVIDENCE.

1. *When parol, admissible to explain writing*.—Defendant sent to the cashier of a bank a letter reading thus: "Please discount for Mr. Cummer to the extent of four thousand dollars. He will give you customers' paper as collateral. You can also consider me responsible to the bank for the same." *Held*, that parol evidence of surrounding circumstances was admissible to show whether this was intended to be a single credit for \$4,000, or a continuing guaranty to that extent. Judgment below affirmed. *White's Bank of Buffalo v. Myles*. Opinion by Earl, J.

2. *Construction of instrument of guaranty: continuing guaranty*.—In this case Cummer was carrying on a continuous business in Buffalo, and doing his banking business with plaintiff. Defendant was his father-in-law, residing in Canada, and was desirous to aid him. Cummer had already a large line of discount, but needed more to enable him to continue business. *Held*, that under the circumstances the letter was intended as a continuing guaranty. *Ib*.

[Decided April 16, 1878.]

FIRE INSURANCE.

A fire insurance policy provided that it should become void "if without the written consent of the company first had and obtained" the insured property "shall be sold or conveyed, or the interest of the parties therein be changed in any manner, whether by act of the parties or by operation of law, or the property shall become incumbered," etc. *Held*, that the change of title caused by the death of the party insured would avoid the policy. (*Wyman v. Wyman*, 26 N. Y. 253; *Burbank v. Rockingham Ins. Co.*, 24 N. H. 550, distinguished.) Order below affirmed. *Sherwood v. Agricultural Ins. Co.* Opinion by Rapallo, J.

[Decided May 21, 1878.]

JURISDICTION.

State courts have, of action by assignee in bankruptcy.—State courts have concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws or treaties of the United States, unless excluded

by express provision or from the nature of the particular case. A State court has jurisdiction of an action brought by an assignee in bankruptcy upon a draft forming part of the assets of the bankrupt, and the authority of the bankrupt court is not necessary to entitle the assignee to sue. Judgment below affirmed. *Kidder v. Horribin*. Opinion by Andrews, J.

[Decided January 15, 1878.]

LEASE.

Rights of lessee dependent on performance of covenant on his part: estoppel and waiver.—By a lease, wherein the lessee covenanted to pay taxes and do other acts, it was provided that at the end of the term the lessee should be entitled to a renewal of the lease, or if that should not be given the lessor should pay the value of the building erected on the premises by lessee to be determined by appraisers. The appraisers were to be appointed before the termination of the lease, and in default of one party appointing his appraiser, after a certain notice, the other party might select his, who could select the other one. *Held*, that in order to entitle the lessee to maintain an action against the lessor for the value of the building, after the termination of the lease, it was necessary for him to perform his covenants under the lease, and a failure to pay the taxes for one year would preclude a recovery. *Held*, also, that the appointment of an appraiser, by the lessor, after notice by the lessee, but in ignorance that the lessee had not performed his covenant, and the appraisal of the value of the building was not a waiver of the rights of lessor and would not estop him from setting up as a defense in such action the failure of the lessee to perform his covenants. Judgment below reversed. *People's Bank of New York v. Mitchell*. Opinion by Miller, J.

[Decided April 23, 1878.]

MUNICIPAL CORPORATION.

1. *Construction of charter of Cohoes: declaration of result essential to complete election*.—By section 9 of the charter of Cohoes, it is provided that the inspectors of election of each ward shall, at each city election, canvass the votes given and make a statement determining and certifying the number of votes cast for each person for city and ward officers, and for school commissioners, and that such statement shall be delivered to the city clerk. By section 10 the city clerk is directed to deliver the statement to the common council, which shall, at the next meeting, which "shall be on the Tuesday next after the annual election," "upon such statements and certificates, declare and determine what persons have been elected to "the respective offices." It is also provided that those having the greatest number of votes for the offices to be filled by the electors of the several election districts or wards "shall be declared duly elected." *Held*, that the declaration and certificate of the common council was indispensable to the election and qualification of ward as well as city officers, and that officers who had received the greatest number of votes could not act officially until such declaration. Judgment below reversed. *People ex rel. Corliss v. North*. Opinion by Rapallo, J.

2. *Provision applies to election of aldermen*.—*Held*, also, that the provisions of section 10 are applicable to the office of alderman, and that under a provision in the charter that the old officers should hold over until their successors were qualified, acts by a common

council made up of old members, whose term of office had expired, performed before the declaration of the election of the new members, would be valid. *Ib.* [Decided January 15, 1878.]

NEW YORK CITY.

Removal of subordinate employee of city without cause.—The provision in section 28 of the charter of New York (Laws 1873, chap. 335) requiring that no regular clerk or head of a bureau shall be removed until he has been informed of the cause of his removal and allowed an opportunity to be heard, does not apply to subordinate ministerial officers, such as a surveyor in the bureau of combustibles, or an assistant to the fire marshal. These officers are not "clerks," and are removable at pleasure. Judgment below reversed. *People ex rel. Royal v. Board of Fire Commissioners of New York.* Opinion by Allen, J. [Decided April 23, 1878.]

NOTES OF RECENT DECISIONS.

ACTION: ON CONTRACT FOR PERSONAL SERVICES, WHEN IT ACCRUES.—Plaintiff agreed to work for defendant for one year at stipulated wages, and he was to be paid at the end of the term of service. He left before his term of service expired, and brought suit for the immediate recovery of the wages he had already earned. *Held*, he could not bring suit to recover, until his term of service had expired, according to the stipulation of the contract. Sup. Ct., Iowa, March, 1878. *Powers v. Wilson.*

CHATTEL MORTGAGE: WHEN NOT VALID.—A chattel mortgage to secure an antecedent debt on the present and after-acquired property of the mortgagor, and which authorizes him to sell the mortgaged chattels in the regular course of his business, and apply the proceeds to his own use, is void. U. S. Dist. Ct., New Jersey, March 5, 1878. *Matter of Bloom.*

CHATTEL MORTGAGE: WHEN VALID AND WHEN VOID.—Does the permission of the mortgagee to the mortgagor to retain possession of the mortgaged goods invalidate the mortgage? *Held*, that if the mortgaged property had consisted of household furniture, or of any property of a like character, where the right or privilege of using the same would not necessarily imply the right or privilege of selling and disposing of the same, then the permission to retain possession would not, of itself, vitiate the mortgage; but when, as in this case, the mortgage is given on a stock of men's and boys' clothing, etc., or a stock of goods or merchandise of any kind, and it is apparent that the only usual mode of using the same is to sell and dispose of such stock, and the mortgage contains no stipulation that the proceeds of such sale shall be applied to the payment of the mortgage debt, or the debt of any other creditor, such mortgage is, and ought to be, declared to be void on its face. Sup. Ct., Indiana, April 4, 1878. *Mobley v. Letts* (Chi. L. News).

CONSTITUTIONAL LAW: LAW IMPAIRING OBLIGATION OF CONTRACT: HOMESTEAD LAW.—A homestead is not exempt from the payment of a debt contracted before the passage of the Homestead Law, although the debt has been barred by the Statute of Limitation, and a new promise is made subsequently thereto. The statute does not extinguish the debt, but only bars the remedy. Sup. Ct., Tennessee, Dec., 1877. *Woodlie v. Towles* (Memphis L. J.).

CONTRACT: ACTION ON CONTRACT NOT FULLY PER-

FORMED: EVIDENCE: PREVENTING PERFORMANCE: WHAT IS NOT: WHAT IS.—Where an express contract has not been fully performed and an action upon an implied contract to pay the reasonable value of what has been done is maintainable, the express contract may ordinarily be introduced as evidence of value. Where the plaintiffs sue for being prevented from performing a contract, the action is *on the contract*; and unless prevention is proved and found, plaintiffs are not entitled to recover any thing on such contract. Mere failure or refusal to pay an installment, as it becomes due, does not amount to prevention; and, therefore, does not authorize the party to abandon the work and recover the benefit he would have received had he fully performed. The fact that defendant failed to make such payments, "well knowing that plaintiffs had to rely on the money received from him," does not change the result. But if the defendant knew at the time the contract was entered into, that plaintiffs relied entirely on his payments to them, or that such reliance was an inducement to the contract on their part, it might be otherwise. So, if defendant had notified plaintiffs that he would pay none of the installments as they should become due, it might amount to prevention. Sup. Ct., California, April 5, 1878. *Cox v. McLaughlin* (Pac. C. L. J.).

CORPORATION: CHURCH CORPORATION: BORROWING MONEY TO BUILD MEETING HOUSE NOT ULTRA VIRES.—The charter of a corporation declared that its object is *inter alia*, the building of a meeting house, etc., and providing for the payment of expenses from pew rents. The amount thus realized being inadequate, the trustees borrowed money on their individual notes. The society resisted the payment of this borrowed money because the charter made no provision therefor. *Held*, that the object of the corporation could not be carried out without a meeting house. If it hired laborers, bought materials, or borrowed money for the consummation of that purpose, it was liable. The evidence tending to show how the business was conducted and settled, ratified by a partial payment, was sufficient to submit to the jury, to find that the money was used in rebuilding the church. Sup. Ct., Pennsylvania, Jan. 9, 1878. *First Baptist Church of Erie v. Neely's Administrator* (Pittsb. L. J.).

ILLEGAL CONTRACT: NOTE GIVEN FOR DISEASED SHEEP SOLD IN VIOLATION OF STATUTE.—The selling or disposing of any sheep, knowing them to be affected with a contagious disease, is a misdemeanor under Code, §4065, and a note given in payment for such sheep is void, even when the purchaser has knowledge of the diseased condition of the sheep purchased. Such contract cannot be enforced. But if the plaintiff did not know the sheep were affected with a contagious disease, he violated no law, and he may enforce his contract whether the defendant had such knowledge or not. Sup. Ct., Iowa, March, 1878. *Caldwell v. Budall.*

JUDGMENT: OF U. S. CIRCUIT COURT: FOOTING OF.—A judgment rendered by the Circuit Court of the United States for the District of Minnesota occupies the same footing as a domestic judgment of a superior court of record of this State. Its validity cannot be impeached in a collateral proceeding by parol proof showing that no jurisdiction was ever in fact acquired over the person of the defendant therein. Jurisdiction is exclusively presumed unless the contrary ap-

firmatively appears upon the face of the record. Sup. Ct., Minnesota, April 18, 1878. *Turrell v. Warren* (N. W. Rep.)

LANDLORD AND TENANT: WHEN LANDLORD MUST KEEP PROPERTY SAFE FOR PERSONS USING IT.—The Mill Company owned a strip of land in Minneapolis lying along near the river and constructed through it a canal, into which it took water at the upper end and furnished it for water power to the tenants to whom it rented mill sites on each side of the canal. It rented these mill sites with the right of way across the canal to each tenant. Over this canal for its entire length and breadth was constructed a platform of timbers and planks which was used for over ten years with the knowledge and acquiescence of the company, by all persons having business with the mills along the sides of the canal, in the same way as a public thoroughfare is used. Morrison was the company's tenant of a mill site abutting on the canal, and a sub-tenant of his constructed a part of the platform opposite the premises sub-let. This sub-lease expired, leaving Morrison in possession under the lease to him of the mill site let to him by the company. *Held*, that as to all persons going upon this platform to transact business with mills along the canal, it was the duty of the company, and not of Morrison, to use ordinary care and diligence to keep the platform. Sup. Ct., Minnesota, April 8, 1878. *Nash v. Minneapolis Mill Co.* (N. W. L. Rep.)

RESPONDEAT SUPERIOR: WHEN CITY NOT LIABLE FOR NEGLIGENCE OF CONTRACTOR.—A city contractor for building a sewer is liable for the negligence of his employees, by which damage accrues to a citizen. The action does not lie against the city. Sup. Ct., Pennsylvania, January 7, 1878. *City of Erie v. Caulkins*.

STATUTE OF LIMITATION: WHEN STATUTE OF LOCI CONTRACTUS NOT PLEADABLE IN FOREIGN JURISDICTION.—A Statute of Limitations of the *loci contractus* cannot be pleaded in bar in a foreign jurisdiction, where both parties were resident in the *loci contractus* during the whole statutory time, so as to make the bar complete there, unless such statute go to the extinction of the right itself, and not to the remedy only. The rule at common law is, that the time of the limitation of actions depends on the law of the forum, and not on the law of the State or country where the contract was made. A statutory bar of one State cannot be pleaded in another, where the bar affects the remedy only. Sup. Ct., Mississippi, Feb. 4, 1878. *Perkins v. Gay* (Memph. L. J.).

STATUTE OF LIMITATIONS: ACKNOWLEDGMENT TO HUSBAND OF DECEASED OWNER OF NOTE, STOPS STATUTE RUNNING.—In a suit upon a promissory note by the husband as administrator of the deceased payee, commenced more than six years after the maturity of the note, it appeared that within the six years, and after the death of the wife, but before her husband had taken out letters of administration, the maker had acknowledged the debt to the husband and had promised to pay the note. *Held*, that the running of the statute of limitations was tolled, and the plaintiff was entitled to recover. The husband was not a stranger, but was the owner of the note in question as part of his wife's estate; he could therefore receive a promise to pay it or an acknowledgment consistent with such a promise. Sup. Ct., Pennsylvania, February 14, 1878. *Keely v. Wright* (W. Not. Cas.)

SURETYSHIP: STATUTE OF LIMITATIONS: WHEN SURETY MAY NOT PLEAD: WHEN ENTITLED TO ACTION AGAINST PRINCIPAL.—Although the administrator of a principal in a note may defeat the recovery upon the note by the plea of the statute of limitations, yet the exoneration of such administrator does not relieve the surety of his intestate from liability. When the surety on such note is compelled to pay the debt, such surety then has a cause of action against such administrator for the amount so paid, or against the administrator of a co-surety for contribution. The right to judgment by motion accrues to the surety upon the rendition of judgment against him, but his cause of action is the payment of the judgment, and the statute only begins to run from that time. Sup. Ct., Florida, April, 1877. *Reeves v. Palliam* (Memphis L. J.)

TAXATION: EXEMPTION FROM PERSONAL, AND NOT ASSIGNABLE.—The word "exemption" is not comprehended within the words "rights and privileges," as applied to a corporation claiming a right of exemption from taxation by virtue of a section of its charter, conferring upon it the rights and privileges of a like corporation, which latter corporation was by express terms of the charter exempt from taxation. Such exemption is personal to the corporation or individual possessing it, and is not assignable. Sup. Ct., Tennessee, March 18, 1878. *Wilson v. Gaines*.

THE NEW YORK STATE BAR ASSOCIATION REPORT.

THE first Annual Report of the New York State Bar Association has been issued. It makes a handsome volume of two hundred pages, and its contents are such as should interest every lawyer. It contains the call, list of members and proceedings of the convention which organized the Association; also the constitution and by-laws of the Association, the rules and regulations of the executive committee, the act of incorporation, the proceedings of the annual meeting last November, the prize essay read at that meeting, the legal biographies then presented, the officers and committees, list of members and an index.

The subject of organization is one deserving the most serious attention of the legal profession. For its own best interests, for the most effective exercise of a wholesome and beneficial influence on the laws and the sentiments of the community, and for the purpose of opposing and counteracting the revolutionary, agrarian and communistic tendencies of the times, the lawyers should meet in council, should organize.

In England, in France and in Germany, the legal profession is a thoroughly organized and associated profession, and it is, largely as a result thereof, a powerful, learned and honorable profession.

In this country, lawyers have not, until recently, associated themselves together, and as a result much of the *esprit du corps* has been lost, and the professional tone and qualification have been lowered. With the hearty support of the lawyers of this State, the State Bar Association will become a powerful influence for good both to the profession and to the people.

Among the proceedings of the annual meeting reported in this volume is an interesting paper by Mr. A. A. Redfield, on "Some Proposed Changes in Probate Procedure," and some valuable suggestions as to the law affecting marriage and divorce, from Mr. Elbridge T. Gerry.

COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, May 28, 1878:

Wood v. Tunnickliff, Kellogg v. Norman, Wilkinson v. Gill, McNamee v. Wilson, judgment affirmed, with costs.—Howe Machine Co. v. Pettibone, Jones v. Ludlum, appeal dismissed, with costs.—Struppman v. Muller, motion to dismiss appeal granted, with costs. Motion to compel the attorney to pay costs personally must be made in the court below after the judgment has been there entered.—National Bank of Schuylerville v. Lasher, Same v. Vanderwerker, motion to dismiss appeal denied. Motion to file amended return granted, without costs to either party.—German American Bank v. Pittston and Elmira Coal Co., Same v. Morris Run Coal Co., appeals dismissed, with costs of one appeal only in this court.—Potts v. Mayer, Clark v. Dickinson, judgment reversed and new trial granted, costs to abide event.—Smith v. Bodine, judgment reversed and new trial granted, costs to abide event, unless plaintiff stipulate to reduce the recovery by deducting \$194.76, with interest thereon from December 31, 1866, in which event judgment as so modified affirmed, without costs to either party in this court.—Mix v. Andes Insurance Co., judgment reversed, with costs to the defendant after appearance in action on ground that cause was removed to Circuit Court of the United States.

NEW BOOKS AND NEW EDITIONS.

KANSAS REPORTS, VOLUME XVIII.

Reports of cases argued and determined in the Supreme Court of the State of Kansas. W. C. Webb, official Reporter. Volume XVIII. Containing cases decided at the January and July terms, 1877. Topeka, Kansas: Geo. W. Martin, 1878.

THE present volume contains among others these cases of general interest. *Matter of Pryor*, p. 72: A statement by an attorney that a ruling made by the judge is contrary to every principle of law, and he desires that it shall not stand unreversed in any court he practices in, held to be a contempt of court. *State v. Rogers*, p. 78: A man indicted for murder cannot justify on the ground of self-defense, the act being committed in a quarrel he had himself provoked. *Missouri Valley Ins. Co. v. Sturges*, p. 93: A person who has no interest in another's life cannot purchase or take by assignment an insurance policy on such life. *Fridwell v. City of Troy*, p. 271: The Legislature may confer on a municipality the power to tax employments as well as property. *New York Life Ins. Co. v. McGowan*, p. 300: An insurance company is liable to a third person in a civil suit for the frauds, deceits and concealments of its general agent, committed while acting in the apparent scope of his authority, though the company did not authorize or justify the acts. *Seaton v. Scovill*, p. 433: A note, otherwise negotiable, is not rendered non-negotiable by the addition of a stipulation to pay costs of collecting, including reasonable attorney's fees, if suit be instituted thereon. *Whitford v. Horn*, p. 455: A title by gift is sufficient to maintain replevin against the administrator of donor. *Greeno v. Barnard*, p. 521: There is no homestead exemption law as against the purchase-money of the homestead. The reporting, as is usual in this series, is carefully done, the head-notes stating accurately and concisely the points decided, and the

statements of fact being clear and as brief as is consistent with a full history of the case.

NOTES.

IN the Wandsworth (England) County Court in the case of *Evans v. Salmond*, decided on the 7th ult., it is held that a post-office order is a negotiable instrument, and an innocent purchaser for value from a wrong-doer is protected against liability.—Judge Blatchford has been requested, by the members of the bar who have practiced before him in the United States District Court for the Southern District of New York, to sit for his portrait, which is to be hung on the walls of the District Court room, and has consented to do so.—The Bar Association of Chicago have been, for a year past, through a committee appointed for that purpose, investigating the workings of the bankrupt law in that city. Of course the results are very unsatisfactory, the various fees and expenses, as a rule, nearly or quite exhausting the estates of the bankrupts.

Few nations are so fond of litigation as the Mexicans; and there is a story which pertinently illustrates the propensity of the Dons for going to law with each other. Don Rafael has been suing Don Esteban for at least ten years in all the courts of the Republic. Over and over again he has lost his cause, and as often has he appealed from the court below to the court above. One day the plaintiff meets the defendant in the Calle San Francisco, Mexico. The adversaries bow stiffly to one another. "How is it, Don Rafael," asks Don Esteban, "that you have not yet carried before the Supreme Court your appeal against the Court of Guadalajara, which, if you remember, was adverse to you?" "Of a truth," replies Don Rafael, "I shall appeal no more, and abandon my claim. I am sick and tired of the whole affair; and, moreover, I have not a single dollar left to pay costs withal." "Is that so, caballero?" quickly returns Don Esteban, pulling out his purse. "Pray do me the honor to accept the loan of fifty dollars, and give notice of appeal at once. It would be a shame and a scandal to let such a fine lawsuit die."

PUBLISHERS' NOTICE.

MR. GEO. W. VAN SICLEN, of the New York Bar, intends to sail for Rio Janeiro, Brazil, by the July steamer of the new direct line, returning in September, and will attend to such professional business as may be intrusted to him. Address No. 99 Nassau St., New York city.

FEARLESS RAILWAY THRESHING MACHINE.

We call the attention of farmers and threshermen to the advertisement of the Fearless Horse-Power and Thresher and Cleaner, elsewhere in this number of our paper. This machine is the only one that received an award on both Horse-Power and Thresher and Cleaner at the Centennial Exhibition, Philadelphia, and ranks as best of its class. An ex-President of the New York State Agricultural Society said of Harder's Machines, "they are the best ever made," and the same testimony has been borne by equally good authority time and again.

For further information send to Minard Harder, Cobleskill, N. Y.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, JUNE 8, 1878.

CURRENT TOPICS.

AFTER considerable discussion, the United States Senate on the 31st ult. passed a bill providing for the appointment of an additional Circuit judge for the Seventh Judicial Circuit, composed of the States of Illinois and Indiana. That this judge is needed is evident from the fact stated by Mr. Thurman, that there are thirty-six hundred suitors whose cases are in waiting in the circuit.

The necessity of additional judges in two of the Federal Circuits was strongly made evident in a discussion in the Senate last week, of a bill to provide an additional Circuit judge in the Second Circuit. Senator Davis stated that at the April term of the Circuit Court in New York which is now in session, 444 jury cases were set down for hearing; on the Equity Calendar there were 116 cases. There were also 59 appeals in Admiralty and 40 motions noticed. In Chicago it was still worse. There were 3500 cases on the docket other than bankruptcy cases, which, with admiralty business, employ all the time of the District Court at that place. It was suggested by a Senator that the repeal of the bankrupt law might tend to diminish the business of the Federal courts, but Senator Davis stated that while the District Courts might be somewhat relieved, the business of the Circuit Courts would be increased. That the repeal of the bankrupt law will very largely increase general law business cannot be doubted, and this must have its effect upon the Federal courts, both District and Circuit.

The Supreme Court of the United States in *Matter of Jackson* reported on another page, declare in emphatic terms that letters sent by mail shall not be opened by the postal officials without due process of law. By section 3894 of the Federal Revised Statutes, the sending of lottery circulars by mail, is made a penal offense. The law is proper enough, but not easily enforceable where the circulars are sent as letters, unless the letters can be opened and examined while in the mails. The Supreme Court, however, says that this cannot be done, and Congress has no power to authorize it to be, except by virtue of a warrant which can only be issued on an

affidavit particularly describing the thing to be seized as is required when papers are subjected to search in one's household. The court further says, that regulations against the transportation in the mail of printed matter which is open to examination cannot be enforced so as to interfere with the freedom of the press. Liberty of circulating is essential to that freedom. When, therefore, printed matter is excluded from the mails, its transportation in any other way cannot be forbidden by Congress. The court very properly concludes that laws prohibiting the transmission of improper matter in the mails must be enforced upon competent evidence of their violation procured in some other way than by the unlawful inspection of letters and sealed packages. The decision will undoubtedly interfere somewhat with the prosecution of offenders, under the act forbidding the sending of obscene literature through the mails as well as that forbidding lottery circulars, but it secures the inviolability of private correspondence which is of paramount importance.

The House Committee on the revision of the laws has reported favorably a bill to repeal that section of the Federal Revised Statutes which relates to the sending of obscene literature through the mails. As the decision above noticed renders the statute of little practical value, its repeal would be proper.

We would call attention to the article on marriage by Isaac Van Winkle, Esq., appearing in our present number. The rules governing this relation under the various systems of jurisprudence, ancient and modern, are fully set forth and explained. The article is well worthy the careful consideration of every reader.

The death of Hon. William F. Allen, which took place on Monday last, removes from the bench of the Court of Appeals one of the ablest jurists of our State. Of the seven judges who formed the court at its reorganization, under the amended judiciary article of the Constitution, three have been removed by death — Judges Peckham, Grover and Allen. Judge Johnson, who was appointed to fill a vacant place upon the bench, and who performed judicial duties for nearly a year, has also died. None of these were what could be called old men, not one of them having passed the constitutional limit of age for the judicial office. There is no doubt that the physical constitution of every one of these judges was broken down by overwork in the performance of official duties, and that, except in the case of Judge Peckham, their deaths resulted from this cause. We see, however, at present, no means of relieving the court from the pressure of business before it. The address of Chief Judge Church at the first meeting of the court after the death of Judge Allen and a brief sketch of the life of the deceased judge will be found elsewhere.

The subject of "defaulting solicitors" is troubling the profession in England at the present time, and one gentleman, Sir Henry Peek, has gone so far as to issue a circular inviting prize essays as to the best mode of dealing with the subject. No doubt a solicitor who does not pay his debts is a very bad individual, but we do not see wherein he is any worse than a tradesman, or physician, or clergyman in similar circumstances. Perhaps the fact that the name of a lawyer very seldom appears in the bankrupt list renders it much more censurable for it to appear there than would be the case in other callings. It is stated that after an exhaustive investigation it has been found that seven and one-half per cent of the solicitors of England have become bankrupt or insolvent. What is the proportion among merchants is not stated, but we are confident that three-quarters of those who go into trade fail to pay their indebtedness in full. The profession has nothing to fear from any investigation that can be made.

In the Supplement accompanying this number are given acts of the Legislature upon these subjects: Amending Laws 1875, chap. 482, § 26, relating to the powers of supervisors; amending Laws 1873, chap. 833, regulating the fees of coroners; relieving auctioneers selling farm property from giving bond or filing semi-annual account; amending 2 R. S. 690, § 2, relating to attempts to extort; facilitating the proof of previous imprisonment and discharge in trials for second offenses; amending 2 R. S. 809, § 87, relating to granting new trials in actions of ejectment; legalizing acts of surrogates on granting letters of administration upon petitions verified before other officers, and allowing the issue of letters upon such petitions; amending section 870 of the Code of Civil Procedure, authorizing married women to execute powers of attorney; forbidding non-residents to gather clams in the waters of the State; relating to the property of absconding persons; providing for mechanics' and laborers' liens, under contracts with municipalities; amending section 2 of the general corporation act; amending the general assignment act of 1877; amending what is known as the "temporary act" of 1876, relating to the Code; amending Laws of 1872, chap. 680, relating to the record of the probate of wills in other States; amending 2 R. S. 781, §§ 76, 78, relating to the removal of indictments; requiring all stock, fire, and marine insurance companies to have capital of \$200,000. The governor has, up to the time of our going to press, signed 395 acts.

By chapter 367 of the Laws of this State, of the present year, chapter 107 also of this year, requiring justices of the peace to give bonds, is amended so as to require the town clerk of any town wherein the justice is also supervisor, to approve of the bond.

NOTES OF CASES.

IN the case of *Hersey v. Elliot*, 67 Me. 526, it is held that if a bankrupt, who is the payee of a negotiable bill or note, sells the same without indorsement before and indorses it after bankruptcy, such indorsement will enable the holder of the note to maintain an action upon it in his own name. The decision is in harmony with a well-settled rule sustained by many authorities. See *Smith v. Pickering*, Peake (N. P. C.), 50; *Anonymous*, 1 Camp. 492, note; *Lempriere v. Pasley*, 2 T. R. 485; *Moubray, ex parte*, 1 Jac. & Wal. 428; *Watkins v. Maule*, 2 id. 237; *Greening, ex parte*, 13 Ves. 206; *Wallace v. Hardacre*, 1 Camp. 46; *Smoot v. Morehouse*, 8 Ala. (N. S.) 870; *Valentine v. Holloman*, 68 N. C. 475. The reasons given for the rule appear to be satisfactory and conclusive. The indorsement in such case is but a mere form. The property in the note passes by the sale. The bankrupt has no actual interest in it afterward. At most, he is to be regarded as merely a trustee of the legal title for the benefit of the vendee. In general, only such right, title and interest, as the bankrupt himself has in law and equity in any estate or property, passes by bankruptcy to the assignee. That the assignee does not take a beneficial interest therein belonging to another person is well settled in the cases cited and many more. *Sawtelle v. Rollins*, 23 Me. 196; *Smith v. Chandler*, 3 Gray, 392; *Nichols v. Bellores*, 22 Vt. 581; *Stroeter v. Sumner*, 31 N. H. 542; *Mitchell v. Winslow*, 2 Story, 630; *Goss v. Coffin*, 66 Me. 432. The principle has been applied also in analogous cases, in proceedings under State insolvent laws. *Norcross v. Pease*, 5 Allen, 331. And in case of the death or marriage of the payee, a negotiable note, transferred by the payee before his death by delivery only, may be indorsed by his administrator with the same effect as if done by himself in his life-time. *Malbon v. Southard*, 36 Me. 147. When a woman assigns by delivery a note payable to her order, and afterward marries the maker, her indorsement of the note after such marriage transfers the legal title. *Guptill v. Horne*, 68 Me. 405.

The Supreme Judicial Court of Maine, in the case of *Eaton v. Boissonnauld*, 67 Me. 540, holds that a note payable at a future day with interest greater or less than the legal rate, in which nothing is said about the rate of interest after maturity, will draw the stipulated rate till maturity only, and after that the legal rate. This is in accordance with the weight of authority, both English and American. *Ludwick v. Huntzinger*, 5 W. & S. 51; *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Burnhisel v. Firman*, 22 Wall. 170; *Cook v. Fowler*, L. R., 7 H. L. 27. The reason given in the case last cited, is that interest for the delay of payment, *post diem*, is not given on the principle of implied contract, but as damages for a breach of contract; that while it might be

reasonable, under some circumstances, and the debtor might be very willing to pay five per cent per month for a very short time, it would by no means follow that it would be reasonable, or that the debtor would be willing to pay, at the same rate, if, for some unforeseen cause, payment of the note should be delayed a considerable length of time. Similar views were expressed in *Brewster v. Wakefield*. The court says that when the note is entirely silent as to the rate of interest thereafter, if it is not paid at maturity, the creditor is entitled to interest after that time by operation of law and not by virtue of any promise which the debtor has made; that if the right to interest depended upon the contract, the holder would be entitled to no interest whatever after the day of payment. In *Brannon v. Hursell*, 112 Mass. 63, however, the court held that, when a recovery is had upon a note bearing ten per cent interest, the plaintiff is entitled to interest at the same rate till the time of verdict. The reason given is that "the plaintiff recovers interest, both before and after the note matures, by virtue of the contract, as an incident or part of the debt, and is entitled to the rate fixed by the contract." This reasoning is at variance with the reasoning in the House of Lords in the case cited; and with the reasoning of the Supreme Court of the United States, in the cases cited; and with the reasoning of the Massachusetts court itself, in *Ayer v. Tilden*, 15 Gray, 178. It is there said that the interest after maturity "is not a sum due by the contract; that it is given as damages for the breach of the contract, and must follow the rule in force within the jurisdiction where judgment is recovered." The rule in the principal case has also been adopted in Connecticut and Rhode Island. *Hubbard v. Callahan*, 42 Conn. 524; *Pierce v. Swanpoint Cemetery*, 10 R. I. 227.

In *Hampshire v. Wickens*, 38 L. T. Rep. (N. S.) 408, decided in the chancery division of the English High Court of Justice on the 29th of January last, the defendant entered into an agreement to take a lease of a dwelling-house in Kensington, to contain all usual covenants and provisoes. The lease tendered to the defendant contained a covenant not to assign without the lessor's consent, such consent not to be withheld to a respectable and responsible tenant. The present action was brought to enforce the agreement. The court held that the covenant was not a usual covenant, and the action was dismissed. The authorities upon this subject in England are conflicting. In *Church v. Brown*, 15 Ves. 258, and *Henderson v. Hay*, 3 Bro. C. C. 632, such a covenant was held not to be usual, but in *Haines v. Burnett*, 27 Beav. 500, and *Strangways v. Bishop*, 29 L. T. Rep. (O. S.) 120, the contrary was held. The doctrine of the principal case has also the support of the Court of Appeal in *Hodg-*

kinson v. Crowe, L. R., 10 Ch. 622, and of the Court of Chancery in the same case, L. R., 19 Eq. 593. In Davidson's Precedents on Conveyancing (3d ed. p. 48) it is said: "the result of the authorities appears to be that in case where the agreement is silent as to the particular covenants to be inserted in the lease, and provides merely for the lease containing usual covenants, or, which is the same thing, is an open agreement without reference to the covenants, and there are no special circumstances justifying the introduction of other covenants, the following are the only ones which either party can insist upon, namely, covenants by the lessee: (1) to pay rent; (2) to pay taxes except such as are expressly payable by the landlord; (3) to keep and deliver up the premises in repair; and (4) to allow the lessor to re-enter and view the state of repair, and the usual qualified covenant by the lessor, for quiet enjoyments by the lessee." See, however, *Wilbraham v. Livesay*, 18 Beav. 206; *Parish v. Sleeman*, 1 De G. F. & J. 326.

In the case of *Arthur v. Craig*, 6 Cent. L. J. 424, decided by the Supreme Court of Iowa at its April, 1878, term, it is held that the executive may annex to a pardon any condition precedent or subsequent, provided it be not illegal, immoral or impossible of performance. In this case a person convicted of larceny from a building in the night time, and sentenced to imprisonment for ten years, received a pardon containing these conditions: that the prisoner should, during the remainder of his term of sentence, refrain from the use of intoxicating liquors as a beverage; should exert himself for the support of his mother and sister, and should not be convicted of a violation of any criminal law of the State. In case he violated any of these conditions he was to be liable to summary arrest upon the warrant of the governor at the time, whose judgment was to be conclusive as to the sufficiency of the proof of the violation of the first and second conditions, and was to be confined in the penitentiary for the remainder of the term of his sentence. The prisoner formally accepted the pardon and its conditions, and was set at liberty. He violated the condition against the use of intoxicating liquors and was arrested upon a warrant by the governor and returned to the penitentiary. Upon proceedings by *habeas corpus* the court held the re-arrest and return to the penitentiary were valid and proper. Whether an executive can impose conditions in pardons has been doubted. 1 Whart. Cr. Law, § 591 d. But it is now considered as settled that such conditions may be made. This is eminently the case where the offender, after having been released upon condition that he leave the country, refuses to go or surreptitiously returns. *Flood's Case*, 8 W. & S. 197; *State v. Smith*, 1 Barley, 283; *People v. Potter*, 1 Park. Cr. 47; *State v. Chancellor*, 1 Strobb. 347; *State v. Fuller*, 1 McCord, 178; *Roberts v. State*, 14 Mo. 138.

THREE GREAT LAW-BREAKERS.

IF a foreigner should accuse the citizens of the United States of a disregard for law, they would probably regard the charge as a gross slander. We are in the habit of pluming ourselves as a law-abiding and order-loving people. And yet it must be conceded that we are a long-suffering people under notorious and shameless infringements of our laws, and that there is a vast amount of "dead-letter law" among us. We have taken pains to speak before on this subject. Our attention is called to it again by the recent and nearly simultaneous death of three very prominent and notorious persons, all long-time residents of the metropolis of this country. It has occurred to us that if a British tourist should have visited our country about three years ago, and should have animadverted upon the lives, employments and influences of William M. Tweed, John Morrissey and Madam Restell, in just and natural terms, the impulse of our people would have been to resent the attack as they resented the attack of Dickens upon the American institution of slavery. Not to say that our people would ever seriously have defended the crimes of political corruption, gambling and abortion, yet so great would have been the sensitiveness of the sore spots that they would have shrunk from the probe of the censor.

The anger of men at the exposure of their vices is much deeper than their pleasure at the approval of their virtues. So all the praise which Dickens bestowed upon our State prison system and our charitable asylums could not allay the irritation which he excited by his just denunciation of slavery.

Doubtless, the foreign tourist would have been in error in assuming that the toleration and prosperity of such persons as Tweed, Morrissey and Restell was a fair index or gauge of the moral state of the community, but he could not have been blamed for remarking such an astonishing spectacle, nor for accusing so supine and indifferent a community of practical participancy in their crimes. That one man should have arisen from the condition of an uneducated mechanic to the rank of State Senator, to the absolute control of a great political party, and the undisputed disposal of millions of the public money, and should for years have controlled elections and made and unmade high officials by his breath, all through the undisguised practice of bribery and corruption; that another man, originally a professional prize-fighter, should have been repeatedly chosen by wealthy and aristocratic constituencies to seats in the State Senate and the lower house of Congress, while all the time the proprietor of a gaming-house; and that a woman, by profession an abortionist, should have lived in a palace on Fifth avenue, and flaunted her showy equipage in Central Park; and that all these persons should for so many years, either not have excited or have

escaped the vengeance of the law, certainly argues a very singular condition of morals. In truth there is always a sort of secret sympathy and admiration in every community for successful and brilliant defiance of the law. For how many years did very respectable men quote Tweed's formula, "what are you going to do about it?" with a tacit assent to the idea that it would probably be of little use to try to do any thing about it. Even now, there are probably a good many virtuous and respectable people who think rather impatiently of Mr. Comstock's efforts to suppress infanticide and obscene literature. There was a good deal of shrewdness in the reply made by a lawyer whom the writer once detected in the act of purchasing a copy of the *Police Gazette*: "Is it possible that you buy that paper?" "Certainly," was the reply, "what gentleman doesn't?" So long as a crime does not affect ourselves, or involve human life, our sympathies for the sufferers are not apt to be very acute, and in fact are quite apt to be on the side of the offender. Men always like to see the weaker party come off best. That was the feeling which led ladies to visit highwaymen in their cells, and give them flowers on their way to execution. In regard to offenses like those of Tweed, it may be added, that "what is everybody's business is nobody's business." Offenses against the public treasury are quite generally regarded as venial. In the opinion of a great many very decent people it is not a very heinous offense to smuggle, provided one does not make a business of it; but a little amateur smuggling for one's self or one's friends, accompanied by a little judicious corruption of the revenue officers, is a rather clever achievement. Tweed had the advantage of being a public robber on a grand and audacious scale. What protected Madam Restell in her long career of infamy, on the other hand, was the peculiarly secret character of her offense, and the improbability of the employment of accomplices, or the use of appliances which could be traced, together with the idea so prevalent that the offense of abortion is rather against sentiment than against morals. It would be difficult to say what protected Morrissey in his business, unless it was true, as he was in the habit of declaring, that there was a public demand for well-regulated gambling places. Mr. Morrissey, with his blunted moral perceptions, used to justify himself by declaring that gambling was no worse than stock-jobbing, or for that matter, than trade itself. But when he invited us to come into his club house at Saratoga some years ago, and see the persons who were his patrons, our acceptance of his invitation convinced us that he was in no danger of prosecution, however erroneous might be his views upon the comparative moral equality of Saratoga and Wall street. If any one is disposed to try the experiment, he may easily experience the sensations of young Goodman Brown,

in Hawthorne's weird legend, when he attended the witches' pow-wow and found there the minister, elders, and deacons, and the matrons and maidens of his own church.

It is true that the community of the metropolis has lashed itself into a spasm of virtue. It has crushed out Tweed and "smashed his ring." It has driven the Restell woman to suicide, and has experienced a holy satisfaction in the reflections incident to that occurrence. The newspapers and the pulpit have had much to say against Morrissey's occupation, but we have not heard up to the hour of going to press, that his place has been shut up except for the funeral. It has thundered awfully. An outraged people has arisen in its majesty and wrath, and overwhelmed the audacious violators of the law, and all that sort of thing. But the question arises, are political corruption and bribery, abortion, and infanticide, and gambling, any less prevalent than before the storm? Are the laws against these crimes any less dead-letter laws? We would that these inquiries might be answered in the affirmative, but we fear that they cannot be. We fear that there is the same individual carelessness about infractions of public rights; the same unrestrained licentiousness; the same greed of gain and love of chance, which rendered possible the career of these three great law-breakers. Law-makers and lawyers cannot convert the spirit of a community, but they can at least do something to preserve law from derision. They can encourage attempts to detect and punish violations of law, and they can punish the guilty. The public authorities have been and are still blamable in this matter. There is a leaven of public sentiment that would sustain them in advances against the strong-holds of such crimes as we have mentioned, and a vigorous and unrelenting prosecution of such offenders would at length create a general public interest which is now lacking. Rain will extinguish a fire, but if you burn powder enough you will produce a rain, as the history of great battles show. There may not be public interest enough to inspire the prosecution of minor offenses, but the faithful discharge of official duty would engender the public spirit which should be the moving cause.

MARRIAGE.*

ISAAC VAN WINKLE, ESQ.

IT is through the marriage relations that the family has its origin; and in modern times the family, as individuals, compose the State. In other words, the State is an aggregate portion of the human family.

* These lectures on Civil law and Comparative Jurisprudence were collected for the instruction of the post-graduate students of the Columbia College Law School, and not with any view to their publication. They are made up of the Roman and the modern Civil law, and the Codes of the principal nations of Europe, and embrace all the continental law on the subjects. I have allowed them to be put in print for the use of those who wish to investigate the subject more thoroughly. All I purpose in these lectures is to take

The theory of the State is to preserve the family in its integrity; since out of the relations of the family to the State, spring the rights and duties relating to persons and property. The preservation of the family as an integral atomic group is one of the most important subjects in behalf of which law exists. Marriage determines the creation of a new family group, and from which act a number of relations spring which, taken in the aggregate, constitute marriage a status. The tendency in all advancing nations is to secure certainty and publicity by better guarantees than those offered by popular practices; and thus the anomaly is often presented by two sorts of marriage ceremonies co-existing in the same State—the one reflecting and possessing the ancient usages of the people; the other the creation of positive law as based upon carefully weighed considerations of public convenience. The theory of marriage as a constituent element of the Roman family was only an accessory of the potestas, that is, the power of the father over the children. According to Modestinus, marriage is "*Nuptiæ sunt conjunctio maris et feminae et consortium omnis vitæ, divini et humani juris communicatio.*" That is a contract by which a man and a woman enters into a mutual engagement to live together their whole life-time as enjoined upon them by laws human and divine.

Justinian says: "Roman citizens are bound together in lawful matrimony when they are united according to law." Again, he defines marriage, "*Nuptiæ autem sive matrimonium est viri et mulieris conjunctio individuum vitæ consuetudinem continens.*" Marriage or matrimony is a binding together of a man and woman to live in an indivisible union. Justinian's definition is perhaps the best since it attempts the least. *Nuptiæ* is properly the ceremonies attending the formation of the legal tie; and *matrimonium* is the tie itself; but the jurists use the two terms quite indifferently, as for instance, Modestinus says: "*Nuptiæ conjunctio maris et feminae.*" The "*individua vitæ consuetudo,*" implied a community of rank and position and of sacred and human law, "*divini et humani juris communicatio,*" but not necessarily of property. Marriage gave neither party any right over the property of the other, except when the wife passed in *manum*; and then all that she had belonged to the husband. Among the Romans marriage was distinguished into *matrimonium justum* and *non-justum*. Under the first both parties could lawfully marry, which form invested or carried with it the paternal power and other civil rights. In order that a marriage should have the effect of *justæ nuptiæ*, it was necessary that three conditions should be fulfilled. *First.* The consent of the parties. *Second.* The parties must be *puberes*; the man must be fourteen and the woman twelve years of age. *Third.* They must have the *connubium*, or the legal power of contracting marriage which consisted of three conditions. *First.* By the old law, both parties must be citizens, or be invested with just so much of citizenship as to enable them to form a *justæ nuptiæ*. *Second.* They must stand within

the legal systems of the leading nations of Europe under some head and compare them with each other. By this method we must embrace somewhat of the history and philosophy of jurisprudence. The chief function of the comparative method is to facilitate legislation, and the practical improvement of the laws. I conceive that there is no more important judicial inquiry than this, and from which the laws of our country can derive more advantage when it has been adopted as a part of our legal training and education.

the requisite degrees of relationship. *Third*. If under the power of any one, such person's consent is necessary; otherwise the marriage was void. If the *pater familias* knew of the marriage and did not oppose it, his assent was presumed. If either of the parties were *impuberes* at the time of the marriage, though then invalid, it became valid by living together with the intention of being married after puberty was attained. This form of marriage was strictly confined to Roman citizens, those to whom the *jus connubium* was conceded. The *connubium* is defined by Ulpian (Ulp. Frag., §3) as the capacity of marrying (*connubium est uxoris jure ducenda facultas*). When, therefore, there is no impediment between two persons to marry, they are said to possess the *connubium*. The *matrimonium non justum* did not confer the *patria potestas* and other important civil rights. There was no *connubium* in case of marriage between *Latini* or foreigners, or between Romans and foreigners; though an equally valid and binding marriage, it did not confer the *patria potestas* and other important civil rights. Ulp. Frag., §4. In ancient times equality of condition was required; and there could not be any marriage between patricians and plebeians. Freedmen were prohibited from marrying the freeborn. The *lex Canuleia*, A. U. C. 309, proposed by the Tribune Canuleius, abrogated the provisions of the Twelve Tables, which prohibited marriage between the patricians and plebeians; and it was the act of the right of intermarriage between the families of each that was one of the most powerful causes which led to the annihilation of the distinction between the two casts. By the *lex Julia*, A. U. C. 757, freedmen and freeborn were allowed to marry, subject to certain restrictions as regards alliances with families of senatorial rank, which were afterward removed by Justinian, who allowed senators to marry whom they pleased. Actual marriage was the privilege of the free alone; the union of slaves was called *contubernium*, that is the union of slaves, or of a slave with a free person. When they were allowed to cohabit, the children born of such a union were regarded as related in blood (*cognati*), and this relation prevented them marrying if afterward they became free.

Though certain forms of marriage were necessary to bring the wife in *manu mariti*, they were not essential to the validity of marriage itself; and the wife did not pass under the power of her husband unless she expressly consented so to do. *Manus* was originally a species of *potestas*, exerted by the man over the person of the woman. At first the husband exercised the *manus* over his wife only. At a later period it became the means of transfer without marriage. The original institution of the *manus* was that of the husband; the woman was brought under his authority, and was said to be in *filia loco*. It was an institution analogous to the *potestas*, but accompanied by many points of difference, on account of its close connection and dependence upon the marital relation. It was not every husband that could exercise the *manus* over his wife, but only those who had been married in a strictly legal manner. The *potestas* over the wife did not always exist in ancient times. It is incorrect to speak of marriage with *manus* and marriage without it. Marriage first took place, and the *manus* might or might not follow. When the marriage took place without *conventio in manum* the wife became simply an *affinis*, but not an *agnati*. In relation to her children she was in *consanguine loco*—a consanguine sister

to her own children. If her husband happened to be under the *potestas* of his father, she was to her father-in-law as a grand-daughter, or, as it was expressed, "*neptis loco est*." The *manus* gave the husband to a certain extent a right of judge over his wife. He had not the right of life and death, as it was possessed by the father over his children, nor even in a case of adultery unless she was taken in the very act. The husband had no right to sell or dispose of his wife. The *jus vendendi* was never employed to effect an actual sale; it was only used to obtain the dissolution of the *manus*. There is not a trace in the Roman law of the actual sale of a wife. As to the "*jus noce dandi*," when the woman had committed a crime, the husband could not surrender the person of his wife for her crime, but he might give up the property he had obtained through her. After "*conventionem in manum*," the woman was without property. If she had been *sui juris* before her marriage, upon marriage the husband became her universal successor. Her property was liable for her debts; and if the husband refused to pay her, there was an "*integrum restitutio*" to compel him to refund. When the woman died in *manum*, there could be no succeeding to her estate by inheritance, but when the husband died she had a right of inheritance in his estate as a child, that is to say, as a daughter. When the marriage was celebrated without *manus*, the *Prætor* granted the succession "*unde vi et uxoris*." From the earliest period of Rome consent alone was necessary to constitute a lawful marriage. But if the *manus* was to supervene, then the marriage must be either by *confarreatio*, *coemptio* or *usus*. *Confarreatio* was the most solemn form by the priest, in presence of the Pontifex Maximus and ten witnesses, in which the cake of wheat bread was broken and divided between the man and woman as an emblem of the "*consortium vite*," or life in common.

Coemptio was the more frequent form, and when the Romans wish to indicate the *manus*, they speak of *coemptio*. This form of marriage was a sort of symbolical purchase of the wife by the husband in the presence of five witnesses and the *libripens* or balance-holder who weighed the copper employed in the purchase. *Usus* was founded on prescription, by the woman cohabiting with the man as her husband for a whole year without being absent from his house three whole nights following each other. Under the new system marriage without *manus* became the ordinary rule of the common law, so that a married woman could dispose of her property without the consent of her husband; and attained a degree of liberty unknown to most systems of legislation; and contrasted very strongly with those heavy disabilities imposed on wives by the common law of England and Scotland. *Servius Sulpicius Rufus* gives us an account how betrothal took place in *Latium*. He that intended to marry a woman stipulated with the person that was to give her in marriage, that he would do so, and on his part promised (*spondebat*) to marry her. The woman that promised was called *sponsa*: the man that promised to marry her *sponsus*. If either party failed to perform their part of the promise, an action lay (*actio ex sponsu*); and if no good reason could be shown, the judge condemned the guilty party to pay damages according to the value of the match. The contract was terminated by death or renunciation. By the Julian law, if the marriage did not take place within two years, unless for special reasons, the contract of betrothal was at an end. In Rome there was no action

for a mere naked promise of a future marriage; but the same object, however, was accomplished by an Earnest (*arrha*) of a substantial kind, given at the time of betrothal and forfeited by the party who failed to carry out the promise. Impotency, diversity of religious sect, unchasteness in speech or action, and extravagance, were sufficient grounds for breaking off the match. Polygamy was not permitted by the Romans. Relationship within certain degrees, either of consanguinity or affinity, rendered the parties incapable of contracting marriage. Ascendants and descendants to the most remote degree could not marry. In the collateral line marriage was prohibited between brothers and sisters, including persons so related by adoption, and also in the special case where the parties stood "*in loco parentis*" to the other as uncle and niece, aunt and nephew. The Emperor Claudius was authorized by the Senate to marry his niece Agrippina, and the example was followed by some Romans; the practice was suppressed by Constantine. Marriage between *cousins-germain* which had for sometime been prohibited, was declared lawful by Arcadius and Honorius. Degrees prohibited in consanguinity were also prohibited in affinity, which is the connection arising from marriage between one of the married persons and the blood relations of the other. Under Constantine, who abrogated the ancient law, marriage was prohibited with the widow of the deceased brother, and the sister of a deceased wife. These rules as to forbidden degrees have been substantially adopted both in England and Scotland, except that they do not recognize adoption. In the Code Napoleon, articles 161, 162 and 163, the prohibitions are thus expressed. In the direct line marriage is prohibited between all ascendants and descendants, whether lawful or natural, and persons connected by affinity in the same line.

In the collateral line marriage is prohibited between the brother and sister, whether lawful or natural, and persons connected by affinity in the same degree.

Marriage is also prohibited between uncle and niece, aunt and nephew. Some marriages were prohibited by the Romans on the grounds of public policy. Governors of provinces were not allowed to take wives from the territory under their administration. Guardians could not marry their wards, or give them in marriage to their children. In the later period of the Empire Christians were not permitted to marry Jews. It is sometimes said that marriage is the foundation of family relationship and family rights; but Van Vangeron and other jurists are of opinion that this is not correct. The *Patria Potestas* seems to be the root of family relationship. The modern civilians held that marriage itself is not strictly a juridical relation, but has acquired this characteristic by reason of its great importance and wide-spread influence which it exercises on all the conditions of social life. Pestel says when we consider and weigh, and examine, even without the least superstition, the nature, the object and the consequences of marriage, we cannot help wondering how any person could fall into the error of classing it among civil contracts.

From the very earliest times of Rome the monogamic principle, which still prevails in the modern law, has been fully recognized; namely, that one man should be joined to only one woman. In ancient Rome, until the time of the Emperor Justinian, concubinage was permitted, but regulated, however, by the same principle. It was expressly

recognized by the *Lex Papia Poppæa*. In legal concubinage the monogamic principle prevailed. The concubine was never an *uxor* nor a *materfamilias*, she remained in the same rank, sustained the same family relations after she became a concubine as before. The wife entered into the dignity and rank of her lawful husband. The children of a concubine were *spurii* in the most extensive sense of the term. They were *liberti naturales*, had no legal father, but only a mother, *sine patri sunt*. The man who had begotten them was bound to provide alimony for them, and this marked the distinction between the *spurii*, in the strict sense of the term, and the *liberti naturales*. Concubinage was *licita consuetudo* long after Rome became Christian. We find titles in the digest referring to this relation of the sexes. It was forbidden in the East by Justinian in his *Novella 91*, and in Germany by the *Reichs Polizei, ordnung parad 1567* (title 26).

The Roman law proceeded upon the principle that marriage did not alter the property relations of man and wife, but it did not carry the doctrine of separation of goods, nor the *dotal* system, to the utmost limits; for it only extended the privilege subject to certain limitations as regards the rights of property after marriage. Opposed to this principle is the doctrine of the community of goods which has been embodied in the judicial system of France, Holland and the greater part of the German empire, and some other countries—a principle no doubt originating in the customs of the ancient Teutonic races that overran and conquered Europe. The Code Napoleon gives the amplest expression to this law in the six sections contained in the chapter on the laws of marriage. These six sections express the common law of France, the *Lois Coutumières* of the Franks. In juxtaposition to this law is that of the *Régime Dotal*, which has all but literally adopted the rules of the Roman law. In dealing with this question, as a part of the modern Roman law, it must not be forgotten that the codes of those countries, that have incorporated the civil law with their juridical systems, have modified the rules relating to marital relations; but they have not materially affected their principles. The precepts of the Roman law, as regards family relations and marriage, may be studied as a sure guide to the right appreciation of the juridical doctrines upon which the modern law has been established.

According to the laws of the Lombards, the parties to a marriage must be of full age, females twelve, males fourteen. By the Riparian and Frisian laws, a freeman who married a slave lost his liberty; but a Lombard could marry his slave, first making her free. A widow could not marry until one year after the death of her husband. The first part of the ceremony of marriage amongst all Barbarians was espousals. Custom, or the laws, appointed to every woman a guardian, without whose consent she could not be obtained in marriage. Amongst the Anglo-Saxons, marriage was treated as a purchase of the female from her legal guardian; she could not be married against her consent. The contract of espousals was made with the guardian by the intended husband paying, or agreeing to pay, a sum of money as the nuptial price of the female, or valuables for the guardian's benefit, and all the relations of the female were entitled to it. A ring was frequently given, *arrharum nomine*, in earnest of the bargain. The amount of the nuptial price was sometimes fixed by law, but more commonly depended on the agreement. By the law of the Saxons the price

was fixed at three hundred *solidi* (over three hundred pounds in gold coin), both for a virgin and a widow, this amounted to a prohibition of marriage in respect of vast numbers. By the Salic law the price of espousals was only one *solidus* and one *denarius* (8½ pence), to her guardian, if she were a virgin. Amongst the Burgundians a woman who married a third time could keep whatever she could obtain as the nuptial price. The woman who married one man after being espoused to another, became among the Visigoths the slave of her lawful spouse; and the man who married a woman espoused to another, forfeited his liberty to the lawful spouse. Amongst the Lombards the man was bound to marry the woman to whom he was espoused, within two years, or he forfeited the nuptial price. To desert a woman and marry another was an insult to the whole family, and he was compelled to pay a composition to the relations; and that the value of the girl might not be diminished by such destitution, the barbarians required, besides the fine, that the man should swear unto twelve of his kindred that he had deserted the girl solely from the love he bore to the woman he had married, and not from any fault of the girl or from enmity to the relations. This is a species of justice and refinement not practiced in our own day. Amongst the Franks the bride on the following morning was entitled to claim from her husband a morning gift (*morgungeba*), in addition to her dower. The Emperor Leo VI, A. D. 886, appears to have been the first of Roman legislators that declared ecclesiastical benediction to be necessary to a marriage. The early Barbarian codes made no mention of ecclesiastical benedictions in the celebration of marriage. In the history of Gregory of Tours, marriage is treated as a civil ceremony. The first mention of priests in the ceremony of marriage in the laws of the Visigoths, which were confirmed at the various councils of Toledo, is in a law of Chintasevind, A. D. 642. In the time of Charles the Bald, marriage appears to have become among the Franks an ecclesiastical ceremony. Its first mention in the laws of the Anglo-Saxons is in those which were made in the reign of King Edmund, 940. It appears that among the Barbarians, as well as the Romans, in the early ages, ministers of religion were not essential to complete the nuptial ceremony.

The Code Napoleon defines marriage to be a civil institution entered into by two persons willing and able to contract, and not laboring under any legal disability. Each party must exercise *free-will*; for it is the consent and not the mere union of the parties that constitutes marriage. In France, a man cannot marry till he has attained the age of 18 years; the woman must be 15 years of age. In England the same age of consent to marry is the same as the Roman law, 14 for males; 12 for females. In certain cases dispensation respecting age may be obtained from the government. Consent is necessary to validate a marriage. Consent was the essential part of marriage by the Roman law. The different forms and varied ceremonies were merely accessories. If the persons who were desirous of marrying were in the power of any one, the consent of the latter was required; if refused, the marriage was absolutely void. A second marriage during the life of the first husband or wife is absolutely void. A marriage under such circumstances, in England, is a felony. It is called *bigamie* (bigamy). The consent of both father and mother is required by a son under 25 years of age, and by a daughter under 21; if the parents disagree as to the consent, that of the father

suffices. If the father or mother is dead, or cannot give consent, the consent of one is sufficient. If both are dead, then the grandfather and grandmother take the place of the parents. If the grandfather and grandmother of the same line disagree, the consent of the grandfather suffices; dissent between the two lines carries consent. When a man has attained his 25th year and the woman her 21st, both are still bound to ask, by a formal notification, the consent of their parents; and till the man has attained his 30th year, and the woman her 25th, this formal act must be repeated twice, from one month to another; and one month after the third application, it is lawful for the parties to marry, with or without consent. After the age of 30, it is lawful to marry, in default of consent, a month after one formal notice has been given, which notice must be served upon the father and mother or grandfather, by two notaries, or by one notary and two witnesses. In the event of the parents or ascendants to whom the notification should be made, being absent, a copy of the judgment declaring the absence, must be produced; or in default of it, *un acte de notoriété* drawn up, on the declaration of four witnesses, by the justice of the peace. So rigid are the marriage laws in France that if these rules are neglected, if the registrar neglects to state in the marriage certificate that the consent of the parents had been obtained, he is liable to a fine of 300 francs and six months imprisonment; and when the prescribed notices are not carried out, to a fine of 300 francs and one month imprisonment. The same formalities are required for illegitimate children when affiliated. If not affiliated, marriage cannot take place before the party is 21 years of age without the consent of a special guardian appointed for the purpose. If neither parents nor grandparents are alive, the consent of the family council is required. Marriage is prohibited between all in the direct line, whether legitimate or illegitimate, and between persons related by marriage in the same line. It is also prohibited between an uncle and a niece; an aunt and a nephew, and also between brothers-in-law and sisters-in-law; but in the two latter cases the government can dispense with prohibition. The Institutes do not notice the marriage of a brother-in-law and a sister-in-law. It was permitted up to the time of Constantine, who forbade it. The prohibition was renewed by Valentinian, Theodosius and Arcadius. The marriage of first cousins, previously forbidden, was made legal by Arcadius and Honorius. Marriage is a civil ceremony in France, and must be celebrated publicly before the registrar of the parish where one of the contracting parties has resided six months. If the parties have not resided six months, the bans must be published at the parish of their former residence. If the contracting parties, or one of them, cannot marry without the consent of another person, the bans must also be published in the parish where such person resides. A marriage contracted in a foreign country between a Frenchman and a Frenchwoman and between a French person and a foreigner, is valid in France, if celebrated according to the forms of the country, provided it has been preceded by the publication of bans and with the consent of the parents. If the parties return to France, the certificate of marriage must be registered within three months of the returning at the place of their abode. The registration of births, marriages, and deaths made in a foreign country before the French Consul, according to the French laws, without any other formalities, is valid.

Marriage, as defined by the Holland Code, is the union of a man and woman for the purpose of having and rearing children, and who are to continue united as one person for the rest of their lives through good and bad fortune. It is frequently preceded by a contract *trouw bekoften* consisting in the obligation of the parties to contract a lawful marriage with each other. The persons who enter into this contract must be capable of being united in marriage, and when the man is not 25 years of age, or the woman 20, the consent of the parents, guardians or relatives is necessary, without which the marriage is clandestine and bad in law. These contracts of marriage may be entered into *purely*, i. e., without any condition, or under condition, provided the condition be not *contra bonos mores*, or impossible, and also on the condition of taking place immediately or after a certain time. The proof of consent to the contract of marriage must be perfectly clear, and on failure of proof, even the tender of oath could not be admissible in this case. The contract of marriage *trouw bekoften* gives an action for the perfecting of the marriage, by which the party, who is unwilling, may be constrained to the performance by civil confinement (*Gyzeling*). This contract, like all other contracts, may be rescinded by the mutual consent of the parties, but it cannot be annulled by one of the parties in opposition to the other, not even on the ground that the marriage would be displeasing to his or her parents, and that they would rather be obedient to them. On lawful grounds, the contract may be dissolved by one of the parties; as, for example, a sudden and continued lunacy of either of the parties, scandalous conduct of the woman with another man and *vice versa*—excessive dissipation, the incapacity to have children, a manifest deceit in the contract by the concealment of considerable debts and the like. Frequently parties do not wish to intermarry according to the law of the land, but on terms and conditions which are regulated by a special contract, which is termed an Ante-Nuptial Contract—that is to exclude the community of goods and the like which would otherwise take place by marriage, according to the law of Holland, without an ante-nuptial contract. Such a contract must be in writing, and contained in a *public instrument* (as by a notary), though it is not necessary to be *registered judicially* since the *Placaat* on this head, of the 30th July, 1624, has never been acted upon. By marriage contracts, all such conditions may be stipulated as the parties think proper, provided they are not contrary to the nature of marriage, viz.: that the parties shall on each side bring in their separate property to the support of the marriage, without inducing any community of goods; that one shall not be answerable for the debts of the other contracted before or after the marriage; that the gain or loss shall either be mutual or that the community in this shall be excluded; or that the wife or her heirs shall have the choice, on the dissolution of the marriage, to share or not in the profit and loss; that the wife, on the dissolution of the marriage, for her property, shall have the right of dower, legal mortgage or preference, or the administration of her own property free from marital power; that the survivor shall be entitled to a certain sum out of the goods of the party who first dies. Such contracts may also provide *how*, after the death of one or both of the parties, the succession to the property is to be regulated, and how the goods of the children, in case they die within the age to make a will, shall be disposed of. Thus ante-nuptial contracts cannot by

any act during the lives of the parties, even with mutual consent, be afterward revoked. But such a revocation seems good when made by the last will, provided they both continue in this mind, and confirm it by death. Whether the conditions in the marriage contract concerning the succession to the property are in like manner irrevocable, so that one of the parties shall not be at liberty to make any alteration therein without the consent of the other, is a point on which jurists differ. Van der Linden is inclined to the opinion that such condition has merely the force of a last will, and may, therefore, be revoked by both or even one of the parties.

The requisites to a lawful marriage in Holland are as follows:

The capability of the parties to enter into this state.

Those persons are incapable who are already in the marriage state, since polygamy is not permitted in Holland.

Those who have not yet attained the age of puberty, which in males is fourteen, and females twelve years.

A widow whose husband has not been dead a sufficient time to determine to a certainty whether she is pregnant or not—such mental incapacity as to render either party incapable of contracting—incurable bodily infirmity—incapability to beget children, and when the parties are too nearly related in blood or affinity—marriage is not only forbidden between those who have previously lived in a state of adultery, but even punishable. With respect to parties who have eloped, there was a strong prohibition in Holland, which was afterward very much relaxed when the consent of the parents is subsequently obtained. The marriage of Christians with Jews or Mahometans was forbidden. Those between Lutherans and Papists were subject to heavy penalties; but this law is now repealed. No guardian or curator may intermarry with his ward or person placed under him till after his accounts are passed and closed. The consent of parents, the publication of bans, or marriage proclamation, are in substance the same as laid down in the civil law and Code Napoleon. There is no legal condition to be observed. Persons may marry above or below their social position.

Marriage in England.—In the celebrated case of Dalrymple, Lord Stowell's opinion was that prior to the Marriage Act of George II, marriage, by the law of England, was constituted by consent *de presenti* without the presence of a clergyman or any religious ceremony. That opinion was overruled by the judgment of the House of Lords, in *Queen v. Mills*, in 1844, where it was decided that after the decree of the council of Trent, the ecclesiastical law of England required the presence of a clergyman to marriage. The English formalities of marriage are now regulated by the Marriage Acts which permit marriage to be solemnized either with a religious ceremony or without it. The act of 4 Geo. IV, chap. 76, adhered to the principle of the common law, that marriages taking place in England must be solemnized between all persons, whatever their religious belief, by a minister in holy orders, and according to the rights of the Established Church, the only exceptions being in favor of Jews and Quakers, whose usage was left undisturbed. This principle having been found to operate harshly against Dissenters, the acts 6 and 7 Victoria IV, chap. 85, since amended in sundry points of detail, introduced new regulations, whereby marriages may now be celebrated in England, after due notice and certificates issued, either in a registered place of worship and in the presence of some

registrar of the district and two witnesses, or at the office of the superintendent-registrar, and in his presence, and in the presence of some registrar of the district, and of two witnesses, upon making the declaration, and using the form of words prescribed. Consent alone will not constitute a marriage however clearly expressed before witnesses. There must be some previous notice, or proclamation of banns, or license. Either a clergyman of the Established Church, or the registrar of the district must be present with witnesses at the ceremony, or mutual declaration respectively; and the marriage must be in an authorized place, and at authorized hours. It seems to me that a well-devised Marriage Act in this State would prevent much fraud and litigation. It would secure many families from the blot or stain put upon their good names by pretended claimants who seem to come to the surface just at the time such exigencies arise; and claiming just such sort of relationship as needed, whether by legitimate or illegitimate descent.

In England the marriage ceremony must take place in a church, or after due notice and certificate, in a licensed chapel or building, or in the registrar's office. When it takes place in a church or chapel of the Church of England, it must be performed by the officiating minister according to the rites of the church and in the presence of two witnesses. If the marriage is solemnized in a registered dissenting chapel, there may be superadded to the civil contract whatever religious ceremony the parties may think fit to adopt. But if the parties contract marriage in a registrar's office, the mutual declaration and exchange of matrimonial consent completes the civil contract, and no religious ceremony is used at such marriage. 19 and 20 Vict. chap. 119, § 12.

The Archbishop of Canterbury is authorized to grant special licenses to marry at any convenient time or place. In all other cases marriage in England cannot take place in a private house, but must be celebrated with open doors in canonical hours—that is between 8 and 12 o'clock in the forenoon. A minor, not a widow or widower, who desires to marry must obtain the consent of the father, if living. If the father be dead, the consent of a guardian is required, if no guardian, the mother's consent, if unmarried; if there be no mother unmarried, then the consent of a guardian appointed by the Court of Chancery; and in some cases of disability, or when consent is unreasonably withheld, relief may be obtained by petition to the Lord Chancellor. Marriage was formerly void by want of consent by parents or guardian. If a minor now succeeds in getting married it is not accounted void. 3 and 7 Will. IV, chap. 85, § 25. All marriages, whether taking place under 4 Geo. IV, chap. 76, or 3 and 7 Will. IV, chap. 85, are required by law to be registered. The rules of the common law have been very generally adopted in the United States, and in a legal point of view marriage is regarded as a civil contract, governed by the same general principles as other contracts. But unlike other contracts it is indissoluble, except by the death of one of the parties, and by causes sanctioned by law. The common law requires no ceremony, no solemnization by minister, priest or magistrate, and such marriage is complete where there is a full and mutual consent by parties who are capable of contracting the relation, even though not followed by cohabitation. No form of words is necessary in solemnizing the marriage contract. A bow of the head in response to the proper interrogatory may indicate

assent as well as the words "yes" or "I do." But *intention* is an essential ingredient of the contract of marriage—a marriage ceremony performed in *jest*, even by a justice of the peace who was in doubt at the time whether the parties were in jest or earnest, is not binding. A promise to marry in future, though followed by cohabitation as man and wife, is not a valid marriage. Where the female is under fourteen years at the time of her marriage and she continues to live with her husband as man and wife, after she reaches that age, it will be a valid marriage at common law. The assent to marriage must be free from all illegal restraint, and the party must have the legal capacity to enter into the contract. The marriage acts of England do not extend to any marriage contracted by British subjects out of England. A marriage entered into in Scotland or in a foreign country, if made in such form as is deemed sufficient in the place where it is contracted, will be considered valid by the law of England; and even the Gretna Green marriages were recognized in English courts, though the parties eloped to Scotland on purpose to evade the laws of marriage in their own country. It is a general rule, whatever inconveniences may sometimes attend it, that a marriage duly solemnized in any country according to its own law, ought to be recognized as binding in point of form all over the world. But there is a distinction between marriage rites and the legal capacity of marrying; for the form of the ceremony depends on the place where the marriage is solemnized, while the legal capacity of persons to marry is determined by the country of their domicile. This principle was established by the judgment of the House of Lords in *Brook v. Brook*. The parties were domiciled in England, where marriage with a deceased wife's sister is prohibited, and they were married at the Danish port of Altona, where the law permitted them to marry. This marriage was declared invalid, and the grounds of decision were, that all persons domiciled in England can marry only those whom the law of England allows them to marry; and that by getting the ceremony performed at Altona or elsewhere, they might vary the form but could not enlarge the capacity to marry.

Marriage in Scotland.—By the law of Scotland marriage is a civil contract constituted by the mutual consent of the parties. A promise to marry at a future period, where no sexual intercourse has followed upon it, may be resiled from, though the person resiling may be liable in damages for breach of promise. The consent of parents or guardians in the case of minors, to marry, is not necessary. The law of Scotland recognizes four different modes by which marriage may be constituted. 1. A public or regular marriage celebrated by a minister after proclamation of banns. 2. Mutual consent by words *de presentii*, without the nuptial benediction or *consubitus*. 3. Promise of marriage, followed by *copula*, at least when declared a marriage by an action of declaration in the Court of Sessions. 4. Cohabitation as man and wife, and being held and reputed as married persons (Fraser, Personal and Domestic Relations, vol. I, p. 112). A public or regular marriage is one celebrated by a clergyman in presence of two or more witnesses, after due proclamation of banns according to the rules of the church. All other marriages are clandestine or irregular; but if the matrimonial consent has been seriously and deliberately interposed, they are equally effectual with regular marriages, though they expose all concerned in

them to certain statutory penalties, which, however, are seldom if ever enforced in modern times. By the 4 and 5 Will. IV, ch. 28, regular marriage may be solemnized by the clergy of any religious persuasion, after due proclamation of bans in the parish churches of both parties. The privilege was previously confined to ministers of the Established Church of Scotland and Episcopal clergymen who had taken the oaths to the government. Among Presbyterians these regular marriages are usually solemnized at the private residence of the woman, but the place of residence is a matter of indifference in point of law. The question of mutual acceptance as husband and wife is put by the minister and answered by the parties; he then declares them married persons in presence of the witnesses, and the ceremony is closed by the nuptial benediction. The registration of marriages in Scotland is regulated chiefly by 17 and 18 Vict., ch. 80, and 18 Vict., ch. 29. As to irregular marriages and the evidence by which they may be established, I will give you in the words of Lord Moncreiff, whose authority in consistorial questions is justly entitled to the greatest weight: "The governing rule of law is unquestionably that marriage is constituted by the consent of the parties alone; and that upon legal and satisfactory evidence that such mutual consent has been seriously and deliberately interposed, the court will declare such marriage, though it should be clear that no formal ceremony or celebration has taken place. Proof of celebration in *facte ecclesie* is of course the first and best mode. Proof of a formal, serious and deliberate declaration of consent before witnesses, if the court be satisfied that such declaration was made with the true intention of entering into marriage, is another settled mode of proving the constitution of marriage, as in the cases of *Macadam*, *Dalrymple*, and many other cases. Whether declarations or acknowledgments of marriage given and accepted, if there be no doubt of the reality of the purposes, are effectual to the same end, as in the cases of *Edmonstone v. Cochran*, *Honeyman*, and other cases, legal proof of a promise of marriage, followed by that intercourse which generally attends marriage, is held to prove the mutual consent required, on a presumption that at the moment of consummation, that which was before a promise only, became a present consent to marriage. Some lawyers have doubted whether this last mode of proving marriage does not differ from the others in this point, that it requires to be established by declaration in the life-time of the parties. Without attempting to resolve this point, it is a settled rule of law that the promise must be proved either by the writing or by the oath of the party by whom it is said to have been given. Finally, the present consent necessary to constitute marriage may be effectually, and, in the Lord Ordinary's opinion, most satisfactorily constituted by a long or continued course of open cohabitation of the parties in the avowed characters of husband and wife, in which mode of proof regard must be had, in the first place, to what in general constitutes the cohabitation of persons bearing the relation of husband and wife, and then to the habit and repute, the reputation in which the parties have been held by their friends and connections, and the community in which they live. When such a cohabitation, for a length of time, with the distinct character affixed to it by the open acts and conduct of both parties is proved by credible and consistent evidence, no more satisfactory proof can be

required that the present consent to marriage has been given in the face of all the world. But it is evident from the very nature of the thing, that this mode of proving the consent necessarily supposes that there was no secrecy in it; that the parties did truly dwell together in the common meaning of the term cohabitation; and that they consorted with one another, not in the mode proper to a state of concubinage or illicit intercourse, but in the manner and with all the ordinary qualities of the marriage state in christian nations! Lord Moncreiff in *Lowrie v. Mercer*, 28 May, 1840, 2 D. and B. 960. It has been a question among lawyers in Scotland, whether promise followed by copula is itself marriage, or is only a ground on which marriage may be constituted by a declarator in the Court of Sessions in the life-time of the parties. This point, which may become a matter of great importance as affecting the legitimacy of children, if raised after the death of either of the parents, does not appear to have been judicially decided. In a case which came before Lord Moncreiff in 1843, he expressed an opinion that a promise *cum copula* does not constitute marriage without a declaration in the Consistorial Court; and that if no such declarator be brought in the life-time of both parents, the marriage can never be established afterward. To put an end to runaway marriages by English persons at Gretna Green and elsewhere in Scotland, which had become very common, it was enacted by 19 and 20 Vict., chap. 93, that after the 31st December, 1859, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for 21 days next preceding such marriage." In Scotland a process called a declarator of putting to silence may be brought in order to set aside a groundless claim of marriage. On the other hand, where a marriage which has actually taken place is denied by one of the parties, the other, by raising an action of declarator in the Court of Sessions, may have the marriage declared, with all its consequent rights and privileges.

The laws respecting marriage and the relations pertaining to its institution are among civilized nations very similar. There is now no legal equality of condition to be observed. Persons may marry above or below their social position. We find that marriage among all nations is a civil contract, constituted by consent of the parties. In some countries certain religious forms are requisite to constitute a regular marriage; but that the non-observance of these forms did not invalidate the marriage. Under the Roman law no writing of any kind was necessary, except where the parties were of unequal condition; then a contract became necessary to rebut the presumption of concubinage. Justinian afterward required a written contract in the marriage of great dignitaries of the empire and persons of illustrious rank.

In France and Holland it is usual to make a contract to regulate the respective rights and interests of the parties.

Consent alone in England is not sufficient to constitute a regular marriage. There must be notice or proclamation of bans or license. In Scotland marriage is a civil contract, and consent of parties is sufficient; but a public or regular marriage can only follow after due proclamation of bans. It is so in Holland and even under the Barbarian laws. As to the age of the

respective parties and their ability or disability to contract marriage, they are in all civilized countries about the same.

The rules as to the forbidden degrees are substantially the same in England, Scotland, France, Holland, the German Empire, and the other continental powers, as they were under the Roman law. Under the Barbarians the parties must not be related within the sixth degree. The Salic law resembles the Roman in this respect. The prohibition in the Codes, Heinneccius observes, were taken more from the canons than the ancient German customs. *Vide* his Elements — Juris Germania.

POWER OF CONGRESS OVER THE MAILS.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM. 1877.

MATTER OF JACKSON.

1. The power vested in Congress to establish "post-offices and post-roads," embraces the regulation of the entire postal system of the country. Under it Congress may designate what shall be carried in the mail, and what shall be excluded.
2. In the enforcement of regulations excluding matter from the mail, a distinction is to be made between different kinds of mail matter; between what is intended to be kept free from inspection, such as letters and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined.
3. Letters and sealed packages subject to letter postage in the mail can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.
4. Regulations against the transportation in the mail of printed matter, which is open to examination, cannot be enforced so as to interfere in any manner with the freedom of the press. Liberty of circulating is essential to that freedom. When, therefore, printed matter is excluded from the mail, its transportation in any other way cannot be forbidden by Congress.
5. Regulations excluding matter from the mail may be enforced through the courts, upon competent evidence of their violation obtained in other ways than by the unlawful inspection of letters and sealed packages; and with respect to objectionable printed matter, open to examination, they may in some cases also be enforced by the direct action of the officers of the postal service upon their own inspection, as where the object is exposed and shows unmistakably that it is prohibited as in the case of an obscene picture or print.
6. When a party is convicted of an offense, and sentenced to pay a fine, it is within the discretion of the court to order his imprisonment until the fine is paid.

ON petition for writs of *habeas corpus* and *certiorari*.

Mr. Justice FIELD delivered the opinion of the court.

Section 3894 of the Revised Statutes provides that "No letter or circular concerning (illegal) lotteries, so-called gift-concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail;" and that "any person who shall knowingly deposit or send any thing to be conveyed by mail, in violation of this section, shall be punishable by a fine of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution." By an act passed in July, 1876, the word "illegal" was stricken out of the section. Under the law as thus amended the petitioner was indicted, in the Circuit Court of the United States for the

Southern District of New York, for knowingly and unlawfully depositing on the 23d of February, 1877, at that district, in the mail of the United States, to be conveyed in it, a circular concerning a lottery offering prizes, inclosed in an envelope addressed to one J. Ketcham, at Gloversville, New York. The indictment sets forth the offense in separate counts so as to cover every form in which it could be stated under the act. Upon being arraigned the petitioner stood mute, refusing to plead, and thereupon a plea of not guilty was entered in his behalf by order of the court. Rev. Stat., § 1032. He was subsequently tried, convicted, and sentenced to pay a fine of one hundred dollars, with the costs of the prosecution, and to be committed to the county jail until the fine and costs were paid. Upon his commitment, which followed, he presented to this court a petition alleging that he was imprisoned and restrained of his liberty by the marshal of the Southern District of New York, under the conviction; that such conviction was illegal, and that the illegality consisted in this: that the court had no jurisdiction to punish him for the acts charged in the indictment; that the act under which the indictment was drawn was unconstitutional and void; and that the court exceeded its jurisdiction in committing him until the fine was paid. He therefore prayed for a writ of *habeas corpus* to be directed to the marshal to bring him before the court, and a writ of *certiorari* to be directed to the clerk of the Circuit Court to send up the record of his conviction, that this court might inquire into the cause and legality of his imprisonment. Accompanying the petition as exhibits were copies of the indictment and of the record of conviction. The court, instead of ordering that the writs issue at once, entered a rule, the counsel of the petitioner consenting thereto, that cause be shown, on a day designated, why the writs should not issue as prayed, and that a copy of the rule be served on the Attorney-General of the United States, the marshal of the Southern District of New York, and the clerk of the Circuit Court. The Attorney-General, for himself and others, answered the rule by averring that the petition and exhibits do not make out a case in which this court has jurisdiction to order the writs to issue, and that the petitioner is in lawful custody by virtue of the proceedings and sentence mentioned in the exhibits, and the commitment issued thereon.

The power vested in Congress "to establish post-offices and post-roads" has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents. The validity of legislation prescribing what should be carried, and its weight and form, and the charges to which it should be subjected, has never been questioned. What should be mailable has varied at different times, changing with the facility of transportation over the post-roads. At one time only letters, newspapers, magazines, pamphlets, and other printed matter, not exceeding eight ounces in weight, were carried; afterward books were added to the list, and now small packages of merchandise, not exceeding a prescribed weight, as well as books and printed matter of all kinds, are transported in the mail. The power possessed by Congress embraces the regulation of the

entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail. In their enforcement a distinction is to be made between different kinds of mail matter; between what is intended to be kept free from inspection, such as letters and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.

Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation the publication would be of little value. If, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress.

In 1836, the question as to the power of Congress to exclude publications from the mail was discussed in the Senate and the prevailing opinion of its members, as expressed in debate, was against the existence of the power. President Jackson, in his annual message of the previous year, had referred to the attempted circulation through the mail of inflammatory appeals, addressed to the passions of the slaves, in prints, and in various publications, tending to stimulate them to insurrection, and suggested to Congress the propriety of passing a law prohibiting, under severe penalties, such circulation of "incendiary publications" in the Southern States. In the Senate, that portion of the message was referred to a select committee, of which Mr. Calhoun was chairman; and he made an elaborate report on the subject, in which he contended that it belonged to the States, and not to Congress, to determine what is and what is not calculated to disturb their security, and that to hold otherwise would be fatal to the States; for if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary and enforce their circulation. Whilst, therefore, condemning in the strongest terms the circulation of the publications, he insist-

ed that Congress had not the power to pass a law prohibiting their transmission through the mail, on the ground that it would abridge the liberty of the press. "To understand," he said, "more fully the extent of the control which the right of prohibiting circulation through the mail would give to the government over the press, it must be borne in mind that the power of Congress over the post-office and the mail is an exclusive power. It must also be remembered that Congress, in the exercise of this power, may declare any road or navigable water to be a post-road; and that, by the act of 1825, it is provided 'that no stage, or other vehicle which regularly performs trips on a post-road, or on a road parallel to it, shall carry letters.' The same provision extends to packets, boats, or other vessels on navigable waters. Like provision may be extended to newspapers and pamphlets, which, if it be admitted that Congress has the right to discriminate in reference to their character, what papers shall or what shall not be transmitted by the mail, would subject the freedom of the press, on all subjects, political, moral, and religious, completely to its will and pleasure. It would, in fact, in some respects, more effectually control the freedom of the press than any sedition law, however severe its penalties." Mr. Calhoun, at the same time, contended that when a State had pronounced certain publications to be dangerous to its peace and prohibited their circulation, it was the duty of Congress to respect its laws and co-operate in their enforcement; and whilst, therefore, Congress could not prohibit the transmission of the incendiary documents through the mails, it could prevent their delivery by the postmasters in the States where their circulation was forbidden. In the discussion upon the bill reported by him, similar views against the power of Congress were expressed by other senators, who did not concur in the opinion that the delivery of papers could be prevented when their transmission was permitted.

Great reliance is placed by the petitioner upon these views, coming as they did, in many instances, from men alike distinguished as jurists and statesmen. But it is evident that they were founded upon the assumption that it was competent for Congress to prohibit the transportation of newspapers and pamphlets over postal routes in any other way than by mail; and of course it would follow that if, with such a prohibition, the transportation in the mail could also be forbidden, the circulation of the documents would be destroyed and a fatal blow given to the freedom of the press. But we do not think that Congress possesses the power to prevent the transportation in other ways as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire over postal routes of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted — consisting of letters, and of newspapers and pamphlets when not sent as merchandise — but further than this its power of prohibition cannot extend.

Whilst regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters or sealed packages subject to letter postage, without warrant issued upon oath or affirmation, in the search for prohibited matter, they may be enforced upon competent evidence of their violation obtained in other ways, as from the

parties receiving the letters or packages, or from agents depositing them in the post-office, or others cognizant of the facts. And as to objectionable printed matter, which is open to examination, the regulations may be enforced in a similar way, by the imposition of penalties for their violation through the courts; and in some cases, by the direct action of the officers of the postal service. In many instances those officers can act upon their own inspection, and from the nature of the case must act without other proof, as where the postage is not prepaid, or where there is an excess of weight over the amount prescribed, or where the object is exposed and shows unmistakably that it is prohibited, as in the case of an obscene picture or print. In such cases, no difficulty arises, and no principle is violated, in excluding the prohibited articles or refusing to forward them. The evidence respecting them is seen by every one and is in its nature conclusive.

In excluding various articles from the mail the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals. Thus, by the act of March 3, 1873, Congress declared, "that no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal-card upon which indecent or scurrilous epithets may be written or printed, shall be carried in the mail, and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things, * * * shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offense, be fined not less than one hundred dollars nor more than five thousand dollars, or imprisonment at hard labor not less than one year nor more than ten years, or both, in the discretion of the judge."

All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries, institutions which are supposed to have a demoralizing influence upon the people. There is no question before us as to the evidence upon which the conviction of the petitioner was had; nor does it appear whether the envelope in which the prohibited circular was deposited in the mail was sealed or left open for examination. The only question for our determination relates to the constitutionality of the act, and of that we have no doubt.

The commitment of the petitioner to the county jail until his fine is paid was within the discretion of the court under the statute.

As there is an exemplified copy of the record of the petitioner's indictment and conviction accompanying the petition, the merits of his case have been considered at his request upon this application, and as we

are of opinion that his imprisonment is legal, no object would be subserved by issuing the writs; they are, therefore, denied.

ISSUING CIRCULATING NOTES FOR FRACTIONS OF A DOLLAR.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

UNITED STATES V. VAN AUKEN.

The act of Congress of July 17, 1872, section 2 (12 Stat. 592; Rev. Stat. 711, § 3583) declares that "no private corporation, banking association, firm, or individual, shall make, issue, circulate, or pay out any note, check, memorandum, token, or other obligation, for a less sum than one dollar, intended to circulate as money, or to be received, or used in lieu of lawful money of the United States," and provides a penalty for a violation of the act. Defendant was indicted for circulating an instrument reading as follows: "The Bangor Furnace Company will pay the bearer on demand fifty cents, in goods at their store in Bangor, Mich." Held, that the instrument not being payable in lawful money, the issue and circulation thereof was not in violation of the act in question.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the Western District of Michigan.

Mr. Justice SWAYNE delivered the opinion of the court.

The act of Congress of July 17, 1872, § 2 (12 Stat. 592; Rev. Stat. 711, § 3583), declares that "no private corporation, banking association, firm, or individual shall make, issue, circulate, or pay out any note, check, memorandum, token, or other obligation, for a less sum than one dollar, intended to circulate as money, or to be received or used in lieu of the lawful money of the United States," and announces as a penalty for the offense fine or imprisonment, or both.

Van Auken was indicted under this act for circulating the "obligations" of the Bangor Furnace Company, a corporation created by and under the laws of the State of Michigan, which obligations are alleged to be in *hæc verba*.

"BANGOR, MICH., August 15, 1874.

"The Bangor Furnace Company will pay the bearer on demand fifty cents, in goods, at their store in Bangor, Mich.

(Signed)

"A. B. HOUGH, Pres.

"CHAS. D. RHODES, Treas."

"Each of which said obligations was for a less sum than one dollar, and was intended by the said Aaron Van Auken to circulate as money, and to be received in lieu of the lawful money of the United States, contrary," etc.

Van Auken demurred to the indictment. The opinions of the judges of the Circuit Court were divided and opposed upon two questions, which were thereupon certified to this court for final determination.

1. Where the obligation set forth in the indictment is within any valid statute of the United States.

2. Whether the statute under which the indictment was found is constitutional.

The solution of the first question depends upon the construction to be given to the words "for a less sum than one dollar." The object of the provision was obviously to secure as far as possible the field for the circulation of stamps, as provided in the preceding section, without competition from any quarter. (This currency was superseded by the fractional notes authorized to be issued by the act of March 3, 1863, § 4, 12 Stat. 711.) Small notes payable in any specific articles, if issued, could have only a neighborhood circulation, and but a limited one there. It could be but

little in the way of the stamps or small notes issued for the purposes of circulating change by the United States. Congress could, therefore, have had little or no motive to interfere with respect to the former. This must be borne in mind in the examination of the question in hand.

A dollar is the unit of our currency. It always means money or what is regarded as money. In this case the statute makes it the standard of measure with reference to the forbidden notes and obligations. If one of them be for a larger "sum than one dollar," it is not within the prohibition and is not affected by the law. It is a fair, if not a necessary inference, that the standard of measurement named was intended to be applied only to things *ejusdem generis*, in other words, to notes for money and to nothing else.

It is certainly inapplicable to any thing not measurable by the pecuniary standard. It could not be applied where the measurement was to be, *ex gratia*, by the pound, the gallon, the yard, or any other standard than money. This view is supported by the statutory requirement that the forbidden thing must be "intended to circulate as money, or to be received or used in lieu of the lawful money of the United States." One of the lexical definitions of the word "sum," and the sense in which it is most commonly used, is "money." "Sum. (2) A quantity of money or currency; any amount indefinitely, as a sum of money, a small sum, or a large sum."—Webster's Dic. "For a less sum than one dollar" means exactly the same thing as, for a less sum of money than one dollar. In the former case there is an ellipsis. In the latter it is supplied. The implication where the omission occurs is as clear and effectual as the expression where the latter is added. The grammatical construction and the obvious meaning are the same. The statute makes the offense to consist of two ingredients: (1) The token or obligation must be for a less sum than a dollar. (2) It must be intended to circulate as money, or in lieu of the money of the United States. Here the note is for "goods," to be paid at the store of the Furnace Company. It is not payable in money, but *in goods*, and in goods only. No money could be demanded upon it. It is not solvable in that medium. *Watson v. McNairy*, 1 Bibb, 356. The sum of "fifty cents" is named, but merely as the limit of the value in goods demandable and to be paid upon the presentment of the note. Its mention was for no other purpose and has no other effect. In the view of the law the note is as if it called for so many pounds, yards, or quarts of a specific article. The limit of value, there being none other, gave the holder a range of choice as to the articles to be received in payment—limited only by the contents of the store.

But it is said the indictment avers that the note was intended to circulate as money, and that the demurrer admits the truth of the averment.

To this there are two answers:

1. The demurrer admits only what is well pleaded.
2. The offense, as we have shown, consists of two elements: the thing circulated, and the intent of the party circulating it.

The demurrer, at most, admits only the latter. As to the former, the judgment of the court is left unfettered, just as if the question before us had been raised by a motion to quash instead of a demurrer.

The first question certified must be answered in the negative. The second one it is, therefore, unnecessary to consider.

VALIDITY OF UTAH DIVORCES.

SUPREME COURT OF MINNESOTA, APRIL 26, 1878.

STATE OF MINNESOTA V. ARMINGTON, appellant.

A divorce granted by a Utah court where neither of the parties ever acquired a *bona fide* residence in Utah, and were both, during the conduct of the divorce proceedings, residents of Minnesota, held, not valid in Minnesota and not a protection against the consequences of a second marriage, and a belief in its validity not a defense to an indictment for bigamy.

APPEAL from a judgment of conviction upon the trial of an indictment for bigamy. Sufficient facts appear in the opinion.

CORNELL, J. [after discussing questions of minor importance relating to practice and evidence]. The remaining question for consideration relates to the decision of the court excluding what purports to be an authenticated copy of a decree of divorce of the "Probate Court in and for Box Elder county, in the Territory of Utah, entered in that court at a Special Term, on the 18th December, 1876, in an action between John L. Armington, plaintiff, v. Martha F. Armington, defendant, dissolving the marriage contract between them. Among the objections made to this evidence was the one that, at the time the decree purports to have been rendered, both parties thereto were residents of this State, and had been for several years prior. When this evidence was offered, it incontestably appeared, from the testimony already given, that both the defendant and his said wife, Mrs. Martha F. Armington, had been resident citizens of this State, and domiciled therein for over nine years prior to the date of the decree, and that they were both actually living in this State at the time of its entry. It did not appear, nor was any offer made to show the fact that either had ever been domiciled, even temporarily, within the Territory of Utah; and as to Mrs. Armington, it is quite clear that she never, at any time during the progress of the proceedings in said court, was outside the limits of this State, or within the Territorial limits of Utah. As to Mr. Armington, the most that can be claimed, from the evidence, is that he temporarily left his residence in Northfield, in this State, sometime in the summer of 1876, and returned in August or September of that year. Where he was during that period, does not affirmatively appear; but it does affirmatively appear that he has resided and practiced medicine in Northfield ever since November in that year. Upon this evidence the court was warranted in assuming that neither of the parties ever acquired a *bona fide* domicile or residence in Utah, and that both were, during the conduct of these divorce proceedings, domiciled residents of this State and subject to its laws. Upon this state of facts, the Probate Court of Utah, whatever may have been the extent of its jurisdiction over the subject of divorce under the local laws of that Territory as respects its citizens, had no jurisdiction to adjudicate upon the marriage relation existing between these parties. To each State belongs the exclusive right and power of determining upon the status of its resident and domiciled citizens and subjects, in respect to the question of marriage and divorce, and no other State, nor its judicial tribunals, can acquire any lawful jurisdiction to interfere in such matters between any such subjects, when neither of them has become *bona fide* domiciled within its limits, and

any judgment rendered by any such tribunal, under such circumstances, is an absolute nullity. *Ditson v. Ditson*, 4 R. J. 93; Cooley on Const. Lim. 400, and notes there cited; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 id. 30; *Hanover v. Turner*, 14 Mass. 227. It does not appear upon the face of the judgment or decree, or in any of its recitals, that either of the parties were ever residents of said Territory of Utah, or domiciled therein. This is a jurisdictional matter which should appear to entitle the judgment to any respect whatever; for though it be conceded that the probate court that rendered the judgment was in the legal sense a court of record, "its jurisdiction," if any, under the local laws of the Territory "over the subject of divorce, was a special authority not recognized by the common law, and its proceedings in relation to it stand upon the same footing with those of courts of limited and inferior jurisdiction," unaided by any legal presumptions in their favor. *Comm. v. Blood*, 97 Mass. 38. The evidence was properly excluded. To disprove any criminal intent, the record was also offered in evidence, coupled with an offer to show that the defendant, acting under the advice of counsel, believed in the validity of such alleged divorce, and that he contracted his second marriage in that belief. In defining the offense of polygamy, the statute declares that "If any person who has a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife, he or she shall, except in the cases therein specified, be deemed guilty of the crime of polygamy." The excepted cases refer to a marriage after a legal divorce by one not the guilty cause thereof, and to one innocently contracted under a belief that the former wife or husband is dead when such wife or husband has been continuously absent, either beyond the sea or after a voluntary withdrawal, and without being heard from alive, for the period of seven years. It will be observed from these provisions, that in a case like the one at bar, the existence of a criminal intent in fact, on the part of the accused, is not an essential ingredient of the statutory crime charged. If the facts specified in the statute are shown to exist, the law presumes the guilty knowledge and intent. *Hamilton v. People*, 57 Barb. S. C. 625. If the pretended decree of divorce upon which he relied was in fact illegal and void because made by a court having no jurisdiction, it afforded him no protection against the consequence of a second marriage, whatever may have been his motive or his belief, in respect to the validity of the decree. His mistake or ignorance, if any, was one of law and not of fact. His case, therefore, is one to which the maxim "*ignorantia juris non excusat*" applies. Being, together with his lawful wife, a resident citizen domiciled in this State and subject to its laws, he was bound to know that the tribunals of no other State or Territory could rightfully take cognizance and jurisdiction over their marital relations for the purpose of decreeing their dissolution; neither could they acquire such jurisdiction through any act of the plaintiff in temporarily changing his domicile when done with no *bona fide* intention, but for the sole purpose of procuring a divorce in fraud of the laws of the State to which he owed allegiance.

NOTE.—In *Litwisch v. Litwisch*, decided by the Supreme Court of Kansas at the March (1878) term, it is held that a judgment rendered by a probate court of Utah Territory, attempting to dissolve the marriage relation existing be-

tween a husband and wife, who had neither of them ever resided there or been within the Territory, and being rendered without any actual notice to the wife, is void absolutely and entirely for want of jurisdiction in the court to render such a judgment. It is also held that where the judgment in such a case does not appear to be void upon its face, it may be shown to be void, in Kansas, by evidence *alunde*.

RECENT AMERICAN DECISIONS.

SUPREME JUDICIAL COURT OF MAINE.*

DOMICILE.

Wife cannot change domicile of absent husband.—The wife cannot change the domicile of the husband against his will. Where a ship-master sailed from his home in Brooklyn, December, 1866, and his wife shortly after came on a visit with her children and trunks to Augusta, and there lived with her mother till summoned by her husband to meet him at Brooklyn, whither he had returned July, 1867. *Held*, that he was not meanwhile taxable in Augusta. *Porterfield v. City of Augusta*.

LIFE INSURANCE.

Non-forfeiting policy: rights of insured under: cancellation.—A policy indorsed by the company, "Non-forfeiting life policy," contained these terms: "It being understood and agreed that if after the receipt by this company of not less than two or more annual premiums this policy should cease, in consequence of the non-payment of premiums, then upon a surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for such sum as is proportionate with the annual payments which have been made." *Held*, that the right of the assured in the policy did not depend upon the surrender of the policy and the taking out of a new paid up policy. The provision that the policy shall cease and determine upon the non-payment of any of the annual premiums, on or before the date specified, cannot be construed as defeating the right to recover thereon such proportionate part of the amount insured, while there is an express stipulation in the same condition that upon such failure of payment, the company will not be liable for the whole sum insured, but only for such proportionate part. Cancellation of the policy upon the books of the company without the knowledge and consent of the assured cannot affect his rights. Upon a policy, like this, distinctly made non-forfeitable in part, by partial non-payment of premiums, nothing in the application looking to an avoidance of the policy and a forfeiture of premiums by such non-payment, can be received to work such forfeiture. *Chase v. Phoenix Mutual Life Insurance Co.*

RESPONDEAT SUPERIOR.

Liability of city for negligence of company constructing public water-works.—If one is injured by driving or falling into an excavation in one of the public streets of a city, which is left at night without being sufficiently lighted or guarded, a recovery may be had against the city, although the excavation was made by a company engaged in constructing the public water-works of the city. *Buller v. City of Bangor*.

SET-OFF.

Loss by lender of bond given as collateral to loan.—The plaintiffs lent the defendant money and took his

* To appear in 67 Maine Reports.

note therefor with a United States bond as collateral security. After the note was payable and before it was paid, the bond was stolen from the bank. *Held*, that the defendant could not legally file his claim for the value of the bond in an action against him upon the note, nor could he avail himself of the claim as a defense by way of recoupment. *Winthrop Savings Bank v. Jackson*.

STATUTE OF LIMITATIONS.

Procuring surrender of note without payment by fraud: runs from time of discovery of fraud: waiving tort.—The defendant procured the surrender of his note by fraud without payment. *Held*, (1) the plaintiff can maintain an action of tort for the fraud, and the statute of limitations commences to run from the discovery of the fraud or the time when the plaintiff may discover it in the use of due diligence. (2) If the defendant by the fraud procured money or its equivalent, the plaintiff may waive the tort and maintain an action for money had and received, and the same rule of limitation applies that is applicable to an action of tort. (3) Procuring the surrender of his note for money then overdue without payment was procuring the equivalent of money. *Penobscot Railroad Co. v. Mayo*.

RECENT ENGLISH DECISIONS.

CONTRACT.

For sale of real estate: parol addition to terms: rescission of original contract.—Defendant wrote to plaintiff saying she would accept £37,500 for the M. estate, and plaintiff's agent replied agreeing to give that sum. There was an understanding between plaintiff and defendant that the purchase-money should be paid by installments. Defendant afterward wrote to plaintiff's agent to meet her at her solicitor's office "to discuss the terms of payment," etc. Defendant did not attend at the office, and her solicitor, not knowing of the understanding, said that the whole purchase-money must be paid down in a few months. Plaintiff's solicitors then wrote to defendant's solicitor saying that plaintiff had no "alternative but to decline the matter," but that, as soon as the defendant was prepared to treat on the footing of payment by installments extending over three years, they would be prepared to "negotiate again on plaintiff's behalf." Defendant did not repudiate the understanding, and instructed her solicitors to accept these terms. Plaintiff's solicitors then submitted to defendant's solicitor written terms headed "Proposals by H. (the plaintiff) for the purchase of the freehold property known as the M. estate." These terms were verbally agreed to by defendant's solicitor. *Held*, that the original contract contained in the first two letters had not been rescinded by the subsequent negotiations. Ch. Div., April 2, 1878. *Hussey v. Payne*, 38 L. T. Rep. (N. S.) 341.

INFANCY.

Voluntary settlement: defense: post-nuptial settlement by vendor: ante-nuptial agreement by him when an infant: statute 27 Eliz., c. 4.—The defense raised by the vendor and his wife to an action for specific performance of contract was that the vendor, when an infant, wrote a letter to the lady he was about to marry, saying that as he should come into his property when he became of age, and they were to be married shortly after, he would make her a present of (*inter alia*) the

houses which were the subject of the action; that the vendor after attaining twenty-one was married to the lady, and that subsequently he executed a settlement assigning the houses in question to trustees in trust for the separate use of his wife for life with remainders over. The settlement did not refer to the ante-nuptial agreement. Upon a demurrer by the plaintiff to this defense, *held* (reversing the decision of Hall, V. C.), that there being no ratification in writing of the ante-nuptial agreement, the post-nuptial settlement was voluntary, and was therefore impeachable under the statute 27 Eliz., c. 4. Ct. App., Mar. 13, 1878. *Trowell v. Shenton*, 37 L. T. Rep. (N. S.) 368.

TRADE-MARK.

Name of place: name given by the public: fraudulent imitation: injunction.—In 1830 S. manufactured certain bitters at Angostura, a town in Venezuela, which he called "Aromatic Bitters." In 1876 he adopted the name "Angostura Bitters." In 1868 these bitters were introduced into England, and obtained the popular name of "Angostura" bitters, which they always retained. M. was also a manufacturer of bitters. He commenced to manufacture them at Upata, about 200 miles from Angostura, in 1860. In 1870 he removed to Ciudad Bolivar (formerly called Angostura). About the year 1874 S. brought an action in Trinidad to restrain M. from using the word "Aromatic" to describe his bitters, which was successful. M. then adopted the name "Angostura," and on the 16th August, 1874, registered that name at Stationers' Hall. S. now brought this action to restrain M. from using the name "Angostura," and from using bottles and wrappers resembling those used by him. *Held*, that, as the bitters made by the plaintiff were known in the market as "Angostura" bitters, and as the bitters made by the defendant were not identical with those of the plaintiff, the defendant must be restrained from using the name "Angostura" in such a way as to induce the public to believe that they were purchasing the plaintiff's bitters. Ch. Div., Jan. 14, 1878. *Siebert v. Findlater*, 38 L. T. Rep. (N. S.) 849.

UNITED STATES SUPREME COURT ABSTRACT.

BAILMENT.

1. *Possession essence of pledge in common and civil law.*—Possession is of the essence of a pledge; and without it, no privilege can exist as against third persons. This is in accordance with both the common and civil law, and is enforced by the express text of the Code Napoleon (art. 2076) and the Civil Code of Louisiana (art. 3162). Decree of U. S. Circuit Court, Louisiana, reversed. *Casey, receiver, appellant, v. Caravac*. Opinion by Bradley, J.

2. *Rights of pledgor and pledgee and third persons.*—The pledgor may have the temporary possession of the pledge, as special bailee, without defeating the legal possession of the pledgee; but where the thing pledged has never been out of the pledgor's actual possession, but has always been subject to his disposal by way of collection, sale, substitution or exchange, no pledge, or privilege, exists as to third persons. *Id.*

3. *Law of Louisiana: bank receiver: bankruptcy.*—Though, in such case, the pledgee might, by the law of Louisiana, have a real action against the pledgor, or his heirs, to recover possession of the thing, he cannot sustain a privilege thereon as against creditors, or

against a bank receiver, or assignee in bankruptcy, who represents creditors. *Ib.*

4. *Rule of equity as to thing not done.*—Equity will not regard a thing as done, which is not done, when it would injure third parties who have sustained detriment and acquired rights by the things that have been done. *Ib.*

5. *Deposit of bills and notes by bank with president to secure third party: law of Louisiana.*—Where it was agreed that a bank should deposit bills and notes with its president and his partner by way of pledge to secure a loan made by a third party; and the president delivers them back to the bank officers for collection, with power to substitute other securities therefor, it is not such a delivery and possession as is necessary to create a privilege by the law of Louisiana. *Ib.*

CONFLICT OF LAW.

1. *Lex rei siti governs transfer of real estate and mortgage.*—The laws of the State in which land is situated control exclusively its descent, alienation, and transfer from one person to another, and the effect and construction of instruments intended to convey it. All such laws in existence when a contract in regard to real estate is made, including the contract of mortgage, enter into and become a part of such contract. Decree of U. S. Circuit Court, N. D. Illinois, modified and in part reversed. *Brine, appellant, v. Hartford Fire Insurance Co.* Opinion by Miller, J.

2. *State statute as to redemption part of mortgage contract and obligatory on Federal courts.*—A State statute, therefore, which allows to the mortgagor twelve months to redeem after a sale under a decree of foreclosure, and to a judgment creditor of his three months after that, governs to that extent the mode of transferring the title and confers a substantial right, and thereby becomes a rule of property. This right of redemption after sale is, therefore, obligatory on the Federal courts, sitting in equity, as on the State courts, and the rules of practice of such courts must be made to conform to the law of the State, so far as may be necessary to give substantial effect to the right. *Ib.*

COURT OF APPEALS ABSTRACT.

CONTRIBUTORY NEGLIGENCE.

1. *What does not constitute: preserving one's own property when in danger.*—Plaintiff, the owner of a tug which was alongside of a boat on which he was, seeing defendant's tug approaching his own and apprehending a collision, immediately ran upon his boat to protect it. The collision took place and plaintiff was thrown down and injured. In an action to recover for the injury done to plaintiff and his tug boat, held, that plaintiff was not guilty of contributory negligence. It is the duty of a person whose property is endangered by the negligence of another to do what he reasonably can to protect it. Judgment below affirmed. *Rexter v. Starin.* Opinion by Earl, J.

2. *Exercising reasonable prudence: not negligence.*—The court at trial charged: "A man contributes to an injury himself when the injury is one which a prudent man might well anticipate as resulting from the circumstances to which he has exposed himself. No speculation should be entered into as to whether it might result in the bruising of his finger or the smashing of his leg. When any thing of that character is anticipated, he is guilty of contributory negligence, if he exposes himself in such a way as a careful and

prudent man would not. *Held*, correct, and to cover a request to charge that if plaintiff knowingly and voluntarily placed himself in a position where he was liable to receive the injury complained of, he was negligent.

[Decided April 2, 1878.]

FRAUD.

1. *Premiums paid for life insurance upon fraudulent representations: representations must have been known to plaintiff to authorize recovery back.*—In an action to recover back premiums paid by plaintiff upon a life insurance policy, on the ground that plaintiff was induced to take the policy on certain false and fraudulent representations made by the company, held, that only such false representations as came to the plaintiff and induced her to take the policy, would be ground for sustaining the action. False statements made to the general public and not shown to have been made to or to have influenced her, would not be sufficient. Judgment below affirmed. *Rohrschneider v. Knickerbocker Life Insurance Co.* Opinion by Earl, J.

2. *A promise not a fraud.*—Plaintiff testified that at the time she took the policy the insurance company's agent told her that she would at the end of four years receive over \$570. *Held*, that this was at most a mere promise to be performed in the future, and fraud could not be predicated on such a promise. *Ib.* [Decided May 21, 1878.]

LIFE INSURANCE.

Surrender by husband whose life is insured in favor of wife not valid without consent of wife.—A husband took a policy of insurance on his life in favor of his wife, paying the premium out of his own means. Subsequently while out of health, he was persuaded by an agent of the insurance company that a failure by him to make known in his application the existence of a bodily malformation would invalidate the policy. He, therefore, surrendered the policy and took back the premium. *Held*, that the husband took the policy as agent for his wife, that he had no power to surrender it without her authority and that the failure by the wife to notify the company of her dissent from the husband's act until after his death, a month after the surrender, was not a ratification, and that she was entitled to a restoration of the policy. *Held*, also, that she could not be required to return the premium as a condition of relief. Judgment below affirmed. *Stilwell v. Mutual Life Insurance Co. of New York.* Opinion by Church, C. J.

[Decided February 5, 1878.]

MUNICIPAL CORPORATION.

Must keep public places safe for unmanageable as well as docile animals.—The complaint stated that the horse of deponent, which was attached to a cart and engaged in carting brick on a dock near the river, suddenly became unmanageable and by reason of the neglect of defendant, a municipal corporation, to provide a proper string piece on the dock, backed off the dock and was lost; that plaintiff did all in his power to prevent the accident, etc. *Held*, that it was the duty of the city, in the matter of erecting the string piece or barrier, to protect animals that, at the time of the loss, were temporarily out of the control of the owner and unmanageable, as well as those that were docile and obedient, and that the facts stated in the complaint were sufficient to constitute a cause of ac-

tion. Judgment below reversed. *Kennedy v. Mayor of New York*. Opinion by Andrews, J.
[Decided April 16, 1878.]

PRACTICE.

1. *Objection not founded on defect in complaint: when not available: right of action.*—When a complaint in an action for negligently destroying a boat by setting it on fire, stated that the boat belonged to plaintiff at the time of the fire, an objection to proof that plaintiff had acquired title by an assignment subsequent to the fire, not based upon the ground of any defect in the complaint, *held*, not sufficient. Judgment below affirmed. *Riddell v. N. Y. C. & H. R. R. Co.* Opinion by Earl, J.

2. *When case not re-examined as to extent of damages.*—Plaintiff did have some interest in the boat which would enable him to recover some damages. *Held*, that when the question was raised by motion to nonsuit only, the extent to which he was entitled to recover would not be examined if he sustained his case in other respects. *Id.*

3. *Negligence: proximate and remote cause.*—Straw piled in and upon a boat was negligently set on fire by defendant, and the burning straw set fire to the boat. *Held*, that defendant's negligence was the proximate cause of the loss of the boat. *Id.*
[Decided April 26, 1878.]

CHIEF JUDGE CHURCH'S EULOGY ON JUDGE ALLEN.

AT the session of the Court of Appeals, held on the 4th inst., Chief Judge Church paid the following tribute to the late Judge Allen:

The judges of the present Court of Appeals are again called to lament the death of one of their members, the Hon. William F. Allen, the third of those who made up its original members, the fourth of those who have sat upon the bench during the present organization, who has been taken from them. It is appropriate for this court to make some record of the public loss thereby, and its remaining members will not forego an expression of their private sorrow. He has filled a large space in the annals of the State. In the years 1843 and 1844 he was a member of Assembly from Oswego county, and was accorded prominent and influential positions upon important committees and in the house. He was the attorney for the United States for the Northern District of New York for some years, and in that office showed the ardor and energy of his character and the strength of his intellect. After the adoption of the Constitution of 1846, upon the first organization of the judiciary under it, he was elected a justice of the Supreme Court for the Fifth District, and, having been re-elected, served continuously for sixteen years. His second election was without opposition, though the political majority in the district was adverse. This is a weighty and unmistakable proof of the high public and private estimate of his judicial and personal competency and character. He was elected State comptroller in the year 1867, and re-elected in 1869, and displayed in that office his characteristics of honesty of purpose, industrious attention to official duty, adherence to convictions of right, and also showed complete capacity for the needs of the position.

While holding the office of comptroller he was elected, under the provision of the constitutional judicial article adopted in 1870, an associate judge of this

court, and has died in the performance of the duties of his high office. We cannot on this occasion enter into a proper consideration of the judicial character and labors of the distinguished Judge who but a few days since sat with us on the bench, and whose loss will be felt and deplored not by the bench and bar of this State alone, but by the whole country. The first thirty-nine volumes of Barbour's Reports contain the published opinions of Judge Allen, pronounced by him while a judge of the Supreme Court. They attest his eminent ability, the fullness of his learning, a firm, intelligent and comprehensive grasp of the most difficult questions in the law, and the wisdom which he brought to bear in adjusting a new system of practice and procedure to the solution of legal controversies. The same qualities which distinguished him in the Supreme Court marked his judicial labors in the Court of Appeals. He was fertile in resource, patient and laborious in the investigation of causes, and unswerving in his adherence to his convictions. His knowledge of constitutional and commercial law, and his clear apprehension of their principles were especially conspicuous. Some of us have been intimately associated with him on the bench of this court since its organization, eight years ago, and others for lesser periods, and we unite in bearing testimony to his great qualities as a judge, to the facility with which he could comprehend and formulate the principles applicable to the most difficult and complicated cases, to his untiring industry and conscientious performance of his duty, and, above all, to his independence of judicial judgment and the fearlessness with which he adhered to and enforced his conviction of right. We never knew him to be influenced in the slightest degree by any attempt to bring popular prejudice or flattery to bear upon the judgment of the court. He was not only independent, but upright and just. Such is a skeleton of his public life. How slenderly it exhibits the many years of mental labor, the firm, intelligent, conscientious and courageous administration of public trusts which distinguished him!

For a fuller history of them resort must be had to the public annals of the State, to the records of the courts, the reports of their decisions, and to the memories of our judges and lawyers and of the citizens of the Commonwealth. He was truly a man of distinction among his contemporaries; a distinction of the sort to be coveted, for it was reached by the qualities which exalt the character, and it took no advantage by false pretensions. Through an extended life he was an honor to his race, to his profession of the law, and to his judicial office, and just as men are lamenting that the arbitrary provision of the Constitution would soon take him from the bench in the ripeness of his character, his talents and his powers, the Almighty Hand, in its wisdom, has removed him from earth. Even "beyond the circle of those private affections which cannot but shrink from the roads of death," there is a "grief for the departure of the eminently good and wise."

His personal character was of the highest order. He took no step outside the path of a wise sobriety and exemplary rectitude. His judgments and his life were in accord. He was simple and modest. He was kind in nature, affable in intercourse, of warm social impulses, sensible of the claims of his fellows and prompt in rendering all the dues of neighborhood. His warm and impulsive nature was held under restraint of reason and of the religion he professed and practiced.

COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, June 4, 1878:

McMahon v. Walsh, Wilson v. The Knickerbocker Life Ins. Co., Quinlan v. The City of Utica, Stewart v. Bramhall, Litchult v. Treadwell, judgment affirmed, with costs. — Gelpcke v. Quentell, Burnham v. Brennan, Presbyterian Society of Knoxboro v. Beach, judgment reversed and new trial granted, costs to abide the event. — Parkinson v. Sherman, In the matter of Sackett street, Brooklyn, order affirmed, with costs. — Woolsey v. Brown, order affirmed and judgment absolute for plaintiff on stipulation, with costs. — Ulster County Savings Institution v. Decker, motion to correct remittitur granted, as far as that costs abide event, without costs of this motion. — Elwell v. Johnson, appeal dismissed, with costs.

Chief Judge Church read a eulogy on the late Judge Allen, and announced that in token of respect for his memory of the deceased, and to enable the remaining members of the court and the bar to attend his funeral, the court would adjourn to Thursday morning, June 6.

NEW BOOKS AND NEW EDITIONS.

ROBERTS' VERMONT DIGEST.

A digest of all the reported decisions of the Supreme Court of the State of Vermont, contained in the reports of N. Chipman, Tyler, Brayton, D. Chipman, Atkins, and in forty-eight volumes of Vermont Reports; also of all the decisions of the courts of the United States for the district of Vermont, which are found in the Vermont Reports. By Daniel Roberts, Burlington, Vt., 1878.

THIS digest, the preparation of which has occupied some years, appears to be carefully and thoroughly done, and it can be depended upon as showing in brief the existing case law of the State of Vermont. The arrangement is excellent, and the plan of the editor in bringing together or in connection the cases which confirm, qualify, distinguish, or in some way illustrate each other, and in referring in the abstract of each case which has been relied on as authority to the subsequent decisions wherein it is cited will render the digest valuable as a judicial history of the various important decisions noticed in it. By the plan mentioned, the value of each case as an authority in the courts of Vermont can be at once determined, and one referring to it will be able to find other cases bearing upon the subject which he is investigating. A few decisions in the earlier reports, which by change of statute or otherwise have become obsolete, are omitted. We do not find any statement giving the names of the omitted cases, which is to be regretted. They cannot number many, and a brief reference to them, showing the points passed upon, would render the digest exhaustive. The work of the editor is so well done, however, that we cannot find fault with him for this omission. The book contains a list of the judges of the Supreme Court of Vermont from 1778 to 1878, and also a very carefully prepared table of the cases digested. It will be found of great value, not only to the profession in Vermont, but also to lawyers residing in other States, as a very large proportion of the decisions are upon questions of general interest.

COLEMAN'S EPITOME OF FEARNE ON REMAINDERS.

An epitome of Fearn's on contingent remainders, and executory devises, intended principally for the use of students. By William M. Coleman, Esq. Philadelphia: T. & J. W. Johnson & Co., 1878.

To the student desiring to become thoroughly familiar with the law of real property, an acquaintance

with the work of Fearn is indispensable, and as a means of comprehending that work, and fastening the principles it enunciates on the memory, the little book before us will serve an important purpose. It contains first an analysis of the principal work in which the leading ideas are briefly stated, followed by an epitome in which all the principles of that work are separately and distinctly set forth. Under each principle is given a single, simple case by way of example in illustration. Then the writer has endeavored to add such explanation as will give the student a clear and distinct view of the particular principle under consideration. The book will prove of use not only to students, but to lawyers engaged in active practice, who wish to refresh their memories in respect to the sometimes intricate and technical doctrines of the common law, on the subject discussed.

OBITUARY.

WILLIAM F. ALLEN.

William F. Allen, Associate Judge of the Court of Appeals of this State, died at his home in Oswego on the 3d inst. He was born in Windham county, Connecticut, July 28, 1806. He came with his father to this State when eight years of age. He was graduated at Union College in 1825, and commenced the study of law in the office of John C. Wright of Schenectady, but completed it in that of Charles M. Lee of Rochester, and was admitted to the bar in 1829. He commenced the practice of his profession in partnership with George Fisher at Oswego, but soon after formed a partnership with A. P. Grant, which continued until the time of his election as Judge of the Supreme Court. In 1842 he was elected Member of Assembly, and again elected in 1844. In 1845 he was appointed United States District Attorney for the Northern District of New York. In 1848 he was elected Justice of the Supreme Court, and in 1856 re-elected to the same office. At the close of his second term in 1863 he went to New York and practiced law there for several years. In 1867 he was elected Comptroller of the State and was re-elected in 1869. In 1870 was chosen to the position he held at the time of his death. In the various positions, judicial and otherwise, held by him he was distinguished among other qualities by his fidelity to duty and by his industry. While administering the office of Comptroller he was instrumental in very largely reducing the State debt, and in organizing a movement in favor of reforms in the management of the State prisons and canals that are now being carried out. His judicial career, which embraced nearly twenty-four years, is well known to the profession throughout the State. The decisions made by him and which appear in numerous volumes of the State reports since 1848, show that he possessed great mental powers and superior culture. The eulogy pronounced by Judge Church at the session of the Court of Appeals held on Tuesday last and appearing elsewhere, is an eloquent and faithful portraiture of the character and qualities of the deceased.

NOTES.

IN the Southwark England County Court on the 28th of March last, in the case of *Poive v. Jacob*, it was held that a London carman is not a common carrier, but is liable to loss or injury of property transported by him, caused by the criminal act of a stranger, occurring through his criminal negligence as bailee. — A case involving a novel point of law was decided by the County Court of San Joaquin county on the 4th ult. A jury in a civil case while out deliberating was taken by the sheriff to a restaurant to eat. As the county had refused to pay for feeding juries in civil cases, the sheriff told the restaurant keeper to collect from the jurors. Of this, however, the jurors had no knowledge. One of the jurors refused to pay for his meal, and was sued by the restaurant keeper. No express promise to pay was proved. The court held that, under the circumstances of the case, the law would not imply a promise on the part of the defendant to pay for what he ate, and gave judgment in his favor.

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, JUNE 15, 1878.

CURRENT TOPICS.

THE President has signed the bill for the repeal of the bankrupt law, so that it is certain that that statute will go out of existence on the 1st of September next. To say nothing of the benefits which will accrue to honest tradesmen and vigilant creditors from a restoration of the old order of things, the increase in general law business which will probably result therefrom, must render the repeal gratifying to the great bulk of the profession. We do not go as far as some of the friends of repeal have done and charge the present depressed condition of business upon the bankrupt law, but we believe it has contributed toward making trade unsettled and uncertain. Its direct effect has frequently been to destroy solvent business houses temporarily embarrassed, while the easy means of escape from legal liability it offered, has tempted men to be careless about incurring debts and extravagant in their expenditures. Where an obligation can be discharged only by payment, most men are cautious about entering into it, but it is otherwise when an easy proceeding at law will discharge it. However, the bankrupt law will soon pass away, and we believe very few will mourn its departure.

By the appointment of Mr. Samuel Hand to the place on the bench of the Court of Appeals, made vacant by the death of Judge Allen, the court secures a gentleman eminent for learning and ability, and who, though yet young, stands among the foremost of his profession in this State. Although without previous judicial experience, Mr. Hand has for some years had an extensive practice before the court of which he now becomes a member, and at one time occupied the position of reporter of its decisions. The qualities which he has displayed as an advocate are an assurance that he will fill with credit the place to which he has been appointed, and the profession and litigants who are interested in causes pending before our highest court have every reason to be satisfied with the choice of the Governor.

The precedent which has been set in the English courts of assailing judges, has been followed in

the New York Court of Common Pleas, a lunatic, by the name of Chalmers, having, on the 7th inst., made an assault in open court on Mr. Justice Daly, who was presiding at a trial there. The assailant, who had an hallucination that the police commissioners of New York were annoying him in various ways, had prepared a petition asking for their arrest, and had presented it to numerous judges and courts, the usual result being his ejection from the court rooms into which he had intruded. On the day mentioned he began to read the petition to Justice Daly, who at first kindly attended to his reading, but discovering the nature of the document requested him to desist, and upon his refusal to do so, directed his removal from the court. Thereupon, the petitioner, folding up the papers he had in his hand, forcibly hurled them at the head of Judge Daly, saying, as he did so, "You are like all the other judges, a liar and a trickster." Of course the belligerent suitor was immediately arrested, and he was subsequently committed by a police magistrate as a lunatic. The petition itself, parts of which were published in the daily press, indicates clearly that the assailant was insane.

In the case of *Mix v. Andes Insurance Co.*, just decided by the Court of Appeals of this State, and appearing in our abstract of the decisions of that court, the right of a corporation to take the benefit of the act of Congress, of March 2, 1867, providing for the removal of causes from the State to the Federal courts, is maintained, and it is also held that the verification of the affidavit required by the president of a corporation is a compliance with the provision of the statute requiring the affidavit of a citizen. This reverses the decision of the Fourth Department General Term, 9 Hun, 397, which affirmed the decision of the Special Term. The General Term based its decision upon *Cooke v. State National Bank of Boston*, 52 N. Y. 96, but this was a mere *pro forma* decision made to enable the question to reach the Federal Supreme Court, and the Court of Appeals did not hold it to be authority.

Mr. Justice Markby, of the Supreme Court of Calcutta, in an article appearing in the current number of the *Law Magazine and Review*, considers at length the causes which are at work in England tending to secure or prevent the adoption of a code, and also to secure an improvement in the system of legal education. The writer thinks that the demand for codification as well as for improved legal education comes from the masses of the people, and that both the bench and the bar, as a rule, as well as the universities, are opposed to any change in the existing condition of matters, and that what help has been so far given by the inns of court and the universities to the inauguration of reform measures has been given because

not help it. The solicitors have looked with more favor upon the changes which have been made and are yet demanded, and one of their public bodies, the Law Institution, for a long time was the only one which showed a hearty interest in the teaching of law otherwise than by a mere apprenticeship. The opposition of the bench and bar to change is attributed by him to prejudice, indolence and a want of confidence in the probable result of the efforts about to be made. We think, however, that a still more powerful influence than either of the ones named, at least so far as the bar is concerned, is self-interest. The position of the bar is high and secure under the existing system, and a change in the form of the law and an improvement in the method of teaching it cannot raise that position, while it may and probably will result in lowering it. The writer criticises the views of those who are anxious for the early codification or digesting of the laws and thinks that the standard of legal learning should be raised before an attempt is made to construct a code. He says, "The laws of a country, whether they be codified or not, reflect the intellect of the lawyers who create them. A code is but an embodiment of the legal learning of the age. Are we not proposing to construct our code at the very moment when learning is at its lowest ebb?"

The Society of Comparative Legislation at Paris takes advantage of the international exhibition held in that city this year to endeavor, in an informal way, to bring together lawyers from various countries, who may be visiting the exhibition, by throwing open its meetings to all foreign jurists who desire to attend. The society is made up of the leading members of the bench and bar of France, and those interested in international law who attend its meetings are certain to be entertained and instructed. The topics of discussion for these meetings, as announced by the society, are: (1) Bills of exchange; (2) Maritime insurance; (3) What authority should a judgment delivered in one State be allowed in another, and under what conditions; (4) The conditions and effects of extradition; (5) To what extent ought foreigners to be admitted to share in the private law of the State in which they are commorant; (6) In what cases should crimes or delicts which have been committed be cognizable by the courts of the State of which the authors are subjects. The rooms of the society are in the "Hotel de la Société d'Encouragement," 44 Rue de Rennes.

NOTES OF CASES.

IN the case of *Clark v. Chambers*, 38 L. T. Rep. (N. S.) 454, decided by the Queen's Bench Division of the English High Court of Justice, on the 41st last, the defendant had placed in a

private road adjoining his ground a hurdle with a *cheveux de frise* on the top in order to prevent the public from looking over the barrier at athletic sports on his ground. Some one not known removed the hurdle to another spot without the defendant's authority, and the plaintiff, passing of right along the road soon afterward in the dark, and knowing the original position of the hurdle, but not that it was moved, ran his eye against the *cheveux de frise* and lost his sight. The jury, in an action against defendant for the injury, found that the original erection of the hurdle was unauthorized and wrongful; that the *cheveux de frise* was dangerous to the safety of persons using the road, and that there was no contributory negligence, and gave plaintiff a substantial verdict. The court held that plaintiff's injury was not an improbable consequence of defendant's act; that it was the defendant's duty to take all necessary precautions under the circumstances to protect persons exercising their right of way, and that the action was maintainable. The case is one of that class represented by the well-known squib case of *Scott v. Shepherd*, 3 Wils. 403; 2 W. Bl. 892, where defendant threw a lighted squib into a market house where several persons were assembled. It fell upon a standing, the owner of which, in self-defense, took it up and threw it across the market house. It fell upon another standing, the owner of which, also in self-defense, threw it off, when it struck plaintiff and exploded and put out his eye, and defendant was held liable. In *Dixon v. Bell*, 5 M. & S. 198, the defendant, having left a loaded gun with another, sent a girl to get it, with directions to the other to draw the priming, which the latter attempted to do, and, as he thought, did. The girl, supposing the priming was drawn, pointed the gun at plaintiff's son, a child, and pulled the trigger. The gun went off and injured the child, and defendant was held liable for the injury. See, also, *Ilott v. Wilkes*, 3 B. & A. 304; *Jordan v. Crump*, 8 M. & W. 782; *Illedge v. Goodwin*, 5 C. & P. 190. In the latter case the defendant's horse and cart were left standing in the street without any one to attend them. A person passing along whipped the horse causing it to back the cart against plaintiff's window. Also, *Lynch v. Nurdin*, L. R., 1 Q. B. 29; *Daniels v. Potter*, 4 C. & P. 262; *Hughes v. Macfie*, 2 H. & C. 744; *Bird v. Holbrook*, 4 Bing. 628; *Harrison v. Gt. North Ry. Co.*, 3 H. & C. 231. See, also, *McCahill v. Kipp*, 2 E. D. Smith, 413; *Powell v. Deceny*, 3 Cush. 300; *Peck v. McNeal*, 3 McLean, 22.

Maddox v. Lond. Chat. & Dov. Railway Co., 38 L. T. Rep. (N. S.), decided by the Common Pleas Division on the 1st of February, was a case similar to that of *Jackson v. Metropolitan Railway Co.*, 37 L. T. Rep. (N. S.) 679, some months since decided by the House of Lords, and noticed by us on page 21 of the current volume. In the

case at bar the plaintiff was a passenger on defendant's railway, taking his ticket at one of the metropolitan stations accompanied by his son. On the arrival of the train at the platform the son entered the carriage first, followed by the father. After plaintiff had completely entered the carriage but before he had taken his seat or passed the passenger sitting next the door, a servant of the defendant shut the door without warning. The plaintiff's thumb was in the hinge and received injury, to recover damages for which the action was brought in the Mayor's Court of London. The jury found for the plaintiff, but the Common Pleas Division held that judgment absolute should be entered for defendant on the ground that there was no evidence of negligence to go to the jury. *Grove, J.*, who delivered the leading opinion, said that even without the decision in *Jackson v. Metropolitan Railway Co.*, he should have reached the same conclusion, and this notwithstanding *Fordham v. London & Bright. Railway Co.*, 18 L. T. Rep. (N. S.) 566, where it was held that when a carriage door had been shut prematurely and without warning, and a passenger's hand sustained injury, there was evidence of negligence to go to the jury. See, also, *Bridges v. North London Railway Co.*, 3 L. T. Rep. (N. S.) 844.

In *Schindel v. Gates*, 46 Md. 604, it is held that the payment, by the principal in a joint and several promissory note, of the interest from year to year will prevent the statute of limitations from attaching to the note in favor of the surety. In the State of Maryland, the rule on this subject, as laid down in *Ellicott v. Nichols*, 7 Gill, 86, is accepted as the law, which the court says is not to be questioned in the absence of legislation to the contrary. It is not, however, the general rule. There are, in regard to the power of one joint maker of a note to deprive the other of the defense of the statute, three distinct and irreconcilable theories: (1) That there is such a power and it exists indefinitely. (2) That there is no such power. (3) That there is such a power but it ends when the term prescribed by the statute has elapsed. The first theory was at one time adopted in England (*Channell v. Ditchburn*, 5 M. & W. 494; *Goddard v. Ingram*, 3 G. & Dav. 46), in Massachusetts (*White v. Hale*, 3 Pick. 392), in Maine, in New Hampshire, and in New York, but it has been of late years done away with by statute or by the decisions of the courts. The second theory is the one in favor at the present time in most of the States, and in the Federal courts. *Bell v. Morrison*, 1 Pet. 351; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Palmer v. Dodge*, 4 Ohio St. 21; *Coleman v. Fobes*, 22 Penn. St. 156; *Levy v. Cadit*, 17 S. & R. 126; *Searigh v. Craighead*, 1 Penn. 135; *Bush v. Stowell*, 71 Penn. St. 208; *Van Keuren v. Parmalee*, 2 N. Y. 523; *People v. Slite*, 39 Barb. 684;

Shoemaker v. Benedict, 11 N. Y. 176; *Winchell v. Hicks*, 18 id. 558. The third doctrine is adopted in Maryland and some other States. *Ellicott v. Nichols*, *supra*; *Newman v. McComas*, 43 Md. 70; *Emmons v. Ocerton*, 18 B. Monroe, 643; *Walton v. Robinson*, 6 Iredell, 341. The second theory appears to be the more equitable one and the one most in accordance with the prevailing view in regard to the statute of limitations, which is that it is a beneficial statute and one of repose on which a defendant has a right to rely with the same confidence as on any other statute, and that its force should be extended rather than restricted. Ang. on Lim. 283; *Shoemaker v. Benedict*, *supra*; *Green v. Johnson*, 3 G. & J. 394; *Fisher v. Hamden*, Paine, 61.

In the case of *Dongan v. Mutual Benefit L. Ins. Co.*, 46 Md. 469, a policy of life insurance stipulated that in case of the non-payment of the premium when due, it, with previous payments, should be forfeited to the company. In 1862 the insured, for the purpose of paying the premium, borrowed money of one Webb, the agent of the company. Webb took the note of the insured for the loan, and as security took an assignment of the policy from the insured and his wife, which was stated to be as security for the prompt payment at maturity of the note, and if that was not paid the policy was "to continue for the sole use and benefit of" Webb. The note was not paid at all. Webb paid premiums on the policy in 1863 and 1864, and in 1865 surrendered it. Negotiations were had between the company and the insured, but no tender of premiums was made by the insured to Webb or the company, and neither Webb nor the company informed him of the surrender until after it had taken place. The insured died in 1870. In an action in equity, brought in 1873, against the company, to recover the amount of the policy, less unpaid premiums, and the note due Webb and interest, after an action in trover for the conversion of the policy brought by insured and wife had failed, the court held that the assignment to Webb was a mortgage and the right to redeem existed; that the punctual payment of the premiums being a condition of keeping alive the policy, the claim to redeem and enforce the policy could not be sustained; but as the surrender was without notice, the company could receive only the interest of the mortgage, and hold the policy subject to the right of redemption as the mortgagee held it before surrender, and that the surrender should be considered to be made on the joint account of the insured and Webb according to their respective interests, and a decree requiring the company to account to the plaintiff for the reserve value of the policy at the time of the surrender, less the amount due Webb at that time for moneys advanced on the note and for premiums paid was made. The court also held that in such a case the statute of limitations did not apply. The case is an interesting one as showing that equity will interfere to prevent a sacrifice of the interests of holders of life insurance policies pledged to secure payments which are not made at maturity, when this can be done without sacrificing the rights of any innocent party.

THE CONSTITUTION AND EXTRADITION TREATIES.

BY SAMUEL T. SPEAR, D. D.

THE Constitution of the United States, in article 2, section 2, gives the treaty power to the President in the following words: "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." The President, according to this language, possesses the treaty power, subject in its exercise to the limitation imposed by the necessary concurrence of the Senate. No treaty, without this concurrence, is on the part of the United States a completed and binding negotiation.

The terms in which this power is granted are general, with no express restrictions in the grant as to the matters upon which it may be exercised. On this point Mr. Justice Story, in his Commentaries on the Constitution, sect. 1508, remarks: "The power to make treaties is by the Constitution general; and, of course, it embraces all sorts of treaties, for peace or war, for commerce or territory, for alliance or succors, for indemnity for injuries or payment of debts, for the recognition and enforcement of principles of public law, and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other."

The Supreme Court of the United States, in *The United States v. 43 Gallons, etc.*, 8 Otto, 197, said: "The power to make treaties with the Indian tribes is, as we have seen, co-extensive with that to make treaties with foreign nations. In regard to the latter it is, beyond doubt, ample to cover all the usual subjects of diplomacy." Chief Justice Taney, in *Holmes v. Jennison*, 14 Pet. 540, spoke thus of the treaty power: "The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced; and consequently it was designed to include all those subjects which, in the ordinary intercourse of nations, had usually been made subjects of negotiation and treaty, and which are consistent with the nature of our institutions and the distribution of powers between the General and the State governments." So, also, in *The People v. Gerke*, 5 Cal. 381, the following doctrine was stated in regard to the scope of this power: "The power to make treaties is given without restraining it to particular objects in as plenipotentiary a form as it is held by any other sovereign in any other community. This principle results from the form and necessities of the Government as elicited by a general review of the federal compact. Before the compact, the States had the power of treaty-making as potentially as any power on earth. It extended to every subject. By the compact they expressly granted it to the Federal

Government in general terms, and prohibited it to themselves. The General Government must therefore hold it as fully as the States held it, with the exceptions that necessarily flow from a proper construction of the other powers granted and those prohibited by the Constitution."

The treaty power, though thus extended in its scope, is, nevertheless, not absolutely unlimited. Mr. Justice Story, in the section above referred to, observes: "But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the State. A power given by the Constitution cannot be construed to authorize the destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it, and cannot supersede or interfere with any other of its fundamental provisions." In *The Cherokee Tobacco Case*, 11 Wall. 616, the Supreme Court of the United States said: "A treaty cannot change the Constitution or be held valid if it be in violation of that instrument." In *The People v. Naglee*, 1 Cal. 231, it was held that a treaty "cannot supersede a State law which enforces or exercises any power of the State not granted away by the Constitution." In *The People v. Washington*, 36 Cal. 658, it was said that "a treaty is but a part of the law of the land, and what is forbidden by the Constitution can no more be done by a treaty than by an act of Congress." In *Pierce v. The State*, 13 N. H. 336, it was held that "the political rights of the people of the several States, as such, are not subjects of treaty stipulations." In *Marbury v. Madison*, 1 Cranch, 137, the Constitution itself was spoken of as the paramount authority in all cases, rendering acts of Congress invalid when inconsistent therewith; and the same principle undoubtedly holds equally good in reference to treaties. Treaties, made since the adoption of the Constitution, are made in the exercise of power derived from it; and if in any of their provisions they contradict that instrument, then they must necessarily be so far unconstitutional and void. A treaty cannot directly appropriate money belonging to the United States, since this power is given exclusively to Congress. *Turner v. The Baptist Missionary Union*, 5 McLean, 844.

Assuming then, for the present, that extradition treaties are not forbidden by the Constitution, the question whether they come within the scope of the treaty power, as bestowed by that instrument, resolves itself into the inquiry whether extradition is one of the usual subjects of negotiation between nations. There can be but one answer to this question, and that must be in the affirmative. Mr. Clarke, in his treatise on Extradition, sec. ed., chap. 2, refers to various early treaties between different countries, having for their object the mutual surrender of fugitive criminals. The writers on public law, though not entirely agreed as to the extent of

the right to demand a fugitive criminal, and the obligation to deliver him up, independently of a treaty, have, nevertheless, discussed the principles involved in the process, and some of them laid down rules by which it should be governed. Extradition, both before and since the adoption of the Constitution, either with or without treaties, is one of the historic facts of usage and practice among European nations; and this shows that it is within the scope of the treaty power, as given to the President, unless some other provision of the Constitution excludes it therefrom.

The courts of this country have had repeated occasion to consider and decide judicial questions arising under extradition treaties and the laws of Congress enacted for their execution; and in no instance have they held either the treaties or the laws to be unconstitutional. The States composing the Union have, under the Constitution, no treaty power; and hence, as was said in *Holmes v. Jennison*, 14 Pet. 540, and decided in *The People v. Curtis*, 50 N. Y. 321, they have no authority to enact or execute laws for the delivery of fugitive criminals to foreign countries. This power belongs exclusively to the General Government, and is to be exercised through extradition treaties. In *Holmes v. Jennison*, *supra*, Chief Justice Taney remarked: "And without attempting to define the exact limits of this treaty-making power, or to enumerate the subjects intended to be included in it, it may be safely assumed that the recognition and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the General Government. And as the rights and duties of nations toward one another, in relation to fugitives from justice, are a part of the law of nations, and have always been treated as such by the writers upon public law, it follows that the treaty-making power must have authority to decide how far the right of a foreign nation, in this respect, will be recognized and enforced when it demands the surrender of any one charged with offenses against it." Judge Blatchford, in *re Angelo De Giacomo*, 12 Blatchf. C. C. R. 391, said: "It is not to be questioned that a treaty stipulation, on the part of the Government of the United States, to surrender fugitives from justice, is a lawful stipulation, and within the authority of the treaty-making power." Mr. Justice Nelson, in *re Kaine*, 14 How. 103, expressed the opinion that the courts of this country "possess no power to arrest, and surrender to a foreign country, fugitives from justice, except as authorized by treaty stipulations and acts of Congress passed in pursuance thereof." This implies that such stipulations are a constitutional exercise of the treaty power.

Every nation, possessing the ordinary attributes of sovereignty, and acting through an established

government, must have the power, unless there be some self-imposed restriction upon it in its local constitution, to stipulate for the delivery of fugitive criminals as between itself and other nations. No nation is bound against its own will, or bound by the law of nations, to make its territory a secure asylum for such criminals, or try and punish them for offenses not committed against its own laws or within its own jurisdiction. Whether a nation shall surrender them that they may be dealt with by the government whose laws they have violated, is a question for its own discretion. This discretion, in respect to the United States, the Constitution lodges with the President in the general grant of the treaty power; and unless there be something in the instrument which excludes extradition therefrom, then it necessarily follows that the President, with the advice and consent of the Senate, has ample power to make treaties for this purpose.

This, then, brings us to the question whether the Constitution contains any provisions which exclude extradition from the treaty power. Mr. William B. Lawrence, in a letter published in the *ALBANY LAW JOURNAL*, vol. 16, p. 405, proposed a series of inquiries for legislative investigation, one of which reads as follows:

"Whether extradition, in whatever mode granted, either by treaty or by the executive or other department of the Federal Government, is not a violation of the Constitution of the United States, which was intended to protect, certainly in all cases of Federal cognizance, all persons within our jurisdiction from being held to answer for a capital or otherwise infamous crime without the presentment or indictment of a grand jury, or deprived of life, liberty or property without due process of law, and professes to secure in all criminal prosecutions speedy and public trial by an impartial jury."

The reference, made in this query, is to the fifth and sixth amendments to the Constitution. In regard to these amendments, and also all restrictions of power found in the Constitution and expressed in general terms, the Supreme Court of the United States has adopted the doctrine that they are applicable only to the Government created by that instrument. They consequently have no application to the State governments, and certainly none to the governments of other countries. See *Barron v. The Mayor of Baltimore*, 7 Pet. 243; *Livingston's Lessee v. Moore*, id. 469; *Fox v. The State of Ohio*, 5 How. 410; *Smith v. The State of Maryland*, 18 id. 71; *Pervear v. The Commonwealth*, 5 Wall. 475; *Twitshell v. The Commonwealth*, 7 id. 321; *Edwards v. Elliott*, 21 id. 535; and Sedgwick's Construction of Statutory and Constitutional Law, sec. ed., p. 555. If the rights, secured by the limitations imposed on the power of the General Government are not invaded by extradition treaties, then it follows that the limitations have no relation to such treaties. What then is the fact?

In the case of *Jonathan Robbins*, which, under the extradition article of the treaty of 1794 between the United States and Great Britain, came before Judge Bee, of the United States District Court for South Carolina, it was urged "that the Constitution secured the right of trial by jury to the citizens [of the United States], and that treaties and laws altering that were of subordinate authority, and, of course, void." To this the Judge replied as follows: "If we attend to the Constitution, and the amendments which are now a part of it, we shall find that all the provisions there made respecting criminal prosecutions and trials for crimes by a jury, are expressly limited to crimes committed within a State or district of the United States. Indeed, reason and common sense point out that it should be so, for what control can the laws of one nation have over offenses committed in the territories of another? It must be remembered also, that in the article of amendments, where it is provided that no person shall be held to answer for a capital offense, unless on a presentment by a grand jury, an exception is made to cases arising in the land or sea service, or even in the militia when in actual service in time of war or public danger. This shows unequivocally that trials by jury may be dispensed with, even for crimes committed within the United States; and these observations are at once an answer to all the arguments founded on the right of trials by jury, they being expressly limited to crimes committed within the United States, and even then with some exceptions." Wharton's State Trials, pp. 401, 402.

Those provisions of the Constitution, whether in the body of the instrument, or in the amendments thereto, which require that trials in criminal cases shall be by jury and on the presentment of a grand jury, refer to offenses committed against the United States, and have no relation to such as may be committed against other governments. Extradition is not a trial at all, but simply a preliminary arrest, examination, and delivery of a fugitive criminal, with a view to his trial in the country whose laws he has offended; and, hence, Judge Bee was clearly right in holding that the constitutional provisions respecting jury trials in criminal cases have no application whatever to the proceeding.

It was also urged in behalf of Robbins, that he was "a citizen of the United States and a native of Connecticut," and "that the treaty can only relate to foreigners." To this the Judge replied that it does not "make any difference whether the offense was committed by a citizen or another person." No reason was given for this opinion; yet the treaty itself, as to the right of demand and the obligation of delivery, made no distinction between citizens and foreigners. Some of the extradition treaties of the United States expressly provide that neither shall be required to deliver up its own citizens and, of course, under these treaties,

there is no obligation of such delivery. Other treaties, however, make no such provision; and under them there is no distinction between citizens and foreigners, so far as the United States are concerned, unless the Constitution exempts the former from the operation of extradition treaties.

We know of no constitutional provision, express or implied, that secures any such exemption to the citizen of the United States. If he goes into a foreign country, he becomes for the time being subject to its municipal laws; and if he violates those laws, then, unless unjustly oppressed contrary to the law of nations, he is not under the protection of the United States, as against trial and punishment therefor by the local authority. The United States Government, except as specially provided for by treaty, would have no jurisdiction to try or punish him; and his rights of citizenship would afford him no immunity for crime committed in a foreign country. If he should return to the United States as a fugitive from justice, and if by the terms of a treaty his crime were an extradition offense, and still further, if the treaty did not exempt the citizens or subjects of the respective parties from being delivered up for such offenses, then there is nothing in the mere fact of his citizenship to give him such exemption, any more than there is in such citizenship to secure exemption from trial and punishment in the foreign country whose laws he has violated. His extradition would not be a trial under those laws, but simply an arrest, a detention and a delivery, that he might be tried where the offense was committed, and where the jurisdiction for this purpose exists; and unless the treaty protects him against such extradition on the ground of citizenship, then he would have no protection, any more than if he were a foreigner. So Judge Bee held in regard to Robbins, even if his citizenship were conceded as a fact. The treaty of 1794 did not exempt him on this ground; and there is nothing in the Constitution to make such a treaty void in its application to citizens of the United States, when demanded as fugitive criminals in accordance with its provisions.

In the case of *Christiana Cochran*, 4 Op. Att.-Gen. 201, who, in 1843, was arrested and held for delivery as a fugitive criminal under the tenth article of the treaty of 1842 between the United States and Great Britain, the ground was taken in her petition and remonstrance addressed to the President, and in the argument of her counsel, that this "article of the treaty is itself void, as being repugnant to the Constitution of the United States." The clauses upon which this claim was based, are the fourth and fifth articles of the amendments to the Constitution.

The fourth of these articles declares that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." To the argument resting on this clause Attorney-General Nelson thus replied: "Now I do not understand the provisions of the tenth article of the treaty of 1842 as being at all in conflict with this article of the Constitution, or that, in fulfilling it, as has been done in this case, the right of personal security of the accused has been assailed. The protection guaranteed is not against all seizures; it is against unreasonable seizures; it [the seizure] can be made only upon probable cause; and, when authorized, the evidence of its reasonableness is to be furnished by oath or affirmation—all of which prerequisites have been complied with in this case." This constitutional clause surely protects no one against arrest by the warrant of a magistrate, upon probable cause supported by oath or affirmation, or against an examination and commitment to prison if the evidence be sufficient to justify detention; and this is precisely what is done in giving effect to an extradition treaty. The party accused is arrested and examined upon complaint made under oath, and, upon proper evidence of guilt, delivered to the foreign government demanding him in pursuance of a treaty. There is nothing in this procedure repugnant to the fourth amendment to the Constitution.

The other constitutional clause, referred to, provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger," and further provides that no person shall "be deprived of life, liberty or property without due process of law." To the argument based on this provision the Attorney-General answered: "Nor do I perceive how it can be supposed that there has been any infraction, by the treaty stipulations, of the fifth article of the constitutional amendments, which, in declaring that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury, was never designed to embrace any other than offenses against the United States. The offense charged by this proceeding is one against the Government of Great Britain, over which the courts of the United States can rightfully exercise no jurisdiction, and for which, in these courts, the accused cannot be required to answer upon or without a presentment or indictment by a grand jury."

This proceeds upon the assumption that the language of the fifth amendment has no application to the offense which is the subject-matter of consider-

ation in an extradition treaty and of the proceedings under it, since the offense is one against a foreign government, and over it the United States have no jurisdiction for trial and punishment. The whole object of the arrest, the initiatory examination, and the final delivery is to give the government, whose laws have been violated, possession of the fugitive criminal, with a view to his trial by the proper authority; and there is nothing in the amendment to preclude this object or the method of attaining it.

The phrase "due process of law," as occurring in this amendment, applies, so far as it has relation to criminal offenses, only to those committed against the United States; and in respect to them it does not forbid the arrest and examination of a person, upon complaint made under oath, or his detention, by the commitment of a magistrate, until his case can be considered by a grand jury. It surely does not forbid the President to make a treaty providing for the arrest and examination of fugitive criminals and their commitment to prison upon adequate evidence, or Congress to enact a law for carrying such a treaty into effect, or the surrender of such criminals that they may answer in the courts of the country whose laws they have offended. The phrase has no relation to the questions that arise and are considered in proceedings for the purpose of extradition under a treaty, or to the powers of the President in making such a treaty.

In the case of *Angelo De Giacomo*, 12 Blatchf. C. C. R. 391, the question was presented to the commissioner, who was conducting the examination, whether the accused could be arrested, held, and delivered up, for an offense within the enumeration of the treaty between the United States and the King of Italy, but committed before the date of the treaty. Judge Blatchford, before whom the case was brought upon *habeas corpus* and *certiorari*, decided that the treaty applied to past as well as future crimes, and hence, that, although the offense in this case preceded the treaty, it was not for this reason excluded from its operation. As to "the restriction, in article four of the amendments to the Constitution, against violating the right of the people to be secure against unreasonable seizures, and the restriction, in article five of such amendments, against depriving a person of liberty without due process of law," the Judge said: "They have no relation to the subject of extradition for crime, as regulated by the treaty in question and the statutes of the United States passed on that subject." Holding an extradition treaty, made by the President of the United States, to be "a lawful stipulation, and within the authority of the treaty-making power," he dismissed these amendments without any discussion, on the ground that they have no relation to the subject.

The question was raised in this case, whether the constitutional provision that "no bill of attainder or *ex post facto* law shall be passed," is not violated by the treaty as thus interpreted. To the first branch of this question the Judge replied: "A bill of attainder is defined to be 'a legislative act which inflicts punishment without a judicial trial,' where the legislative body exercises the office of judge, and assumes judicial magistracy, and pronounces on the guilt of a party without any of the forms and safeguards of a trial. *Cummings v. Missouri*, 4 Wall. 323. This treaty does none of these things, nor do any of the statutes for carrying the treaty into effect contain provisions which fall within such definition."

As to the second part of the question the Judge remarked: "By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed, or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Cummings v. Missouri*, 4 Wall. 326, and *Calder v. Bull*, 3 Dall. 390. The Judge held that the treaty, as construed by him, was not an *ex post facto* law, within the proper meaning of this phrase. On this point he observed: "The fact of extradition cannot be properly regarded as punishment, within the sense of that word, as used when considering the subject of *ex post facto* laws. There is no offense against the United States, and no trial for any such offense, and no punishment for any such offense. It is true that extradition relates only to criminal offenses, but it relates only to criminal offenses committed abroad; and no treaty for extradition, nor any statute passed in relation to extradition, purports to punish the fugitive for the offense. Both treaties and statutes assume that he is to be tried upon the charge, if not already convicted. With the question of punishment, or the kind or degree, they have no concern. They merely declare that the protection of this government shall not be interposed between the fugitive and the laws which he has violated, and that, if he flees hither for such protection, the injured Government may take him hence, and shall be aided therein. This Government neither assumes nor exercises any power for the punishment of crime." It follows, from the very nature of an *ex post facto* law, that the constitutional provision in regard to such laws can have no application to extradition treaties.

Mr. Lawrence, in the query above quoted, refers to the provision in the sixth amendment which declares that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury." The right here guaranteed is that of "a speedy and public trial by an impartial
- of the State and district wherein the crime

shall have been committed, which district shall have been previously ascertained by law." The words of the amendment which Mr. Lawrence did not quote, show that the whole provision relates to persons who are to be tried for crime under the authority of the United States, and hence that the provision has nothing to do with extradition, since the crime for which extradition is sought was not committed within any "State" or "district" of the United States, and since the surrender of a fugitive criminal to a foreign government under the stipulations of a treaty is not a trial for any crime. The cases referred to in the amendment are those in which the Government of the United States arraigns and tries the accused for offenses committed against its laws; and these certainly are not cases in which that Government is asked, in pursuance of a treaty, to deliver up fugitive criminals for offenses committed against a foreign government.

So, also, in another query, Mr. Lawrence suggests the inquiry "whether extradition, either with or without treaty, is consistent * * * * with the bills of right, as incorporated into the organic laws of all the States of the Union." If he had simply said "without treaty," there would have been force in the query; but when he says "either with or without treaty," he raises a question which can very easily be answered. The Constitution makes all the treaties of the United States a part of "the supreme law of the land," and, as such, superior to any State Constitution or State law. It gives to the President the treaty power; and if he makes extradition treaties, with the advice and consent of the Senate, and if such treaties are not repugnant to the Constitution itself, then, being made, they are a part of this "supreme law." Any thing in State constitutions inconsistent therewith would not displace the authority and operation of these treaties, but simply render those constitutions null and void to the extent of the inconsistency. The treaties would not yield to the constitutions, but the latter would yield to the former.

The conclusion, derivable from this survey of the subject, is that extradition treaties come fully within the scope of the treaty power as given to the President, subject to the qualification of the Senate's approval by the requisite majority, and that there is nothing in any part of the Constitution which excludes such treaties from the exercise of the power. The doctrine is well settled in this country that it is only through such treaties that extradition can be had at all. The whole question, therefore, as to extradition, as to the making of treaties for this purpose, as to the crimes that shall be enumerated, as to the terms upon which mutual delivery shall be granted, and as to the nations with which the treaties shall be made, is, by the Constitution, submitted to the sound discretion of the

President, subject to the limitation imposed by the power of the Senate.

Where nations are widely separated from each other, and have but few facilities of intercourse, and especially where they are very different in the type of their civilization and their criminal codes such treaties are much less necessary and far less expedient than between nations that are co-terminous, and whose codes for the trial and punishment of crime are substantially similar. No civilized country would think of making such a treaty with a nation of barbarians. The object of extradition is not to furnish an opportunity for cruelty and oppression in dealing even with criminals, but to promote the general interests of enlightened justice.

The Government of the United States does not permit the criminal laws of other countries to operate within its own territory, and does not extend its laws to offenses committed elsewhere than under its own jurisdiction. It tries and punishes offenders against its own laws and leaves other nations to do the same. Adopting this principle, it must either furnish an asylum to all fugitive criminals who may take refuge in this country, or enter into treaty stipulations for their surrender to the governments against whose laws they have offended. The latter is the policy which the Presidents of the United States have judged it expedient to adopt, as shown by the number of treaties which, with the approval of the Senate, they have negotiated for this purpose since 1842.

All nations are interested in the discouragement and suppression of crime; and extradition, under the stipulations and with the limitations and safeguards of a treaty, seems an appropriate means to this end. It is the only method of attaining the end in the class of cases to which it applies, unless nations undertake in their respective courts, and in cases where the offenders have sought safety by flight, the work of trying and punishing crimes committed against each other. There is no reason to suppose that the United States will ever adopt this expedient as a substitute for extradition. It contradicts the fundamental principle of American jurisprudence which requires that crimes shall be tried and punished under the law of the place where they were committed. Whatever objections there may be against extradition, they are far less serious than those against such an expedient.

Extradition pronounces no judgment upon the laws of other countries, and exercises no judicial power in the trial of criminals or the administration of punishment. It simply says that fugitives from justice shall not, by flight from the jurisdiction of the laws which they have violated, be protected against arrest in the country to which they have fled, and that, upon proper evidence of their

trial and punishment. Treaties to this end are a rational and just exercise of the treaty power. The object to be attained is worthy of the method; and it is clearly better that the principles governing the method should be settled beforehand by a mutual understanding and agreement between nations, rather than leave the whole question to be determined in each specific case. Nations, in this way, place themselves in the friendly attitude of mutual service in respect to a matter in which they have a common interest.

PUBLIC POLICY AS A BASIS FOR JUDICIAL DECISIONS.

BY FRANK L. WELLS.

IF all contracts were to be enforced without regard to the effect they would have upon the public good, the general welfare of society, it would be conducive of the utmost immorality and dishonesty. Legislatures could be bribed, markets cornered, marriages prevented, illegal divorces obtained, and the elective franchise seriously impaired. Moreover, the courts would be compelled to allow compensation for the most pernicious practices. But for the prevention of this we find the well-known, though somewhat chaotic principle of the common law, that all contracts which in themselves are wrong, which are based on an illegal or immoral action, or which would injure the social or commercial interests of the State, are contrary to public policy, and will not receive judicial cognizance. The Illinois court says: "It is a rule of common law that all contracts in violation of its principles or opposed to legislative enactments, or that are opposed to public policy, are void. The object of all laws is to repress vice, and to promote the general welfare of the State or society, and an individual shall not be assisted by the law in enforcing a demand originating in a breach or violation on his part of its principles and enactments. And the rule was laid down by the United States court, that 'where the contract grows immediately out of, or is connected with, any illegal or immoral act, a court of justice will not lend its aid to its enforcement. And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is thereby equally tainted.'" 20 Ill. 215.

And even if a contract is not *in itself* injurious, but belongs to an injurious class, it is void. 13 La. Ann. 209.

And courts should, of their own motion, dismiss a case based upon a consideration which contravenes public policy, whether the parties to the suit take the objection or not. 15 Cal. 387.

Where a board of county commissioners had offered a reward of \$200 for the conviction of the first ten illegal voters in a certain election, \$300 for the next ten, \$400 for each succeeding ten, and if the election was decided to be illegal, \$1,200 in addition, the Illinois court held, that it gave too great a temptation to subornation, and, therefore, was against public policy. 67 Ill. 256.

It is doubtful whether this decision would be sustained by the other States, as it would tend to the prevention of rewards for the capture of criminals, with-

avenging hand of justice. But it seems to illustrate how careful are the courts to annul any contract which would be prejudicial to the public good.

Contracts in restraint of trade are in direct violation of the principles of well-ordered society. But contracts in restraint of trade if not general, but only limiting certain particular persons, and within reasonable limits, are not void. 11 Ind. 72. Thus, a contract not to run boats on a certain line of travel is not void. 6 Cal. 258; 20 Wall. 64. Nor is a contract for the exclusive control of a firm's manufacture. 49 Cal. 865. So a "bond or promise upon good consideration not to exercise a trade for a limited time, at a particular place, or within a particular parish, is good. But where it is general not to exercise a trade throughout the kingdom, it is bad, though founded on good consideration, as being a too unlimited restraint of trade, and operating oppressively on one party without benefiting either." 17 Cow. 307. Such a contract must be limited to time or place. 4 Daly (N. Y.), 188.

Any contract which would influence an officer to neglect his duty, or which remunerates him for what he is required by law to do, is contrary to public policy. But it has been held that a prisoner may contract with his jailer to furnish extra attention when necessary, as in case of sickness. Though, if such attention is obligated by law, it will be void. 40 N. Y. 547.

It is the privilege of every citizen to use all honorable means to obtain legislation, but this privilege is so easily taken advantage of by corrupt lobbyists and legislators, that the courts are especially zealous to keep the fountain of legislation pure and unpolluted. And any contract leading to improper, secret, or corrupt tampering with the Legislature, or for a contingent compensation for obtaining legislation, is void. 40 N. Y. 547; 16 How. 314.

To prevent witnesses from testifying, or any thing which would tend to induce them to testify falsely, could not legally be made the consideration of a contract. But an agreement with one jointly indicted with others, that in case he will testify fully and candidly, the facts will be presented to the court with a recommendation on the part of the prosecutor or prosecuting officer, that a *nolle prosequi* be entered as to him, is not against public policy. 60 N. Y. 362.

Positions of public trust cannot be made the subjects of bargain and sale. Thus, representations that a person could or would be appointed to official position, as an inducement to a party to make a contract, cannot be given in evidence, however false such representations may have been, or however much the party may have been injured by relying upon them. Such inducements are against public policy, and cannot be used as a ground for recovery in an action. 8 Kan. 601.

Where both parties were applicants for the position of United States assessor, and one agreed to withdraw on consideration that the proceeds should be divided, should the other receive the appointment, it was held to be invalid; and a new agreement after the appointment was decided to be in pursuance of the original contract and failed with it. 71 Penn. St. 282.

The prevention of competition at public sales is illegal. The Supreme Judicial Court of Massachusetts states the rule thus: "An agreement between two or more persons that one shall bid for the benefit of all, upon property about to be sold at public auction, which they desire to purchase together, either because they propose to hold it together or afterward to divide

neither desiring the whole, or any similar honest or reasonable purpose, is legal in its character, and will be enforced. But such agreement, if made for the purpose of preventing competition and reducing the property to be sold below its fair value, is against public policy, and therefore illegal." 115 Mass. 592.

Railroads as quasi public corporations have no right to contract to change either their route or the position of their depots. Thus where a stockholder agreed to use his influence to locate the depot at a certain point, the court, in reply to his answer that the position was best for all concerned, said: "Nor is it any satisfactory answer to say that when the agreement was made he had come to the opinion that the location in question was best for the interests of the public, and for the interests of the corporation. That opinion might be changed by new views and new offers." 5 Ore. 177. But if there are two routes laid out, one through a farm, and the other along the highway, the company may contract to choose the one along the highway and leave the farm intact. 41 Iowa, 293. The North Carolina court thinks a railroad director should not be led into temptation, and to guard against it, refuses to allow him to buy up, and speculate in, claims against the company. 10 N. C. 393.

Public policy also demands that no fraud or imposition shall be practiced. And where one physician contracted with another, whereby the latter took the office of the former for a term, was licensed in his name, personated him when applied to, and prescribed in his name, the court held that it was an imposition on the public, and as such, contrary to public policy. 66 Ill. 452.

Gambling contracts are void. Thus, no contract to pay a bet upon any game of chance will stand. Nor will a wager upon horseracing, or an election, if it can in any way affect the result of the election. But if the election is held in another State, the contract is good, as it cannot be supposed to affect the result. 21 Ill. 245. The rule may be stated: That if a contract is based on any game of chance, or if it will lead to the violation of the principles of good government, the contract is void. But if it affects none but the parties it is not against public policy and is therefore legal.

No contract will be enforced which is made on Sunday. But as this branch is mostly statutory, the decisions on the subject are mainly but constructions of State laws, and not suited to a general magazine article.

Any contract based on the prevention of, or brokerage in, the marriage relation are void as contrary to public policy, no matter how much midnight oil, or bituminous coal a marriage broker may consume, or how much she may even spend in clothes to make her patron more desirable. If her client prove ungrateful she can only sigh for the days that are gone, and the money that is spent. The courts will afford her no relief. 62 Barb. 92.

As to the phase of public policy relating to lotteries and stocks: As there is much difference in the different States in regard to this, and as it is largely statutory, I will but mention these important branches. The States where there is no statute authorizing lotteries declare them to be in violation of the rules of public policy as being a fraud and imposition. But some States even have lotteries managed by the State itself. As for stocks, the legitimate buying and selling does not contravene public policy. But that which

worth, is against public policy, as it encourages a hurtful system of speculation and is in many ways injurious to the community.

WHAT CONSTITUTES DELIVERY ON SALE OF PERSONAL PROPERTY.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

GARFIELD, plaintiff in error, v. PARIS.

Defendant, while in New York, ordered over \$4,000 worth of spirituous liquors from plaintiffs, to be sent to him in Michigan. At the time, and as part of the agreement for the sale of the liquors, plaintiffs agreed to furnish certain labels, which were copyrighted and furnished exclusively by them, and which added value to the liquor when attached to the package containing it, without extra charge. The labels were delivered to defendant in New York and the liquors shipped to him in Michigan. By the laws of the latter State the sale of spirituous liquors is forbidden, and contracts founded on such sale are void. Held, that it was for the jury to determine whether the labels constituted a part of the goods sold to defendant, so as to render a delivery of them in New York a sufficient delivery within the statute of frauds, and thus render the contract a New York one and not a Michigan one, and notes given for the purchase-price of the liquors valid, and a verdict for the plaintiff on such notes would not be set aside.

ERROR to the Circuit Court of the United States for the Eastern District of Michigan. The facts appear in the opinion.

Mr. Justice CLIFFORD delivered the opinion of the court.

Neither the manufacture nor the sale of spirituous or intoxicating liquors is allowed by the law of the State where the present controversy arose. Instead of that the State law provides that all payments made for such liquors so sold may be recovered back, and that all contracts and agreements in relation to such sales shall be utterly null and void against all persons and in all cases, with an exception in favor of the *bona fide* holders of negotiable securities and the purchasers of property without notice. 1 Comp. Laws, 690.

Two bills of goods consisting of spirituous liquors were purchased of the plaintiffs by the defendants, which, including exchange, amounted to \$4,143.69. Payment being refused the plaintiffs brought suit in the court below to recover the amount and the verdict and judgment were for the plaintiffs. Exceptions were taken by the defendants and they sued out the present writ of error.

Sufficient appears to show that the plaintiffs are citizens of New York and that the defendants are citizens of Michigan; that the liquors were purchased of the plaintiffs, as alleged, and that the same were received and sold by the defendants, but they set up the prohibitory liquor law of the State, providing that all such contracts are utterly null and void.

Evidence was introduced by the plaintiffs showing that the liquors were ordered by one of the defendants at a time when he was temporarily in the city of New York, and that the plaintiffs by his request sent certain labels to be attached to the same to the defendant at the hotel in that city where he was stopping. By the agreement at the time the sale was made the plaintiffs were to furnish these labels to the purchasers, and the evidence showed that the value of the labels entered into the price charged for the liquors, and

be furnished to the buyers by the sellers without any other charge than the price to be paid for the liquors. Labels of the kind were something more than ordinary labels affixed to bottles, as they indicated not only the kind of liquor which the bottle contained, but also embraced an affidavit that the distillation was genuine, and of the particular brand manufactured and distilled by the plaintiffs, support to which is derived from the fact that the label was copyrighted, so that no other person than the plaintiffs had any right to make, use, or vend it.

Certain questions were submitted to the jury, among which were the following: Were there any receipt and acceptance in New York of part of the goods sold, and if so, what was so received? to which the jury answered, there was, to wit, certain labels. Was any thing added to the price of the liquors on account of the labels, and if so, what amount? Answer.—There was nothing added, but the labels added to the value of the liquors and formed part or parcel of the price.

Testimony was offered by the plaintiffs in respect to the delivery of the labels to the defendant while he was at the hotel in New York, to which the defendants objected, but the court overruled the objection and the testimony was admitted, subject to the defendants' objection.

Errors assigned are in substance and effect as follows: (1) That the court erred in refusing to charge the jury that the delivery of the labels as proved was not a receipt and acceptance of part of the goods sold within the meaning of the State statute of frauds. (2) That the court erred in refusing to charge the jury that the evidence was not sufficient to take the case out of the statute of frauds. (3) That the court erred in refusing to charge the jury that the sale was not consummated until the defendants received and accepted the goods in the State where they resided. (4) That the court erred in instructing the jury that the defense set up is one not to be favored, and that the proof to support it must be clear and satisfactory before the jury can consistently enforce it. (5) That the statute is a penal statute in derogation of the rights of property, and that for that reason if for no other it must receive a strict construction. (6) That the court erred in instructing the jury that if the labels were included in the contract and the liquors were worth more to the defendants on account of the labels, then the receipt and acceptance of the same by the acting defendant took the case out of the New York statute of frauds, and their verdict should be for the plaintiffs.

1. Due exception was also made to the ruling of the court in admitting the evidence reported in respect to the delivery and acceptance of the labels furnished to the purchasers at the time the order for the liquors was filled, the objection being that the labels are not mentioned in the plaintiffs' bill of particulars filed in the case.

Matters of evidence are never required to be stated in such a paper. Courts usually require such a notice where the declaration is general, in order that the defendant may know what the cause of action is to which he is required to respond. Nothing is wanted in this case to meet that requirement, as all the items of the demand are distinctly and specifically stated in the bill filed in compliance with the order of the

Merchants selling spirituous liquors in bottles usually label the bottles to indicate the kind, character, age, quality, or proof of the liquor, or to specify the name of the manufacturer or the place where it was manufactured or distilled. Such are somewhat in the nature of trade-marks, and are useful to the seller of the liquors to enable him to distinguish one kind of liquor from another without opening the bottle, and to commend the article to his customers without oral explanation.

2. Coming to the errors formally assigned, it is manifest that the first and second may be considered together, as they depend entirely upon the same considerations.

Both parties concede that the bargain for the sale of the liquors in this case was made in New York, and by the laws of that State contracts for the sale of any goods, chattels, or things in action for the price of fifty dollars or more shall be void unless (1) a note or memorandum of such contract be made in writing and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods or the evidences or some of them of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase-money. 3 Rev. Stats. (6th ed.) 142, § 3.

Four answers are made by the plaintiffs to that proposition, each of which will receive a brief consideration:

(1) That the defendants received and accepted the labels which the plaintiffs contracted to furnish at the time they filled the order for the liquors. (2) That the case is not within the statute of frauds, inasmuch as the defendants received the liquors and sold the same for their own benefit. (3) That the statute of the State prohibiting the sale of such liquors and declaring such contracts null and void has been repealed. (4) That the subsequent letter written by the defendants to the plaintiffs takes the case out of the operation of the statute requiring such a contract to be in writing.

Authorities almost numberless hold that there is a broad distinction between the principles applicable to the formation of the contract and those applicable to its performance, which appears with sufficient clearness from the language of the statute—such a contract must be in writing or there must be some note or memorandum of the same to be subscribed by the party to be charged—but the same statute concedes that the party becomes liable for the whole amount of the goods if he accepts and receives part of the same or the evidences or some of them of such things in action, and the authorities agree that where the question is whether the contract has been fulfilled it is sufficient to show an acceptance and actual receipt of a part, however small, of the thing sold in order that the contract may be held to be good, even though it does not preclude the purchaser from refusing to accept the residue of the goods, if it clearly appears that they do not conform to the contract. *Benj. on Sales* (2d ed.), 117; *Hinde v. Whitehouse*, 7 East, 55; *Morton v. Tibbels*, 15 Ad. & Ell. (N. S.) 434.

Hence, said Lord Campbell, in the case last cited, the payment of any sum in earnest to bind the bargain or in part payment is sufficient, the rule being that such an act on the part of the buyer, if acceded to on the part of the vendee, is an answer to the defense. *Edam v. Dudfield*, 1 Ad. & Ell. (N. S.) 205.

Accept and receive are the words of the statute in question, but the law is well settled that an acceptance sufficient to satisfy the statute may be constructive, the rule being that the question is for the jury, whether the circumstances proved, of acting or forbearing to act, do or do not amount to an acceptance within the statute. *Bushel v. Wheeler*, 15 Ad. & Ell. (N. S.) 445; *Chitty on Cont.* (10th ed.) 387; *Parker v. Wallis*, 5 Ell. & Bl. 26; *Lillywhite v. Devereux*, 15 Mees. & Wels. 290; *Simmonds v. Humble*, 13 C. B. (N. S.) 261; *Addison on Cont.* (6th ed.) 169.

Questions of the kind are undoubtedly for the jury, and it is well settled that any acts of the parties indicative of ownership by the vendee may be given in evidence to show the receipt and acceptance of the goods to take the case out of the statute of frauds. Conduct, acts and declarations of the purchaser may be given in evidence for that purpose, and it was held in the case of *Currie v. Anderson*, 2 Ell. & Ell. 598, that the vendee of goods may so deal with a bill of lading as to afford evidence of the receipt and acceptance of the goods therein described. *Gray v. Davis*, 10 N. Y. 291.

Throughout it should be borne in mind that one of the defendants in person visited the plaintiffs' place of business, and while there ordered the liquors, and that the liquors were all received by the defendants at their place of business and were sold by them for their own benefit, that the contract between the sellers and purchasers was that the former should furnish the labels as part of the contract, and the evidence shows that they fulfilled that part of the contract and that they delivered the same to the contracting party at his hotel before he left the State where the purchase was made.

Satisfactory evidence was also introduced by the plaintiffs showing that they drew a draft on the defendants for the payment of the price and that the defendants answered the letter of the plaintiffs declining to accept the same, as more fully set forth in the record, in which they state that the purchase was on four months, with the further privilege of extending the time two months longer by allowing seven per cent interest, adding that if the plaintiffs doubted their word they had "a written contract to that effect." What they claim in the letter is that the arrangement was made with the salesman, and they state that they would not have given him the order, if he had not given them "those conditions." They make no complaint that the liquors were not of the agreed quantity and quality, and certainly leave it to be implied that they had been duly received and that they were satisfactory.

It was contended by the plaintiffs that the case was taken out of the statute of frauds—(1) Because the labels were a part of what was purchased and that the defendants accepted and received the same at the time and place of the purchase. (2) That the subsequent letter, as exhibited in the record, is sufficient for that purpose.

Enough appeared at the trial to show that the labels were copyrighted, and that the plaintiffs agreed to furnish the same without any additional charge, and the bill of exceptions also shows that it was conceded that the defendants accepted and received the labels at the hotel as claimed by the plaintiffs. Still the defendants denied that the labels were of any value, or that they entered into or constituted any part of the

judge submitted to the jury, remarking at the same time that by the furnishing the labels with the liquors the defendants acquired the right to use the copyright to that extent, without which or some equivalent permission or license, they would have had no such lawful authority.

Pursuant to these suggestions the jury were directed to ascertain whether the liquors were worth more to the defendants on account of the labels, and whether the labels were included in the contract, and they were instructed that if they found affirmatively in respect to both of these inquiries then the receipt and acceptance of the labels as alleged took the case out of the statute of frauds, because then there was a receipt and acceptance by the defendants of a portion of the things purchased.

Appropriate instruction was also given to the jury in respect to the subsequent letter sent by the defendants to the plaintiffs, and the jury were told by the presiding judge that if they found, under the instructions given, that the defendants received and accepted a part of the things purchased, then the contract was made valid as a New York contract, and that their verdict should be in favor of the plaintiffs. *Currie v. Anderson*, 2 Ell. & Ell. 598. That if the contract was not made valid by the acceptance and receipt of the labels, nor by the letter exhibited in the record, then it was a Michigan contract, and their verdict should be for the defendants. *Meredith v. Meigh*, 2 El. & Bl.; *Castle v. Snowden*, 6 Hurlst. & Norm. 835; *Law Rep.*, 1 C. P. 5.

Controlling authorities already referred to show that the question whether the goods or any part of the same were received and accepted by the purchaser is one for the jury, to which list of citations many more may be given of equal weight and directness. Just exception cannot be taken to the form in which the question was submitted to the jury, and the record shows that the verdict was for the plaintiffs, and that the jury found, in response to the fifth question, that the label added to the value of the liquors, and that they formed part or parcel of the price. *Jackson v. Lowe*, 7 Moore, 227.

Where goods are purchased in several parcels, to be paid for at a future day, the whole, within the meaning of the statute of frauds, constitutes but one contract, and the delivery of part to the purchaser is sufficient to take the case out of the operation of the statute of frauds. *Mills v. Hunt*, 20 Wend. 431.

Apply the finding of the jury in this case to the conceded facts and it shows that the defendants were in the situation of a purchaser who goes to a store and buys different articles at separate prices for each article, under an agreement for a credit as in this case, accepting a part, but leaving the bulk to be forwarded by public conveyance. Frequent cases of the kind occur, and it is well-settled law that the delivery of a part of the articles so purchased, without any objection at the time as to the delivery, is sufficient to take the case out of the statute of frauds as to the whole amount of the goods. *Mills v. Hunt*, 20 Wend. 431.

The delivery in such a case, in order that it may have that effect, must be made in pursuance of the contract, the question whether it was so made or not being one for the jury, but if they find that question in the affirmative, then it follows that the case is taken out of the statute of frauds. *Van Woert v. Railroad*, 67 N. Y. 541.

Parol evidence is admissible to show what the circumstances were attending the contract and to show the receipt and acceptance in whole or in part of the goods purchased. *Tompkinson v. Spraight*, 17 C. B. 704; *Kershaw v. Ogden*, 3 Hurlst. & Colt. 721.

Due acceptance and receipt of a substantial part of the goods will be as operative as an acceptance and receipt of the whole, and the acceptance may either precede the reception of the article or may accompany their reception. 2 Whart. Ev., § 875.

Differences of opinion have existed upon some of these matters, but all the authorities or nearly all concur that the question is for the jury, to be determined by the circumstances of the particular case. 2 Whart. Ev. 875.

Viewed in the light of these suggestions it is clear that the question whether the evidence showed that the case was taken out of the statute of frauds by the acceptance and receipt by the defendants of a part of what was purchased by them, in connection with the letter of the defendants, exhibited in the record, was fairly submitted to the jury, and that their finding in the premises is final and conclusive.

Attempt was also made by the plaintiffs to support the judgment upon the ground that the defendants were estopped to set up the statute of frauds as a defense, in view of the fact that they had received the liquors and sold the same for their own benefit, but it is not necessary to examine that proposition in view of the conclusion that the case is taken out of the operation of the statute by the other evidence and the finding of the jury. Nor is it necessary to give any consideration to the proposition that the act of the State of Michigan to prevent the manufacture and sale of spirituous and intoxicating liquors as a beverage is repealed, for the same reason, and also for the additional reason that the repealing clause saves "all actions pending and all causes of action which had accrued at the time" the repealing act took effect. Sess. Acts, 1875, p. 279.

Having come to the conclusion that the case is taken out of the statute of frauds, it is not deemed necessary to give the other assignments of error a separate examination. Suffice it to say that the court is of the opinion that there is no error in the record.

Judgment affirmed.

LIABILITY OF LAND-OWNER FOR IMPROPER USE OF LAND.

ENGLISH COURT OF APPEAL, MARCH 1, 1878.

HURDMAN V. NORTH-EASTERN RAILWAY COMPANY,
38 L. T. Rep. (N. S.) 839.

A man who places an artificial mound upon his property and thereby causes rain-water, percolating naturally, to come on to the property of his neighbor, is liable to the latter in respect of damage so caused.

A statement of claim alleged that defendants, being owners of property adjoining the plaintiff's, placed a quantity of soil and rubbish upon and against their wall, and thereby raised the surface of defendants' land above the level upon which plaintiff's house was built; that the rain which fell upon the said soil, etc., percolated through the said wall into the plaintiff's house, and caused damage. In the alternative it was alleged that the defendants negligently and improperly placed the soil, etc., upon their land, and negligently and improperly built the wall, so that the rain water percolated through the wall and injured plaintiff's house. On demurrer, it was held (affirming the decision below), that the statement of claim stated a good cause of action.

APPEAL from a decision of Manisty, J., giving judgment for the plaintiff on a demurrer.

Statement of claim: 1. At the time of and before the commencement of the damage hereinafter mentioned, the plaintiff was and he still is possessed of a house known as No. 16 Lodge terrace, Sunderland. 2. The defendants then were and still are possessed of a certain close of land adjoining the said house of the plaintiff. 3. The defendants placed and deposited in and upon the said close of the defendants, and upon and against a wall of the defendants which adjoins and abuts against the house of the plaintiff, large quantities of soil, clay, limestone, and other refuse, close to and adjoining the said house of the plaintiff, and thereby raised the surface of the defendants' land above the level of the land upon which the plaintiff's house was built. 4. The rain which fell upon the said soil, clay, limestone, and other refuse, so placed as aforesaid, oozed and percolated through the said wall of the defendants into the said house of the plaintiff, and the plaintiff's house thereby became wet, damp, unwholesome and unhealthy, and less commodious for habitation. 5. By reason of the said acts of the defendants the walls of the said house of the plaintiff became and were very much injured, and the paper and plaster upon the said walls have been destroyed. 6. In the alternative the plaintiff alleged that the defendants so negligently and improperly placed and deposited the said soil, clay, limestone, and refuse, upon the defendants' said land, that the rain water falling thereon oozed and percolated through and into the plaintiff's house, whereby the plaintiff's house was damaged as before mentioned.

The defendants put in a statement of defense, dealing with the allegations in the amended statement of claim. They also demurred to the whole claim, on the ground "that the acts, matters and things alleged to have been done by the defendants do not give rise to any right of action on the part of the plaintiff." The plaintiff joined issue.

On the argument of the demurrer Manisty, J., gave judgment for the plaintiff and against the demurrer. The defendants appealed.

Herschell, Q. C., and Gainsford Bruce, for the defendants, cited *Wilson v. Wadden*, 35 L. T. Rep. (N. S.) 639; *L. Rep.*, 2 Sc. App. 36; *Fletcher v. Rylands*, 19 L. T. Rep. (N. S.) 220; *L. Rep.*, 3 H. L. 330; *Baird v. Williamson*, 15 C. B. (N. S.) 376; *Smith v. Kenrick*, 7 C. B. 564; *Crompton v. Lea*, 31 L. T. Rep. (N. S.) 469; *L. Rep.*, 19 Eq. 115; 44 L. J. 69, Ch.; *Smith v. Fletcher*, 31 L. T. Rep. (N. S.) 190; *L. Rep.*, 9 Ex. 64; *Nicholls v. Marsland*, 35 L. T. Rep. (N. S.) 725; *L. Rep.*, 10 Ex. 225; and 2 Ex. Div. 1.

Waddy, Q. C., and J. Edge, for the plaintiff.

COTTON, L. J. In this case plaintiff has brought an action for injury alleged to have been caused to his house, which abuts on a wall of the defendants, by certain acts done by the defendants on their own land. The question is raised on demurrer to the statement of claim, and the question, therefore, is whether that alleges a good cause of action. For the purposes of our decision we must assume that the plaintiff has sustained substantial damage, and we must construe the statement as alleging that the surface of the defendants' land has been raised by earth and rubbish placed thereon, and that the consequence of this is that rain water falling on the defendants' land has made its way through the defendants' wall into the house of the plaintiff, and has caused the injury complained of. The question is, are the defendants, ad-

mitting this statement to be true, liable to the plaintiff? and we are of opinion that they are. The heap or mound on the defendants' land must, in our opinion, be considered as an artificial work. Every occupier of land is entitled to the reasonable enjoyment thereof. This is a natural right of property, and it is well established that an occupier of land may protect himself by action against any one who allows any filth or other noxious thing produced by him on his own land to interfere with this enjoyment. We are further of opinion that, subject to a qualification to be hereafter mentioned, if any one by an artificial erection on his own land causes water, even though arising from natural rainfall only, to pass into his neighbor's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured, and this view agrees with the opinion expressed by the Master of the Rolls in the late case of *Broder v. Saillard*, L. Rep., 2 Ch. Div. 700: "If there were no authority on the question I should have felt no difficulty about it, because I take it that the law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbor makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it. It is no answer to say that the defendant is only making a reasonable use of his property, because there are many trades and many occupations which are not only reasonable, but necessary to be followed, and which still cannot be allowed to be followed in the proximity of dwelling-houses, so as to interfere with the comfort of their inhabitants. I suppose a blacksmith's trade is as necessary as most trades in this kingdom; or I might take instances of many noisy and offensive trades, some of which are absolutely necessary, and some of which, no doubt, may not only be reasonably followed, but to which it is absolutely and indispensably necessary for the welfare of mankind that some houses and some pieces of land should be devoted; therefore I think that is not the test. If a stable is built, as this stable is, not as stables usually are, at some distance from the dwelling-houses, but next to the wall of the plaintiff's dwelling-house, in such a position that the noise would actually prevent the neighbors sleeping, and would frighten them out of their sleep, and would prevent their ordinary and comfortable enjoyment of their dwelling-house, all I can say is, that it is not a proper place to keep horses in, although the horses may be ordinarily quiet." I have limited this statement of liability to liability for allowing things in themselves offensive to pass into a neighbor's property, or for causing by artificial means things in themselves inoffensive to pass into a neighbor's property to the prejudice of his enjoyment thereof, because there are many things which when done on a man's own land (as building so as to interfere with the prospect, or so as to obstruct lights not ancient) are not actionable even though they interfere with a neighbor's enjoyment of his property. But it is urged that this is at variance with the decision that if, in consequence of a mine owner on the rise working out his minerals, water comes by natural gravitation into the mines of the owner on the deep, the latter mine owner cannot maintain any action for the loss which he thereby sustained. But excavating and raising the minerals is

considered the natural use of mineral land, and these decisions are referable to this principle, that the owner of land holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural user by his neighbor of his land, and that when an interference with this enjoyment by something in the nature of nuisance (as distinguished from an interruption or disturbance of an easement or right of property in ancient lights, or the support for the surface to which every owner of property is entitled) is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbor of his land. That this is the principle of these cases appears from the case of *Wilson v. Waddell*, L. Rep., 2 App. 99, and from what is said by the Lord Chancellor in *Rylands v. Fletcher*, L. Rep., 3 H. L. 328. Moreover, the cases referred to have laid down that a mine owner is exempt from liability for water which, in consequence of his works, flows by gravitation into an adjoining mine, only if his works are carried on with skill and in the usual manner, and in the present case it is stated that the defendants have conducted this operation negligently and improperly. The decisions, therefore, as regards the rights of adjoining mine owners do not enable the defendants to discharge themselves from liability. It was also argued that a land-owner, who, by operations on his own land, drains the water percolating underground in the property of his neighbor, is not liable to an action by the man whose land is thus deprived of its natural moisture, and this, it was argued, was inconsistent with a judgment for the plaintiff on a statement alleging as a cause of action an alteration in the percolation of water. It is sufficient to say that no one can maintain an action unless there is some injury to something to which the law recognizes his title, and the law does not recognize any title in a land-owner to water percolating through his property underground, and in no definite channel. We are of opinion that the maxim, "*Sic utere tuo ut alienum non laedas*," applies to and governs the present case, and that, as the plaintiff by his statement of claim alleges that the defendants have by artificial erections on their land caused water to flow into the plaintiff's house in a manner in which it would not, but for such erections, have done, the defendants are answerable for the injury caused thereby to the plaintiff.

RECENT AMERICAN DECISIONS.

SUPREME COURT OF OHIO. SUPREME COURT COMMISSION OF OHIO.*

ADVERSE POSSESSION.

Line fence permitted to be off from line: effect of.—Where, by the title deeds of adjoining proprietors of land, the dividing line is left open to be established by a survey or measurement, and is thereafter fixed and marked by mutual agreement between them, and they occupy to such established line for a period sufficient to create title under the statute of limitations, such proprietors will be held to the line so established, although it may not be the true line. Under such agreement, one of the parties, holding under a deed, and

in actual possession of part of the tract, is deemed to be in possession of the entire tract described in his deed, up to the division line, there being no actual adverse possession against him. *Smith v. McKay* (Com.).

DAMAGES.

In case of trespass: cutting of timber: innocent purchaser not liable for impaired value by cutting.—Timber was cut from land of B. by trespassers, who by their labor converted it into cord wood and railroad ties, thus increasing its value three-fold. It was then sold to an innocent purchaser, who was sued by B. for the value of the wood and ties. Whatever might be the rule of damages, as against the wrong-doers, as against innocent purchasers B. cannot recover the value of the timber as enhanced by the labor of the wrong-doers, after it was severed from the realty. *Lake Shore & Mich. So. Railway Co. v. Hutchins* (Com.).

FRAUD.

Purchase of goods on credit by one without means: when fraudulent and when not so.—A contract for the purchase of goods on credit, made with intent on the part of the purchaser not to pay for them, is fraudulent; and if the purchaser has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay. But where the purchaser intends to pay and has reasonable expectations of being able to do so, the contract is not fraudulent, although the purchaser knows himself to be insolvent and does not disclose it to the vendor, who is ignorant of the fact. *Talcott v. Henderson* (Court).

PARTNERSHIP.

1. *Liability of retiring partner.*—A retiring partner remains liable for all the existing debts of the firm, to the same extent as if he had not retired. An agreement between him and the remaining partners, or with the new firm that succeeds, that they will assume and pay all such debts, while valid as between the partners, has no effect upon the creditors of the old firm, unless they become parties thereto. *Rawson v. Taylor* (Com.).

2. *That firm has assets to pay debts does not relieve retiring partner.*—R. held the promissory note of the firm of T. G. & Co. After it was given, some members of the firm retired, leaving assets sufficient to pay all debts, and taking the obligation of the succeeding new firm, to pay all debts and save the retiring partners harmless. Held, that unless R., by some valid contract, express or implied, had made himself a party to this new arrangement, or had so acted as to be estopped, his rights on the note against all the members of the old firm remained unchanged; that while, as between the partners themselves, the relation of principal and surety existed, yet, as to the payee of the note, all were principals and joint debtors, although notice of such obligation was brought home to him. Ib.

3. *When creditor may release security without impairing rights.*—Where the payee of such note has received from the new firm a chattel mortgage of the partnership property, sufficient, if applied, to satisfy the debt, he may, with the assent of the retiring partners, release the mortgage, and return the property or its avails to the new firm, without impairing his rights against all the joint obligors on the note, even though he had such notice of the subsequent contract between the partners. Ib.

* To appear in 30 and 31 Ohio St. Reports. From E. Dewitt, Esq., State Reporter.

RAILROAD.

1. *Fencing: where fence division one, company and land-owner under equal duty to keep.*—Where a fence constructed by an individual land-owner serves as a partition fence between a railroad track and the inclosed fields of such individual owner, but not so divided that each owner is charged with maintaining in repair a distinct portion thereof, the railroad company and individual land-owner are, each, under equal obligations to keep and maintain the entire fence in repair until so divided. *Dayton & Mich. R. R. Co. v. Miami County Infirmary (Com.).*

2. *When land-owner guilty of contributory negligence.*—If the land-owner, knowing the partition fence to be out of repair, turns his stock into a field inclosed by such defective fence, and, by reason of its insufficiency, his stock goes upon the railroad track and is killed by a passing train, run without negligence, such land-owner is chargeable with contributory negligence, and cannot recover for the loss. *Ib.*

RECENT ENGLISH DECISIONS.

INJUNCTION.

Mere delay not ground for refusing.—Where a plaintiff seeks an injunction in aid of his legal right, relief will not be refused on the ground of mere delay on his part, unless he is barred by the statute of limitations. *Ch. Div., March 5, 1878. Fulwood v. Fulwood, 38 L. T. Rep.*

LIBEL.

Privilege: anonymous letter: bona fide answer to inquiries.—The defendant, manager of a bank, having been applied to for information respecting the plaintiff, who had had business transactions with the bank in which the applicant was interested, gave to the applicant an anonymous letter, which he had received a year previously, and which contained libelous charges against the plaintiff. *Held*, that the communication was privileged. *Com. Pl. Div., Feb. 20, 1878. Robshaw v. Smith, 38 L. T. Rep. (N. S.) 423.*

MORTGAGE.

When mortgagor cannot create charge in his own favor.—A mortgagor having an equity of redemption, or an ultimate interest in a fund by the performance of some condition without which he cannot get at it, does not by that condition create a charge in his own favor as against his mortgagee. *Ch. Div., Jan. 24, 1878. Saunders v. Dunman, 38 L. T. Rep. (N. S.) 416.*

TRADE-MARK.

Bottles indelibly marked with distinctive design: user by rival tradesman for sale of his own production: injunction.—When one trader sells an unpatented production of his own in bottles or casks indelibly marked with his known design, the court will restrain a rival trader from selling a similar production in the same bottles or casks, although the rival trader puts a label of his own thereon. *Ch. Div., April 10, 1878. Rose v. Loftus, 38 L. T. Rep. (N. S.) 435.*

RECENT BANKRUPTCY DECISIONS.

CONTRACT.

To procure adjudication against firm of one making it valid.—An agreement by a member of a firm to consent, and to procure the consent of his partners to an adjudication against the firm, is valid, and the con-

sideration therefor may be recovered. *Sup. Ct., Michigan. Sanford v. Huxford, 17 Nat. Bankr. Reg. 385.*

DISCHARGE.

Covenant of warranty barred by.—Defendant sold to plaintiff certain premises by warranty deed, and at the same time gave him a writing by which he agreed to pay off a certain mortgage which was a lien upon the premises. Defendant was afterward adjudicated bankrupt and received his discharge. Subsequently the mortgage was foreclosed and the premises sold. In an action for breach of warranty, *held*, that plaintiff should have proved his claim in the bankruptcy proceedings under section 5068 as a contingent debt, and that not having done so, his claim is barred by the discharge. *Sup. Ct., Iowa. Parker v. Bradford, 17 Nat. Bankr. Reg. 485.*

FRAUDULENT SALE.

Knowledge in vendee must be shown to set aside.—In an action to recover from a vendee goods sold on the eve of bankruptcy, the assignee must establish not only that the bankrupts intended to dispose of their property in fraud of the act, but that defendant knew such to be their intention and guiltily combined and colluded with them to carry it into effect. *U. S. Dist. Ct., California. Dickinson v. Adams, 17 Nat. Bankr. Reg. 380.*

NATIONAL BANK.

1. *Trial of matters affecting, should be in Federal, not State courts.*—Where a question arises involving the right of national banks to make loans of a particular character upon mortgage, the assignee should be permitted to litigate such question in the Federal courts, and should not be sent into the State courts to try it on the distribution of surplus moneys in a foreclosure suit, or in a suit brought by the party holding the alleged invalid mortgage. *U. S. Dist. Ct., S. D. New York. In re Duysen, 17 Nat. Bankr. Reg. 495.*

2. *When injunction restraining foreclosure of mortgage will not be set aside contrary to interest of creditors.*—The Bowery Savings Bank held a first mortgage on property of the bankrupt which was not contested by the assignee. It commenced foreclosure proceedings which were restrained by injunction of the bankrupt court. On motion to be allowed to proceed with the foreclosure to the entry of judgment, *held*, that there was no reason for allowing it to do so, as its rights would be fully secured on the distribution of the proceeds of the sale whenever the property should be sold under the direction of the court. The fact that a recovery of the amount of a mortgage in the bankrupt court would be burdened with greater expenses than if the mortgagee were allowed to go on and foreclose will not control the action of the court, where it is obviously for the interest of the creditors that the estate should be administered in the bankrupt court. *Ib.*

3. *Good reason should be shown for sale by assignee at auction.*—The assignee must, in the present state of the real estate market, show a good reason for an immediate sale before he will be allowed to sell the property at public auction. *Ib.*

PARTNERSHIP.

Change in firm: construction of agreement: title to property.—The firm of J. & S. was dissolved by mutual consent, and the firm property divided, each partner agreeing to pay the debts contracted in respect of the

property received by him. S. sold an interest in the portion received by him to M., with whom he formed the new firm of S. & M., which incurred debts and became bankrupt. Before the adjudication, the property of the latter firm was attached by a creditor of the firm of J. & S. *Held*, that the property attached was property of the new firm; that the assignee was entitled to possession of it for the purpose of satisfying the creditors of that firm, and that only the balance which might be due to S. after payment of the firm debts and adjustment of accounts between the partners, would be subject to the attachment. U. S. Dist. Ct., California. *Crane v. Morrison*, 17 Nat. Bankr. Reg. 393.

PETITION.

Estimate of number of creditors for: those less than \$250 counted: amendment.—Where the petitioning creditors who hold debts exceeding two hundred and fifty dollars do not represent one-third of all the provable debts, every two hundred and fifty dollar creditor sinks into a common unit in the mass of creditors, and counts but one with the rest. Where the name of a creditor is stated in the petition, asserting a claim by a proper averment, but omitting the amount, the claim may be amended by adding the amount, if done in good faith. U. S. Dist. Ct., W. D. Pennsylvania. *In re Blair*, 17 Nat. Bankr. Reg. 492.

PREFERENCE.

Creditor not active in proceedings may prove debt: to what cases act applies.—After a recovery against a preferred creditor by the assignee the creditor may prove his debt, if he has not actively assisted in the fraud. The provision of section 12 of the statute of 1874 (Rev. Stats., § 5021) in relation to proof of debt by preferred creditors, applies to cases begun prior to December 1, 1873, as well as to those begun since that time. U. S. Dist. Ct., Massachusetts. *In re Black*; *Ex parte Stillton*, 17 Nat. Bankr. Reg. 399.

UNITED STATES SUPREME COURT ABSTRACT,
OCTOBER TERM, 1877.

CRIMINAL LAW.

1. *Intent: what knowingly and willfully implies.*—Doing or omitting to do a thing "knowingly and willfully" implies not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it. Judgment of United States Circuit Court, Massachusetts, reversed. *Fillon, plaintiff in error, v. United States*. Opinion by Field, J.

2. *Presumption of knowledge from business: distilling spirits.*—Parties engaged in distilling spirits are presumed to be acquainted with the utensils and machinery used in their business, and with their character and capacities. But the law does not attach culpability and impose punishment where there is no intention to evade its provisions, and the usual means to comply with them are adopted. *Id.*

3. *What law requires.*—All that the law requires of them to avoid its penalties is to use in good faith the ordinary means—by the employment of skilled artisans and competent inspectors—to secure utensils and machinery which will accomplish the end desired. If, then, defects should exist, and the end sought be not attained, or defects in the utensils or machinery not then open to observation should subsequently be discovered, the parties are not chargeable with "knowingly

and willfully" omitting to do what is required of them. *Id.*

EIGHT HOUR LAW.

Federal statute does not apply to employee of contractor with government: privity of contract.—By a contract between O. and the United States, O. agreed to furnish the United States, from certain quarries, granite to be delivered at Washington, D. C., to be paid for at specified prices, and to furnish the labor, tools and materials necessary to cut, dress and box the granite at the quarries in such manner as should be directed, the United States agreeing to pay the full cost of said labor, tools and materials, etc., and fifteen per cent addition. A time of delivery was specified, and O. was to forfeit in case of default \$100 per day for each day thereafter until delivery. Appellee was employed by O. on the work done under this contract and was paid at the rate of ten hours per day. *Held*, that there was no privity between appellee and the United States, and he did not work for it and could not, on a claim that he should be paid at the rate of eight hours per day, maintain an action for additional compensation from the United States. Judgment of Court of Claims reversed. *United States, appellant, v. Driscoll*. Opinion by Swayne, J.

MARITIME LAW.

1. *Bottomry bond: may be given upon cargo.*—The master of a bark, loaded with sugar, and which had become disabled in a foreign port, in order to procure funds for necessary repairs, executed a bottomry bond upon the bark, cargo and freight. The cargo was insured by the D. Company. On the voyage home the bark was wrecked, but a part of the cargo saved. The D. Company paid the insurance, and the owners of the cargo assigned to the company all their interest in the cargo. In an action by the company against the agent of the bond holder to recover the proceeds of the cargo which had been taken possession of and sold by him, *held*, that the master had power to hypothecate the cargo, as well as the ship and freight, to enable him to prosecute his voyage, and the agent was entitled to retain the proceeds of the cargo and apply them toward the bond. Judgment of United States Circuit Court, Massachusetts, affirmed. *Delaware Mutual Safety Insurance Co., plaintiff in error, v. Gossler*. Opinion by Clifford, J.

2. *Discharge of loan by utter loss of vessel: what constitutes utter loss.*—The bottomry bond contained a provision discharging the borrowers from liability in case of the "utter loss" of the vessel by the perils of the sea. The vessel was cast ashore, and after being surveyed and found incapable of being repaired, was broken up and the pieces sold. *Held*, not an "utter loss" within the meaning of the provision. *Id.*

NATIONAL CURRENCY ACT.

Construction of: liberal forfeitures not favored.—The National Currency Act should be liberally construed to effect the ends for which it was passed, but a forfeiture under its provisions should not be declared unless the facts upon which it rests are clearly established. In case of a claim of forfeiture against a bank for taking unlawful interest upon the discount of bills of exchange payable at another place, it should appear affirmatively that the bank knowingly received or reserved an amount in excess of the statutory rate of interest and the current exchange for sight drafts. Accordingly, where it was not shown what the rate of

exchange was, a charge of one-quarter of one per cent in addition to the statutory rate of interest would not be sufficient to authorize a forfeiture. Judgment of Superior Court of city, etc., of New York affirmed, *Wheeler v. Union National Bank of Pittsburg*. Opinion by Harlan, J.

PRACTICE.

Appeal: reversal not allowed for irregularities working no harm.—Where a reference was made to a master to compute the amount due, and the proceeding was wholly unnecessary, it being the duty of the court to compute the amount itself, or have it done by the clerk or the complainant's counsel, *held*, that the decree would not be reversed on the ground that appellant had no notice of the time of the master's sitting, or of the filing of his report. This court will not reverse a decree in chancery for an immaterial departure from the technical rules, when it can see that no harm resulted to the appellant. Decree of United States Circuit Court, Minnesota, affirmed. *Allis, appellant, v. Northwestern Mutual Life Insurance Co.* Opinion by Miller, J.

COURT OF APPEALS ABSTRACT.

COMMON CARRIER.

Not relieved from liability because shipper violates law: fictitious firms.—A wrong-doer is not protected in the invasion of the rights of another party because such party happens to be transacting business in violation of a special statute. Accordingly, where plaintiff, who was carrying on the business of selling carriages in the name of a firm in violation of the statute against fictitious partnerships (3 Rev. St., 5th ed., § 42), shipped a carriage upon defendants' railroad, directed to the firm, *held*, that defendant would be liable as carrier to plaintiff for injury done to such carriage in the course of transportation, and plaintiff's violation of the statute would be no defense. Judgment below affirmed. *Wood v. Erie Railway Co.* Opinion by Miller, J.

[Decided January 22, 1878. Reported below, 9 Hun, 648.]

CONTRACT.

Construction of: sale of "about" a specified quantity: words of expectancy, not of quantity.—Defendants agreed to take "all the oil cake made by the plaintiffs at their mill" during six months, the plaintiffs to have the option of reserving not to exceed fifty tons per month for their local trade. The contract also stated that the plaintiffs agreed to sell defendant about 2,000 tons of oil cake to be delivered at the rate of about 350 tons per month. *Held*, that the words stating the amount were words of expectancy and not of quantity, and that the controlling stipulation of the contract as to quantity, was that which called for a sale and purchase of all that the mill made for the six months, and that the defendants were bound to take that amount less what plaintiffs kept in the use of their option. Judgment below affirmed. *Kellogg v. Norman*. Opinion by Folger, J. [Decided May 28, 1878.]

LICENSE.

What does not constitute: railroad upon highway.—An act of the Legislature (Laws of 1873, chap. 531) provided for the laying out of an avenue and the construction of a horse railroad thereon by a company, but the use of steam power was not allowed. Plaintiff, through whose lands the avenue was to run, had several interviews with the president of the company,

in which he stated that he desired a steam road and would use his endeavors to enable the company to use steam. The company claimed to have the right to lay its track on the avenue without compensation under the act mentioned. In 1874 (chap. 307), a law was passed permitting the use of steam. *Held*, it could not be inferred that plaintiff, by his acts and declarations, surrendered his legal right to the land, or authorized the company to lay its track there without compensation. Judgment below reversed. *Murdock v. Prospect Park and Coney Island Railroad Co.* Opinion by Andrews, J.

2. License given to railroad company may be revoked.

—The authorities in this State seem to be decisive that a license granted a railroad company to enter land and construct its railroad, operates simply to justify the entry, and is revocable at the pleasure of the licensor. *Ib.*

[Decided May 21, 1878. Reported below, 10 Hun, 598.]

LIEN.

1. General and special: negotiable warehouse receipts.

—A maltster to whom barley is delivered for malting upon a general contract, though he may have a colorable right of lien upon any specific quantity of barley in his possession for the whole amount due upon the general contract against the one with whom such contract was made, if he issues negotiable warehouse receipts entitling the holder to the delivery of a specified quantity of barley on "payment of the charges accrued thereon," only has a lien against an innocent holder of the receipt for value, and without notice, for the charges on the specific barley described. Judgment below affirmed. *White v. Hoyt*. Opinion by Allen, J.

2. Estoppel: equivocal promise: consideration.

—Where, however, an innocent holder for value of such receipt was informed that the maltster claimed a lien upon the specific barley described for the entire amount due on the contract (the original owner having promised the maltster that the holder would pay such amount), and such holder did not deny his liability, but in answer to the maltster's message, stating that the barley would be delivered only upon the holder assuming such lien, wrote an equivocal letter, which was capable of being interpreted into a promise to assume liability, *held* that such holder, upon receiving the barley, became liable for the whole amount due, and for which a lien was claimed. *Held*, also, that the release of the barley was a sufficient consideration for the agreement. *Ib.*

[Decided May 21, 1878.]

LIFE INSURANCE.

1. Provisions forfeiting policy for non-payment of premiums: when company estopped from insisting on.

—A life insurance policy contained a provision forfeiting it in case the premium was not paid when due. The insured was entitled to share in the profits, and the amount of premium at any given pay day could be ascertained only by the company. The insured lived at a place distant from the office of the company, and transacted business with it for six years through a local agent of the company located at her place of residence, who, each pay day, was furnished with statements of the amount then due from the insured. This agent was, in March, 1874, removed, and no one put in his place. Variations from the terms of the policy had by mutual agreement been made on several occasions. Payment had been received by the

company by post-office order without objection. In March, 1874, seven days before the premium became due, the insured wrote the company, asking for a statement of the amount of premium to become due, and inclosing a post-office order which she believed would cover the amount. The company did not answer this letter until after the day of payment had passed. *Held*, that the company was estopped from claiming that the insured had failed to pay the premium when due, and could not insist on a forfeiture of the policy for such non-payment. Judgment below affirmed. *Meyer v. Knickerbocker Life Insurance Co.* Opinion by Folger, J.

2. *Tender of premiums when not necessary to keep alive policy.*—The insured repeatedly offered to pay the necessary premiums, but the offers were refused, the company declaring that the policy had ceased. *Held*, that the insured need not on each following pay day make formal offer of payment to keep the policy alive. *Ib.*

[Decided May 21, 1878.]

NEGOTIABLE INSTRUMENT.

Transferee for precedent debt not holder for value.—A party taking a promissory note in payment of a precedent debt is not a *bona fide* holder for value so as to cut off the defense that the person transferring the note had wrongfully diverted it from the purpose for which it was intrusted to him. Judgment below reversed. *Potts v. Meyer.* Opinion by Church, Ch. J.

[Decided May 23, 1878.]

REMOVAL OF CAUSE.

Corporation entitled to benefit of act of 1867: verification by president of corporation sufficient.—The provision of the United States Statute of March 2, 1867, for the removal of causes to the Federal courts where the action in the State court is between citizens of different States, applies to corporations as well as individuals, and a petition by a corporation, signed in its name and verified by its president, accompanied by an affidavit of the president setting forth the required facts, is a compliance with the provision of the act requiring a citizen to make and file such petition and affidavit, etc., and entitles the corporation making it and complying with the statute in other respects to a removal of the cause. The case of *Cooke v. State National Bank*, 52 N. Y. 96, in form holding that a corporation could not make the affidavit required by the act of 1867, "was merely *pro forma* to facilitate the final disposition of that case, and it was not intended to lay down a rule which would govern other cases." Judgment below reversed. *Mix v. Andes Insurance Co.* Opinion by Earl, J.

[Decided May 23, 1878. Reported below, 9 Hun, 397.]

SURETYSHIP.

Release of indorsement consideration for contract: contribution: burden of proof.—One Sayles and plaintiff made a joint and several note for the benefit of Sayles, but the fact that plaintiff signed as surety was not expressed. This note was indorsed by defendant, who afterward signed as surety. *Held*, (1) that a release of the contract of indorsement would furnish a sufficient consideration for the contract of suretyship, and (2) that defendant was presumptively a surety for both Sayles and plaintiff; and in an action for contribution on the ground that defendant was co-surety with plaintiff for Sayles, plaintiff must show that fact

affirmatively. Judgment below affirmed. *Sayles v. Sims.* Opinion by Church, Ch. J.

[Decided May 21, 1878.]

USURY.

Provision that corporations shall not plead, extends to their sureties.—The provisions of Laws 1860, chapter 172, forbidding corporations to set up the defense of usury, includes collateral contracts of individuals as securities, guarantors or indorsers for corporations. Accordingly where defendant indorsed a note for the accommodation of a corporation, which borrowed money thereon, *held*, that he could not set up the defense of usury. (*Rosa v. Butterfield*, 33 N. Y. 664, followed.) Judgment below affirmed. *Stewart v. Bramhall.* Opinion by Andrews, J.

[Decided June 4, 1878. Reported below, 11 Hun, 139.]

COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, June 11, 1878:

Baldwin v. Liverpool and Great Western Steam Co. (limited), No. 254, judgment affirmed; no opinion.—*Burleigh v. Center*, No. 265, judgment affirmed; opinion per Curiam.—*Curtis v. Delaware, Lack. and Western R. R. Co.*, No. 202½, judgment affirmed; opinion by Miller, J.—*Fillgrave v. Chappell*, No. 261, judgment affirmed; no opinion.—*Goodwin v. Simonson*, No. 244, order affirmed; opinion by Miller, J.—*Heidenheimer v. Mayer*, No. 228, judgment affirmed; no opinion.—*Hiscock v. Harris*, No. 157, order affirmed and judgment absolute for defendants on stipulation, with costs; opinion by Andrews, J.—*Jackson v. Johnson*, No. 232, judgment reversed and new trial ordered, unless plaintiff stipulates to reduce recovery in the sum of \$847.13 and interest from March 3, 1868, in which event judgment as so modified affirmed, without costs to either party in this court; opinion by Andrews, J.—*Tyng v. Halsted*, No. 412, dismissed, with costs of one appeal only; opinion by Church, Ch. J.

NEW BOOKS AND NEW EDITIONS.

DALY'S REPORTS, VOL. VI.

Reports of cases argued and determined in the Court of Common Pleas for the City and County of New York. By Charles P. Daly, LL. D., Chief Justice of the Court. Vol. VI. New York: Baker, Voorhis & Co., 1878.

THERE are quite a number of interesting cases in this volume, among which we will notice these: *Smith v. Reed*, p. 33: A boarding-house keeper was held liable for the loss of a boarder's property by theft, committed by a stranger permitted by a servant, in the employ of the boarding-house keeper, to go into the boarder's room. *Hoffman v. Gallaher*, p. 42: Plaintiff agreed to paint a portrait of defendant, which should be a likeness satisfactory to his friends. In an action for the price of the portrait, *held* that it was not competent to exhibit the portrait to the jury to enable them to determine if it was a satisfactory likeness. *McGuire v. N. Y. C. & H. R. R. Co.*, p. 70: In an action for personal injuries for negligence, a stipulation by defendant's attorney as a condition for postponement, that the action should not abate if plaintiff died, *held* valid and enforceable. *Matter of Fincke*, p. 111: The court may summarily order an attorney to pay to his client money collected in a suit, and if the attorney claims a lien for professional services, he

is not entitled to a jury to determine his claim. *Sprague v. W. U. Tel. Co.*, p. 200: A failure to send a telegraph message at all is not a "mistake or delay in delivery or non-delivery," within the meaning of the usual stipulation in blanks for telegraph messages. *Devlin v. O'Neil*, p. 305: A sale of goods to be disposed of by the vendee at retail if conditional, is fraudulent and void as to creditors of vendee. *Levinson v. Post*, p. 321: A blacksmith was held liable for the unskillfulness, in shoeing a horse, of his servant, who was not employed to shoe horses, but who undertook the work. *Richard v. Boas*, p. 460: The certificate of protest of a notary to a foreign bill of exchange must have the impression of a seal upon the paper itself, or upon some adhesive substance attached thereto. *Gross v. Jackson*, p. 463: Chairs furnished for a theater of a pattern that had to be made with reference to the size and shape of the theater, and which were screwed to the floor, held, a part of the building and subject to a mechanics' lien. *Sulzbacher v. Dickie*, p. 469: A landlord contracted with a builder to put a new roof on his building, without binding the builder to protect the goods of the tenants as a matter of injury from the weather. Held, that the landlord was liable to the tenants for injury to their goods from a storm, caused by the builder negligently leaving the roof without covering. *Wynn v. Schappert*, p. 559: Delivery of a letter to a mail-carrier in a city, held a deposit in the post-office. The reporting, we need not say, is excellently done, and the book is well printed and bound.

HONEYMAN'S PUBLIC LAWS OF NEW JERSEY, ABRIDGED.

An abridgment of the Revised Statutes of New Jersey, and of the Amended Constitution. By A. V. D. Honeyman, Counselor at law, author of "The new treatise on the Small Cause Court, etc." Somerville: Honeyman & Rowe, 1878.

This is intended as a convenient manual of the statute law of New Jersey for handy reference. It appears to be accurate, and to embrace all the public acts now in force in that State, and the small compass into which the substance of those acts is brought will render it a very valuable assistant to those who desire to readily ascertain what is the statute law governing any particular subject, and where it can be found. The subjects are arranged alphabetically, and a very full index at the end of the volume renders its contents very easily accessible. We cannot well see how any lawyer or justice of the peace in New Jersey can dispense with the use of this convenient little book.

HUSBANDS' LAW OF MARRIED WOMEN IN PENNSYLVANIA.

The Law of Married Women in Pennsylvania, with a view of the Law of Trusts in that State. By Clement M. Husbands, Esq., of the Philadelphia bar. Philadelphia: F. & W. Johnson & Co., 1878.

The law relating to married women was at one time quite uniform throughout the States where the common law prevailed. But statutory enactments have of late years rendered it so dissimilar in different localities that a treatise adapted to the existing law of one State could be only partially depended on in examining a case to be decided under the laws of another. The tendency of the legislation everywhere has, of course, been to emancipate the married woman from the disabilities under which she was placed by the English law, but the extent as well as the nature of

the changes made are very unlike. The author of this work has, therefore, very properly confined his labors to an attempt to show what are the rights and liabilities of married women in Pennsylvania alone. But the value of his book will not be confined to that State only. Several other States have modeled their legislation upon that of that State, and in many of the States those rules of the common law which still prevail in Pennsylvania are yet in force. The author in the treatise before us first considers who is a married woman, defining what constitutes marriage, what are voidable marriages, and what void ones. He next explains what are the reciprocal obligations of husband and wife; then the nature and effect of the contracts of married women, and how far she can impose liability upon her husband by her contracts, torts, frauds and crimes. Next he shows how far she can deal with her separate estate, what are her rights of property, and her capacity to sue and liability to be sued. After a consideration of how far husband and wife may be witnesses for each other, he treats upon her rights to trade, to make a will, and in her husband's estate, and what acts and functions she may perform. The subject of divorce, as well as other matters incident to the relation of marriage, are also treated upon. Trusts are so intimately connected in Pennsylvania with the estates of married women that the topic was not deemed foreign to the volume, and its principal features are therefore given. The treatise is well written and must prove of great use to the profession both in and out of Pennsylvania.

NOTES.

THE current number of the *Law Magazine and Review* contains several very interesting and valuable articles. "Codification and Legal Education," by Mr. Justice Markby, of the Supreme Court, Calcutta, is an elaborate discussion of the very important subject of codification, and its effect upon legal education with criticisms upon the views expressed by Lord Cairns, Sir James Stephen, Sir Henry Thring and others. "Practical Legislation," by Francis Savage Reilly, Esq., is a consideration of the methods of constructing statutes with some suggestions as to style and subject-matter. "On the Study of the Law," by Charles Clark, Q. C., is a readable and valuable essay upon a subject which is always of interest to the profession. "Criminal Procedure in Scotland and its Lessons for England," by Alexander Robertson, M. A., will be found of practical value here as well as in England, the suggestions in respect to the discontinuance of the grand jury being upon a matter which has engaged the attention of several State Legislatures and constitutional conventions. "The Quarterly Notes," "Reviews of New Books," and other editorial departments, are, as usual, full of entertaining matter.

"Suffrage in Cities," and "The railway in relation to public and private interests," are the titles of two addresses delivered by Simon Sterne, Esq., the former in a popular course of lectures under the auspices of the trustees of Cooper Institute, and the latter before the merchants and business men of New York, at Steinway Hall. Like every thing written by Mr. Sterne, these addresses are philosophical and scholarly and clothed in the most elegant diction. oogle

ALL communications intended for publication in the LAW JOURNAL should be addressed to the editor, and the name of the writer should be given, though not necessarily for publication.

Communications on business matters should be addressed to the publishers.

The Albany Law Journal.

ALBANY, JUNE 22, 1878.

CURRENT TOPICS.

WE give elsewhere the resolution relating to the Code of Civil Procedure passed by the special committee of the Senate of this State on the revision of the statutes at its meeting on the 17th inst. It will be seen that the committee pronounces emphatically against any retrograde legislation on the matter and that the Code now in force, as sought to be amended by the Legislature at the session which has just closed, should be retained. The committee will, therefore, report at the next session of the Legislature the bill containing the nine supplementary chapters with such amendments as may be deemed expedient. As the Senate remains unchanged until the close of the next session, there is no probability of repealing the thirteen chapters of the Code of Civil Procedure now in force. It is understood that a careful review of the nine chapters mentioned will be made for the purpose of obviating the objections of the governor to them, and that these chapters will be passed anew at the next session of the Legislature in such a form as to deprive the governor of all pretext for vetoing them. The committee intends also to review and report at the next session the bill relating to property and other civil rights, and also the Criminal Code prepared by Judge Emott. It will be seen that the committee asks suggestions from the bench and bar of the State to aid it in its labors.

The governor's veto of the amendments to the Code was simply factious, and his reason therefor flippant in the extreme. How much soever men may differ about the merits of the Code of Civil Procedure, it is conceded on all sides that some of its provisions need amending, and the amendments passed both houses of the Legislature without opposition, but have fallen in the Executive Chamber; not because they were not needed or were in themselves objectionable, but only because they were not in what the governor conceives to be the most approved form. The reason given for the veto is a mere pretext, or else the governor is not as consistent in all things as he is in his hatred of the Code. Last year he signed the Amending Act, which was

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in the precise form of the bill he has now vetoed, and which has never given rise to any difficulty of application; but it now occurs to the governor that such amendments will "require two men to apply the Code." The real reason of the governor's action was unquestionably a desire to make the Code as unpopular as possible, by preventing its defects from being remedied. For this most unworthy object he has not scrupled to expose the profession and the public to the difficulties and inconveniences arising under some of the sections of the Code which the amendatory act would have corrected.

The Supreme Court judges of the Third Judicial District have as much work to do as those in any district in the State, and more than those in at least five of the districts, yet their pay is much less than what is received by their brethren in the first and second districts, and no more than is paid to judges in the fourth, fifth, sixth, seventh and eighth districts, where the judicial office involves much less labor. To compensate these judges for the heavy labors which they perform, the Legislature, at its recent session, passed an act which increased the amount paid them from \$7,200, which they now receive, to \$9,700 per annum. The governor has returned, without approval, this bill, giving, as reasons therefor, that enough is paid now. The judges in the first district receive \$17,500, and those in the county of Kings \$18,000, while those in the second district, not residing in Kings county, receive \$9,700. If there is any equity in paying judicial officers in proportion to the work they have to do, as those in other positions are supposed to be paid, the judiciary of the third district are entitled to what it was proposed in this bill to give them. The governor thinks, however, that the example set in the first and second department of high judicial salaries, ought not to be followed in other parts of the State. The judiciary, as it seems to us, are not overpaid, and would not be even with the increase which the bill mentioned designed to give them.

A criminal case has recently come before the courts of India which is exciting great interest in that country by reason of the position of the parties implicated. The Rajah of Poorree, who is the hereditary guardian of the temple of Juggernaut, and the secular head of the Hindoo religion in Oressa, and who is worshiped by vast numbers of people as the visible incarnation of Vishnu, became possessed with the idea that a Hindoo ascetic of great sanctity who enjoyed a special reputation for curing diseases was attempting to perform some work of incantation against him. He, therefore, induced the ascetic to visit his private apartments, and, with the aid of his servants, put him to the

torture and then cast him out into the street. The injured man was found by the police, but died from his injuries within a few days. The Rajah was arrested, tried for murder, convicted and sentenced to transportation for life. An appeal was taken, but it is probable that the conviction will be sustained.

The Bar Association of Chicago gave Mr. Justice Harlan, of the United States Supreme Court, a public reception and a dinner at the Palmer House in that city, on the occasion of his recent visit there for the purpose of holding the Circuit Court. The bench and bar of Illinois were fully represented, and the reception passed off in the most satisfactory manner. The fact that no speeches were allowed rendered the gathering much more social in its character than is usual upon such occasions. We trust the example set by the Chicago Bar Association may be followed in other localities. Such gatherings are not uncommon in England, and the result is that the relations between the bench and bar are much more intimate if not more friendly than in this country. If the members of our profession in the large cities knew each other socially as well as in a business way it would be for their mutual advantage.

The Court of Appeals, on the 21st inst., adjourned until the 16th of September next, when a new calendar will be made up for the session then to be held. The cases undisposed of on the present calendar will be transferred to the new one without further notice. In other cases notice must be filed with the clerk on or before the second day of September. Judge Hand, the newly-appointed associate judge of the court, took his seat for the first time on the 17th inst.

Mr. Justice Dillon, of the United States Circuit Court, delivered an address before the Iowa State Bar Association, at its recent meeting at Des Moines, in that State, wherein he describes a visit to the Inns of Court and Westminster Hall, in the summer of 1875, and considers the peculiar advantages of the system of law which originated there, and which prevails throughout most of this country and many of the English Colonies, such as Australia, New Zealand, etc. The chief excellencies of this system he considers to be the independent and stable tenure of the judicial office, the trial by jury, and the doctrine of *stare decisis*. The peculiar merits of these features of our law are considered at length in the address. The jury trial, as juries now are, he considers to be less suited to civil than criminal business. The statutory limitations on the power of judges to control juries, which exist in some of the States, he believes to be responsible for much of this.

NOTES OF CASES.

IN *Davis v. Lond. & Provinc. Marine Ins. Co.*, 38 L. T. Rep. (N. S.) 478, decided on the 2d of March last by the Chancery Division of the English High Court of Justice, one Evans, an insurance agent of defendant, having become liable to it for certain sums of money, plaintiff, who was his friend, having been given to understand that defendant could and was about to prosecute him criminally, and that the police had been instructed to arrest him, agreed to and did deposit £2,000 in a bank as an indemnity and security for Evans' liabilities, under the belief that criminal prosecution would in consequence be abandoned. Before the agreement and deposit were made the defendant was informed, by its legal advisers, that the prosecution against Evans could not be maintained, and had withdrawn its instructions to the police to arrest, but plaintiff had not been informed of these facts. The court held that the agreement must be rescinded and the money repaid to plaintiff. The court concludes, that although the contract was bad, whether as one to stifle a prosecution, or as induced by a misrepresentation that a prosecution was to be stifled when no prosecution was intended, plaintiff was not precluded from relief: first, because the money being *in medio*, something must be done with it; second, because illegality, arising from pressure or from an attempt to stifle a prosecution, is not sufficient to make the court stay its hand. The decision is not in conflict with that principle of law which forbids the courts from interfering to save a party who has entered into an illegal contract from the consequences of a failure by the other party to fulfill. In case of an agreement to compound a felony, the plaintiff, seeking to recover back money paid, cannot even claim relief on the ground of pressure. *Sheppard v. Dornford*, 1 K. & J. 491; *Sharp v. Taylor*, 2 Ph. 801; *Thompson v. Thompson*, 7 Ves. 470; *Farmer v. Russell*, 1 B. & P. 296. But see *Tennant v. Elliott*, 1 B. & P. 3; *Williams v. Bayley*, 4 Giff. 638. Such a contract, being one of suretyship, is not one *uberremus fidei* to be upheld only in the case of there being the fullest disclosure by the intending creditor. But the contract must be based on the full and voluntary agency of the individual who enters into it, and when there is no consideration, as in the case at bar, a very little will do to authorize the court to interfere. Therefore, any thing like pressure upon the part of the intended creditor will have a very serious effect on the validity of the contract, and still more so where that pressure is the result of maintaining a false impression on the mind of the person impressed. See, also, *Hill v. Gray*, 1 Stark. 434; *Carter v. Boehm*, 3 Burr, 1905; *Peck v. Gurney*, L. R., 6 H. L. 377; *Keates v. Cadogan*, 10 C. B. 591; *Turner v. Harvey*, Jac. 169; *Puleford v. Richards*, 17 Beav. 87; *Rees v. Berrington*, 2 Ves. Jun. 540.

The question as to what is the position of an Indian who maintains his tribal relations in respect to the laws of the United States, and what the status of the offspring of intermarriage between Indians and whites, was recently passed upon by the United States District Court for the Western District of Arkansas, in the case *Ex parte Reynolds*, in which application was made by *habeas corpus* for the release of an Indian charged with murder, committed in the Indian territory, on the ground that the court did not have jurisdiction to try the case. The court held that Indians who maintain their tribal relations are the subjects of an independent government, and as such, not in the jurisdiction of the United States. The Indian tribes are treated as sovereign communities, but when the members of a tribe scatter themselves among the citizens of the United States, they become merged with the people, owe complete allegiance to the government, and are entitled to equality with other citizens. When there is offspring from a union between an Indian living with his or her people in the tribal relation, and a citizen of this country, the status of such offspring is that of the father. The rule *partus sequitur patrum* which is adopted by the common and civil law, and by the law of nations, governs in such a case. The case of the *United States v. Sanders*, Hempstead, 486, holds that the status of the mother governs that of the offspring. This is the rule when applied to the offspring of freemen and slaves, upon the principle of the civil law, that the owner of a female animal is entitled to her brood, but it is reversed when applied to the offspring of two free persons. See *Ludlum v. Ludlum*, 31 Barb. 486, where it is said that "the universal maxim of the common law being *partus sequitur patrum* it is sufficient for the application of this doctrine, that the father should be a subject, lawfully and without breach of his allegiance, beyond sea, no matter what may be the condition of the mother."

The right of trial by jury does not apply to every case. If a lawyer fails to pay over moneys collected in a suit for his client, the court may summarily order him to do so, and if he claims a lien on the moneys, for services rendered, he cannot ask for a jury to determine the question, but it must be settled by a reference. That is the decision of the New York Court of Common Pleas in the case *Matter of Fincke*, 6 Daly, 111, where an attorney, who had received \$2,665.08 on a partition suit, refused to pay any part of the same over to his client, claiming that he had performed services for her worth that amount. The court, upon the application of the client, issued an order to show cause why the amount should not be paid over, and upon the appearance of the attorney ordered a reference of the matter. The referee reported that the attorney had performed services worth \$1,314.10, and

the court ordered him to pay his client the balance, \$1,350.98. This disposition of the case is in accordance with *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489, where it is held that an attachment may be issued against an attorney who retains money that belongs to his client and refuses to pay it over, and that even good faith is no exemption from such remedy, as the court, in that case, says: "The law is not guilty of the absurdity of holding that, after a client has spent years in collecting through his attorney a lawful demand, he shall be put to spending as many more to collect it from his attorney, and if that attorney should not pay, then try the same track again." And in *Re Paschal*, 10 Wall. 491, it is said by the Supreme Court of the United States, that for refusal by attorneys to pay money collected for their client in a suit, "the court may entertain summary proceedings by attachment," "and may, in its discretion, punish them by fine and imprisonment, or discharge them from the functions of their offices, or require them to perform their professional or official duty under pain of discharge or imprisonment." 4 Blackst. Com. 288. See, also, *Barry v. Whitney*, 3 Sandf. 696; *Grant's Case*, 8 Abb. Pr. 357; *Hess v. Joseph*, 7 Robb. 609; *Ex parte Ketcham*, 4 Hill, 564; *Saxton v. Wyckoff*, 6 Paige, 182; *Wilmerdings v. Fowler*, 14 Abb. Pr. (N. S.) 249; *Merritt v. Lambert*, 10 Paige, 352.

In *Gross v. Jackson*, 6 Daly, 463, chairs were furnished to a theatre of a pattern that had to be made with special reference to the size, shape, and plan of the auditorium of the theatre in which they were to be placed, and were screwed to the floor, as they could not stand alone. The court held that they formed a part of the building, and that a mechanic's lien could be filed and enforced against the building by the one furnishing them. In *Potter v. Cromwell*, 40 N. Y. 287, 297, and *Voorhees v. McGinnis*, 48 id. 278, three tests are given whereby the question whether a given article has become by annexation a part of the freehold: 1. To give to articles, personal in their nature, the character of real estate, the annexation must be of a permanent character. There are exceptions to this rule in those articles which are not themselves annexed, but are deemed to be of the freehold, from their use and character, such as mill stones, statuary, and the like. *Capen v. Peckham*, 35 Conn. 88; *Teaff v. Hewitt*, 1 McCook, 511. 2. A second test, but not so certain in its character, is that of adaptability to the freehold. *Voorhis v. Freeman*, 2 W. & S. 116; *Pyle v. Pennock*, id. 390. 3. A third test is that of the intention of the parties at the time of making the annexation. See cases above cited, and *Murdoch v. Gifford*, 18 N. Y. 28; *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306; *Swift v. Thompson*, 9 Conn. 63. The English cases go further than the American in the direction of the principles stated. *Walmesly v. Milne*, 7 C. B. (N. S.) 115; *Boyd v. Shorrocks*, L. R., 5 Eq. 72; *Climie v. Wood*, L. R., 3 Exch. 257, and 4 id. 328. See, also, *Ford v. Cobb*, 20 N. Y. 344; *Cresson v. Stout*, 17 Johns. 116; *Vanderpool v. Van Allen*, 10 Barb. 157; *Swift v. Thompson*, 9 Conn. 63; *Walker v. Sherman*, 20 Wend. 636; *Taffe v. Warnick*, 3 Blackf. 111; *Tobias v. Francis*, 8 Vt. 425; *Gale v. Ward*, 14 Mass. 352; *Hutchinson v. Kay*, 23 Beav. 413. In *Re Dawson*, 16 W. R. 424. Also *Pierce v. George* (108 Mass. 78), 11 Am. Rep. 310, and note at page 314, where the various authorities are collated.

CONSTRUCTIVE FRAUD.

IT is a well-established if not a beneficent principle of equity jurisprudence that gratuitous benefits, as between persons occupying certain confidential relations to each other, are to be deemed constructively fraudulent, and only supported by the clearest proof of equity and good faith. The relations to which equity applies this doctrine are those of guardian and ward, trustee and *cestui que trust*, principal and agent, attorney and client, physician and patient, clergyman and parishioner. These, it will be perceived, are all relations of a conventional character. Whether the same doctrine is applicable to the natural relation of parent and child has been somewhat mooted, and it is our present purpose to examine this question.

Story, in his *Equity Jurisprudence*, section 311, in speaking of a transaction between attorney and client, thus lays down the general rule: "The burden of establishing its perfect fairness, adequacy, and equity, is thrown upon the attorney, upon the general rule that he who bargains in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other. If no such proof is established, courts of equity treat the case as one of constructive fraud." It will thus be seen that Story makes no distinction between the cases of conventional and those of natural relations. The English cases universally apply this doctrine to cases of gifts from child to parent. There are many dicta, also, to support this idea, and yet there would seem to be a reasonable ground of distinction, and for the application of that author's further inculcation, in section 309 of the same work, that "we are not to indulge undue suspicions of jealousy, or to make unfavorable presumptions as a matter of course in cases of this sort."

In support of this latter quotation the author cites the case of *Jenkins v. Pye*, 12 Pet. 253, where the Supreme Court of the United States declare that they would "not be disposed to adopt or sanction the broad principle contended for, that the deed of a child to a parent is to be deemed *prima facie* void." In that case the court say: "It is undoubtedly the duty of courts carefully to watch and examine the circumstances attending transactions of this kind, when brought under review before them, to discover if any undue influence has been exercised in obtaining the conveyance. But to consider a parent disqualified to take a voluntary deed from his child, without consideration, on account of their relationship, is assuming a principle at war with all filial as well as parental duty and affection, and acting on the presumption that a parent, instead of wishing to promote the interest and welfare, would

be seeking to overreach and defraud his child. Whereas, the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view; and to presume the existence of circumstances conducing to that result. * * * The natural and reasonable presumption, in all transactions of this kind, is that a benefit was intended the child, because in the discharge of a moral and parental duty."

The same doctrine is enunciated in the celebrated case of *Hunter v. Atkins*, 3 M. & Keene, 113, which was a case of confidence arising merely from intimate friendship. In this case Lord Brougham recognizes the distinction between the conventional and the natural relation. In regard to the former, he observes: "If a person standing in these relations (of attorney, guardian or trustee) to client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing every thing to his knowledge which he himself knew." In regard to confidential relations, other than the conventional ones, he says: "the party seeking to set aside the deed may not be called upon to show direct fraud; but he must satisfy the court by the circumstances that some advantage was taken of the confidential relation."

This distinction, so far at least as regards gifts from parent to child, has never to our knowledge been dissented from in England or America, although there has been some contrariety of opinion as to the converse case of gift from child to parent. And even in that case, we think it will be difficult to find a decision, as distinguishable from mere dictum, holding an opposite doctrine to that of *Jenkins v. Pye*. Except in cases where the evidence shows a probability or the certainty of unfair dealing and overreaching, the general rule of the burden of proof seems to be as in ordinary cases of fraud — the person alleging it must prove it. Such we believe to be the result of the New York cases, as for instance the case of *Sears v. Shafer*, 6 N. Y. 268, where it is said: "A court of equity will set aside a deed obtained by persons standing in such relation to the grantor as to give them a controlling or very strong influence over the conduct of such grantor, upon slight evidence of the improper exercise of such influence."

In *Whelan v. Whelan*, 3 Cow. 538, it was held that where a grant is made by an aged father to his children with whom he lives, who have the management of his property, and in whom he reposes particular confidence, if a court of equity sees that any arts or stratagems, or any undue means, or the least speck of imposition, or the least *scintilla* of fraud

entered into the bargain, it will avoid the grant. It is true that there are many expressions to the contrary in *Comstock v. Comstock*, 59 Barb. 453, a case of a deed from a child to a parent, but there was ample proof in that case to raise the presumption of fraud and undue influence. See page 470.

Similar expressions by Mr. Justice Hunt, in *Nesbit v. Lockman*, 84 N. Y. 167, are entirely *obiter*. The gift was sustained by the court on the finding of the referee, that it was made without the exercise of any fraud, deceit or undue influence, which finding, the court say, "must settle the question for us." Besides, this was a gift to the clerk of the donor's attorneys.

Bergen v. Udall, 31 Barb. 9, was a case where a daughter, on coming of age, was induced by undue persuasion to make a voluntary conveyance to her father, and the facts clearly showed undue influence and overreaching.

Brock v. Barnes, 40 Barb. 521, was a case of attorney and client, where the former obtained from the latter, an aged, infirm, and feeble man, in 1859, a grant of an annuity extending back in its operation to 1836, the instrument not being in the client's writing nor witnessed, and there being also evidence of a settlement between the parties in 1858.

Powers v. Powers, 48 How. 389, was a case where the plaintiff, just on coming of age, conveyed to his mother, for \$5,000, his interest in his deceased father's estate, and evidence of misrepresentation was disclosed. Even in this case, the court say, at page 395: "The courts in this country have not gone so far as they have in England to establish any presumption of law against the validity of such transfers, but they will not sustain such a transaction, where it appears that any advantage has been taken of the inexperience of the child, or of the confidence naturally reposed by a child in the suggestions, advice, and judgment of a parent."

Brice v. Brice, 5 Barb. 533, was a case of a deed from an old and feeble father to his son and confidential agent, for the mere consideration of a support for life. It affirmatively appeared that the son "had acquired great and controlling influence" over the father, and that the son and a brother-in-law procured the deed by representing to the old gentleman that he was old and foolish, and alluded to his having signed improper papers, thus "artfully appealing to his fears, and betraying the child-like confidence he reposed in them."

These are the principal New York cases bearing upon this question, and it will be noted that in every one of them there was affirmative evidence on the part of the person seeking to avoid the gift or obligation, of fraud, deceit, bad faith, or undue influence in obtaining it.

In Massachusetts we find an instructive case in *Howe v. Howe*, 99 Mass. 88. There the grantor, be-

ing eighty-three years old, and sick of a fever at the time, executed deeds of all his property to his children, excluding the son of a deceased child, contrary to his previously declared intention. The following instructions, among others, were requested: "2. That the circumstances attending the execution of the Holman deed — the facts that *Holman at the time had charge of the grantor's affairs*; that he helped to carry the chain; that he accompanied the grantor to Stephen Morse's house, and remained present while the deed was written and executed, and accompanied him back; that the memorandum of the courses and distances was given to his daughter, and that the grantor's wife did not sign the deed — raise a presumption of fraud and undue influence. 8. That the circumstances attending the execution of the deeds to the three sons at Elbridge's house — the facts that the documents were prepared by Elbridge's dictation, by an attorney employed by him, and who never saw the grantor nor communicated with him; that they were executed in Elbridge's house in the presence of himself and his family; that Elbridge brought the justice to his house, who only stayed long enough to put the formal questions and receive a nod or word in reply; that they were not read over to him; that the grantor's wife did not execute the deeds; that they embraced all his real estate; and that there was executed at the same time a bill of sale of all his personal property; that *Elbridge had charge of the grantor's affairs at the time under a power of attorney*; and that the transaction was contrary to the grantor's previous declarations of his intention that the petitioner should be remembered in the disposition of his estate, and have the Berlin wood lot — raise a presumption of fraud and undue influence."

The court remark: "The facts set forth in the second and third prayers for instructions were submitted to the jury as evidence of fraud and undue influence. *There is no legal presumption arising from them*, but only a presumption of fact, etc." "Influence properly gained, although used for a selfish purpose, and to obtain an unfair and unjust advantage, will not avoid a deed thereby obtained, unless there is fraud or duress, or the influence is exerted by a stronger mind over a weak one, in such a manner and to such a degree as to substitute the will of the person exerting the influence in place of that of him upon whom it is exerted, so that the latter is no longer a free agent."

In *Sanfley v. Jackson*, 16 Tex. 584, the court, after conceding the general rule of the burden of proof, in case of confidential relations, proceed: "But it is clear that this rule was never applied, either qualified or unqualified, to a deed or gift from a parent to a child; and the reverse of such principle has always been sustained; and there is not believed to be a single exception to the principle that a deed

from a parent to a child is always regarded with a favorable eye, and every presumption is in favor of its validity."

"A settlement made by a parent on a child, so far from being regarded with jealousy, will always be presumed to be free from suspicion; because it is the natural course for property to take. One of the main objects of the acquisition of property by the parent is to give it to his child; and that child in turn will give it to his, and in this way the debt of gratitude we owe to our parent is paid to our children." Page 581.

The same doctrine has received an authoritative sanction in the English case of *Beauland v. Bradley*, 2 Smale & Giffard, 839, decided in the year 1854. In that case the testator was 85 years old; deaf, and alleged to be weak and infirm in mind and body, and very much under the influence of the defendant, Ann Bradley, his housekeeper, and it was alleged that eight days before his death, for an inadequate rent, he executed a lease, through the procurement of Ann Bradley, to his grandson, and his son-in-law (Ann Bradley's husband) without any advice from a solicitor. There was no evidence of any undue influence by Ann Bradley or the lessees.

The Vice-Chancellor says: "The bill alleges that when the lease was executed by the testator, he was confined to his bed; that Ann Bradley had much influence over him, and that he was induced by her to execute this lease just eight days before his decease, and without professional advice, in favor of his grandson and his son-in-law, the husband of Ann Bradley. If the allegations of surprise and undue influence had been proved, there would be no difficulty in granting the relief sought by this bill; but the plaintiff fails in proof of what is the foundation of his case—the undue influence and surprise.

It is said that the lessor, being the grandfather of one of the lessees and father-in-law of the other, there existed such a confidential relation, between him and those he intended to benefit, as to throw upon them the onus of proving the absence of undue influence. It is a new doctrine, that a parent cannot by a deed, only a few days before his death, benefit a child or grandchild. The case which has been cited in support of it, *Hoghton v. Hoghton*, is very different. That was a case in which a son, having just attained twenty-one, gave up property for the benefit of his father, who was his natural guardian, and was, therefore, within that rule of the court which protects a person under the influence of others from having that influence abused. There is, however, no rule of this court which prohibits a man by a voluntary deed from bestowing a benefit upon his son, or grandson, or son-in-law, even although only a few days before his death. To provide for his children or grandchildren is, or may be,

a necessary duty; and when a father discharges that duty, this court will not presume a fraud. If, therefore, fraud is alleged, it must be proved in the ordinary way. In this case no fraud has been shown, and I must, therefore, dismiss the bill, so far as it seeks to have the lease set aside."

This case explains the true reason for the distinction between cases of gift from child to parent. In the latter class the relation of guardian and ward exists, and there is some semblance of reason in applying the stringent rule where that relation exists by nature as well as where it is created by convention.

In short, we think, upon principle, as well as upon authority, that the editors of White and Tudor's *Leading Cases in Equity* (one of the most excellent of law books) are justified in saying: "In order to avoid a grant, on the ground of undue influence, it must be shown that the influence existed, and was exercised for an undue and disadvantageous purpose. The former point may be inferred from the relative or actual position of the parties; but the latter must be determined by an examination into the nature and results of the transaction which is called in question. Both these points must concur to produce the effect of avoidance."

As the law stands, therefore, in cases of natural relationship, the law does not apply the doctrine of constructive fraud, and impose on the claimant the burden of showing the fairness and good faith of the transaction.

Fraud is implied in law only when the confidential relation is of the conventional character above mentioned, or where the circumstances in proof indicate a probability of bad faith or undue influence.

If this question were new, we should hope to have the law laid down in a more reasonable form concerning conventional relations. It seems extremely severe and inconvenient to assume, in every case of such relations, that fraud must be assumed from the mere existence of the relation, without any proof whatever of any extrinsic probability of fraudulent practice. In criminal law the contrary presumption prevails, even in spite of proof that may strongly point toward guilt. It is the true office of equity to protect the helpless, confiding and inexperienced against the wrong practices of those holding relations of trust and confidence toward them, but it is the actual wrong practice, and not the mere suspicion of wrong practice, against which the vigilance of the law should be directed. In many of these cases the age and experience of the parties affords the strongest natural presumption against the probability of fraud, but the artificial presumption remains the same. The lamb is frequently called on affirmatively to convince the court that he did not muddy the stream above from which the complaining wolf was drinking.

But the doctrine of constructive fraud is probably too ancient and deep-seated to be easily uprooted. It is quite in keeping with the idea, so long prevalent, that men are not fit to be trusted as witnesses upon oath in their own behalf. We must continue to take it for granted, we suppose, that an attorney will clear his confiding client, a trustee defraud his ignorant *cestui que trust*, a guardian overreach his inexperienced ward, an agent impose on his careless principal, a physician over persuade his dependent patient, and a clergyman deceive his dying parishioner, because we have so long been taught to believe that such is human nature; but we are really gratified to learn, contrary to the tradition of our profession, and to the carelessly uttered *dicta* of many judges, that there is no legal presumption that a child will take advantage of the generosity of his parent, however much disagreement there may be as to gifts from child to parent.

In conclusion, we are led to remark, that as gifts between parent and child are generally privately bestowed, and are rarely investigated until after the death of the donor, it seems rather hard measure to insist that the survivor shall give affirmative evidence of the entire fairness of the transaction, and yet at the same time effectually prevent him from doing so by closing his mouth as a witness.

CUSTOM BAD IN LAW.

ENGLISH HIGH COURT OF JUSTICE, COMMON PLEAS
DIVISION, FEBRUARY 1, 1878.

BRADBURN V. FOLEY.

A custom that the outgoing tenant of a farm shall look exclusively to the incoming tenant, where there is one, and not to the landlord for compensation for the seeds, acts of husbandry, tillages, etc., is so unreasonable, uncertain and prejudicial to the interests of both landlords and tenants as to be bad in law.

SPECIAL case from County Court. The action was brought by the trustee in bankruptcy of one Davies, who was a tenant of defendant, for seeds, sowing, harrowing, and other acts of husbandry and tillage on the leased farm. Before the crops had grown for the benefit of which these acts had been performed, the tenancy of Davies expired and another tenant came in. At the trial evidence was given on the part of the plaintiff that the custom of the country was for the landlord to pay the outgoing tenant for the seeds, acts of husbandry, tillage, etc., unless there was an agreement between the outgoing and incoming tenants that the incoming tenant should pay for the same.

For the defendant it was contended that he was not liable, and that by the custom of the country when there was an incoming tenant who entered on the farm at the expiration of the tenancy of the outgoing tenant, he and not the landlord became liable to pay the outgoing tenant for the seeds, acts of husbandry, tillages, etc., and that the landlord was only liable when there was no incoming tenant.

By way of reply, it was contended that no such custom as that set up by the defendant could in fact

exist, and that such custom was unreasonable and bad.

The learned judge entered a verdict generally for the defendant upon the facts and evidence before him. He found that, by the custom of the country, the incoming tenant, and not the landlord, was liable to pay for the seeds, acts of husbandry, and tillages.

The questions for the opinion of the court are: 1. Whether such a custom as that set up by the defendant can in fact exist? 2. Whether, if such a custom can in fact exist, it is a good custom? 3. Whether, upon the facts stated, the landlord or the incoming tenant is liable to the plaintiff for the seeds, acts of husbandry, and tillages, etc.?

Jelf, for plaintiff.

J. D. Stm, for defendant.

LINDLEY, J. It appears to us that, if the custom found to exist in this case can be supported in point of law, there is nothing in the lease under which the plaintiff held inconsistent with the custom, so as to exclude its application to him when his tenancy determined. It is very true that when he went in he agreed to pay the outgoing tenant's valuation "in exoneration of the landlord;" but there is no provision in the lease to the effect that the landlord should compensate the plaintiff on his going out; and apart from custom no obligation so to do can be implied. The expression "in exoneration of the landlord" shows that the landlord was (or might be alleged to be) liable to compensate the plaintiff's immediate predecessor in the occupation of the farm; but whether such liability was by reason of some custom or some contract is not stated, and is not known to us; and even if it were by reason of some supposed custom, the existence of such custom is inconsistent with the custom found in fact to exist. The custom here found to exist in point of fact is to the effect that the incoming tenant, if there be one, is the only person liable to compensate the outgoing tenant: the custom as found exempts the landlord from liability altogether. Such a custom will be found on examination to involve the following consequences: 1. That the outgoing tenant has imposed upon him for his sole and exclusive debtor a person in whose selection he has no choice, and with whom he has made no contract at all. 2. That the incoming tenant has to make compensation to the outgoing tenant irrespectively of the purposes for which he (the incoming tenant) may work the land; and whatever the terms between him and his landlord may be, and whether the incoming tenant takes the land for a week, a month, a year, or a long term. 3. That the outgoing tenant can make no arrangement with his landlord as to his valuation, unless the incoming tenant is a party to it and assents to it. 4. That in the event of a letting and undertaking it is (on the custom as stated) uncertain who is to pay, viz., the immediate lessee from the landlord or the ultimate tenant who takes possession. 5. That such a custom would lead any prudent tenant to run his farm out as much as by law he could, and to leave as little as possible for the incoming tenant to pay for. A custom having such consequences as these appears to us so unreasonable, uncertain and prejudicial to the interests both of the landlords and tenants as to be incapable of being supported in point of law. The argument that it is to the interest of the landlord to secure a sol-

vent tenant, and that consequently the outgoing tenant runs practically little or no risk does not meet all the grounds of unreasonableness above pointed out. Indeed, it does not adequately meet any of them; for it would be to the interest of an unscrupulous landlord to put in an insolvent man as tenant for a short time, so as to avoid having to pay the outgoing tenant himself, and yet to obtain possession before the poverty of the new tenant could be productive of injury. The reasonableness or unreasonableness of a custom is a question of law for the court (see *Tyson v. Smith*, 9 A. & E. 421), and not a question of fact for the jury, and the principles applicable to such questions will be found in Com. Dig., Copyhold, S., and *Tyson v. Smith*, *ubi sup.*, and on these principles we proceed. It may, indeed, be said that the custom here condemned is that which prevails in practice all over England, it being well known that as a matter of fact the outgoing and incoming tenants usually settle questions of valuation between themselves without referring to the landlord. This is no doubt true; but if the practice is examined it will be found to be based entirely on the principle that the landlord is liable by custom to the outgoing tenant, and that the incoming tenant is not liable to the outgoing tenant where there is no contract, express or tacit, between them. See *Fartell v. Gascoigne*, 7 Ex. 273; *Stafford v. Gardner*, L. Rep., 7 C. P. 242; *Codd v. Brown*, 15 L. T. Rep. (N. S.) 536. The custom here found to exist is totally different; it exonerates the landlord from all liability, and imposes a liability on the incoming tenant to the outgoing tenant, even in the absence of any contract, express or tacit, between them. There is no inconsistency, therefore, in condemning the custom and upholding the practice which is based upon a custom wholly opposed to that with which we have to deal. Holding as we do that the custom found to exist in point of fact cannot be supported in point of law, we set aside the verdict of the County Court Judge and direct a verdict to be entered for the plaintiff subject to a valuation; the defendant must pay the costs of the action and of this appeal.

Judgment for the plaintiff.

THE CONFISCATION LAW NOT RETROACTIVE.

UNITED STATES SUPREME COURT, OCTOBER TERM,
1877.

CONRAD V. WAPLES.

In May, 1862, C., who was a member of the Confederate Congress, and engaged in armed hostility to the United States within the Confederate lines, conveyed to plaintiff, his son, also within the Confederate lines and engaged in hostility to the United States, certain real estate situate in the city of New Orleans, then within the Federal lines. Subsequently, and under authority of the act of Congress of July 17, 1862, the property was confiscated in proceedings against C., and sold by the United States marshal. *Held*, (1) that the confiscation act mentioned did not authorize proceedings for acts committed before its passage. (2) That transfers of property between those in hostility to the government before its passage were not invalid. (3) That the proceedings could only affect the interest of C. in the property at the time the act was passed, and that the proceedings did not invalidate the title of plaintiff to the property acquired by transfer from C. in May, 1862.

IN error to the Circuit Court of the United States for the District of Louisiana. The facts appear in the opinion.

Mr. Justice FIELD delivered the opinion of the court.

This is an action for the recovery of certain real property described in the petition of the plaintiff, situated in the city of New Orleans, and of the rents and profits. The plaintiff claims title to the premises by a conveyance from his father, Charles M. Conrad, made to himself and his brother, on the 6th of May, 1862, and a subsequent conveyance to himself of his brother's interest. The conveyance of the father was made in settlement and discharge of certain obligations resting upon him under the laws of Louisiana, by reason of his having received, as the natural tutor of his children, property belonging to them as minor heirs of their deceased mother. It appears from the record that she died intestate, at New Orleans, in 1839, leaving the plaintiff and his brother, her only heirs, and an estate valued at a sum over \$35,000. The estate consisted principally of her separate property; a small portion was her share of the real property belonging to the matrimonial community. The surviving husband qualified and was confirmed as the natural tutor of the children and took charge of their property. The law of Louisiana imposes a general mortgage upon all the property of a tutor to secure the interest of minors and his faithful execution of the trust, but gives him the right to substitute in place of it a special mortgage upon particular parcels of his property. The tutor here availed himself of this right at different times. The last special mortgage was executed in 1847, and, with other property, covered the premises in controversy. Previously to this, and in 1845, his indebtedness to his sons had been ascertained and fixed by decree of the probate court at the sum of \$36,757. This amount was subsequently increased.

No account of his administration was ever rendered by the tutor until May 6, 1862, when a settlement took place between him and his sons, and in discharge of his obligations to them he executed before the recorder and ex-officio notary public of the parish of St. Helena, a public act of sale, by which he sold and conveyed to them several lots situated in New Orleans, and among them the one in controversy in this case. This act of sale, which purports to have been recorded in the city of New Orleans on the 31st of the same month, the court refused to admit in evidence.

The defendant, Waples, in his answer, asserts title to the premises in controversy under a deed to him by the marshal of the United States, executed in March, 1865, upon a sale under a decree of the District Court, rendered in February of that year, condemning and forfeiting the property to the United States in proceedings taken under the confiscation act of July 17, 1862. The other defendants disclaim title.

On the 1st of May, 1862, New Orleans passed into the possession of the army of the United States, and on the 6th of the month, Gen. Butler, commanding our forces there, issued a proclamation re-establishing the national authority in the city. The proclamation bears date on the 1st of May, but was not published until the 6th. The Conrads, father and sons, had left the city before it was captured. They had previously been engaged in the rebellion against the United States—the father as a member of the Confederate Congress and the sons as officers of the Confederate army—and they continued in such rebellion until the close of the war. The parish of St. Helena was within the Confederate lines when the act of sale of May 6, 1862, was executed; and the questions presented for our determination relate to the admissibility and effect of that act of sale, and to the subse-

quent condemnation and sale in the confiscation proceedings.

Numerous exceptions were taken to the rulings of the Circuit Court in admitting and rejecting evidence, and in giving and refusing instructions to the jury, but we do not deem it important to notice them in detail. What we have to say upon the confiscation act, the title which passed by a condemnation and sale under it, and the power of enemies to sell and convey to each other their interest in real property situated within the lines of the other belligerent, will sufficiently express our judgment upon the questions involved, and serve to guide the court below in any subsequent proceedings.

The law of July 17, 1862, so far as it related to the confiscation of property, applied only to the property of persons who thereafter might be guilty of acts of disloyalty and treason. It carefully excluded from its application the property of persons who, previous to its passage, may have committed such acts. It left the door open to them to return to their allegiance without molestation for past offenses. The fifth section, with the exception of the third clause, directed the seizure of property only of persons who might *thereafter* hold an office or an agency under the government of the Confederacy, or of one of the States composing it, or might *thereafter* act as an officer in its army or navy, or who, owning property in any loyal State or Territory or in the District of Columbia, might *thereafter* give aid and comfort to the rebellion; and the joint resolution of the two houses of Congress, passed in explanation and limitation of the law, removed that exception. That resolution declared that the third clause of that section should be so construed as not to apply to any act or acts done prior to its passage. The sixth section, which provided for the seizure of the property of persons other than those named in the previous section, who, being engaged in armed rebellion, did not, within sixty days after the warning and proclamation of the President, cease to aid, countenance and abet the rebellion, declared that "all sales, transfers and conveyances of any such property after the expiration of the said sixty days," should be null and void. 12 Stats. at Large, 627.

Nothing done, therefore, by the elder Conrad when he made his sale to his sons, which was before the passage of the confiscation act, affected his title or power of disposition. It is true he was, as already stated, then engaged in the rebellion, as a member of the Confederate Congress, and giving constant aid and comfort to the insurrectionary government. But until some provision was made by law, the courts of the United States could not decree a confiscation of his property and direct its sale. This follows from the doctrine declared in *Brown v. United States*, reported in the 8th of Cranch. In that case the question arose whether certain property of the enemy, found on land at the commencement of hostilities with Great Britain in 1812, could be seized and condemned as a consequence of the declaration of war. And it was held that it could not be condemned without an act of Congress authorizing its seizure and confiscation. The court said that it was conceded that war gives to the sovereign the right to take the persons and confiscate the property of enemies wherever found, adding that the mitigation of this rigid rule, which the humane and wise policy of modern times has introduced into practice, cannot impair the right though it may more or less affect its exercise. "That," said the court, "re-

mains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court."

The only acts of Congress providing for the confiscation of property of persons engaged in the rebellion are those of August 6, 1861, and of July 17, 1862. That of 1861 applied only to property acquired with intent to use or employ the same, or to suffer the same to be used or employed in aiding or abetting the insurrection, or in resisting the laws, and did not touch the property in controversy here. And the act of 1862, as already stated, did not authorize a seizure and confiscation for past acts. It might have done so, on the simple ground that the owner of the property seized was a public enemy, without reference to the time he became such, but Congress otherwise provided, and its will furnishes the rule by which to determine the rights of the elder Conrad at the time he disposed of his property.

The statute not only did not recognize past acts as grounds for confiscation, but it reached only the estate of the actual owner at the time the property was seized. It might, undoubtedly, have provided for the confiscation of the entire property, from its being within the enemy's country, but the Legislature did not so enact. Congress limited the exercise of its power of confiscation to those cases where the owners were officers or agents of the insurrectionary organization, or of one of the States composing it, or commanding in its army or navy; or where while holding property in a loyal State or Territory or in the District of Columbia, they gave aid and comfort to the rebellion, or where not being within these classes, but being in arms in support of the insurrection, they refused for sixty days, after the warning and proclamation of the President, to return to their allegiance. It was the seizure and confiscation of "the estate, property, money, stocks, credits, and effects" of the persons thus specially designated that the act authorized; not the seizure and confiscation of property in enemies' territory or of enemies generally. It was at the estate and interest which belonged to offending persons of the classes mentioned that the act aimed, nothing more. Proceedings under the act, therefore, affected only their estate and interest in the property seized. It was so held by this court in *Day v. Micou*, reported in the 18th of Wallace, where the effect of an adjudication and sale under the act was the direct point in judgment. And this conclusion was not considered as at all affected by the fact that after the seizure proceedings *in rem* were to be instituted for the condemnation of the property. The question, said the court, remained, what was the *res* against which the proceedings were directed; and this, it answered, was that which was seized and brought within the jurisdiction of the court. "A condemnation in a proceeding *in rem*," it added, speaking through Mr. Justice Strong, "does not necessarily exclude all claim to other interest than those which were seized. In admiralty cases and in revenue cases a condemnation and sale generally pass the entire title to the property condemned and sold. This is because the thing condemned is considered as the offender or the debtor, and is seized in entirety. But such is not the case in many proceedings which are *in rem*. Decrees of courts of probate or orphans' courts directing sales for the payment of a decedent's debts or for distribution are

proceedings *in rem*. So are sales under attachments or proceedings to foreclose a mortgage *quasi* proceedings *in rem*, at least. But in none of these cases is any thing more sold than the estate of the decedent, or of the debtor or the mortgagor, in the thing sold. The interests of others are not cut off or affected."

If we apply these views to the case at bar, we must hold that there was nothing in the proceedings and decree under the confiscation act against the property of the elder Conrad, upon which the defendant in his answer relies, which could in any respect affect the rights of the younger Conrads to the lands conveyed to them before that act was passed, unless the fact that the parties to the conveyance were, at the time of the sale, engaged in the rebellion against the United States and were within the enemies' country, rendered it unlawful for the father to transfer and the sons to receive the title to real property situated within the Federal lines. The illegality of the sale on this ground was insisted upon in the court below, and the position was there sustained. But we do not think the position at all tenable. The character of the parties as rebels or enemies did not deprive them of the right to contract with and to sell to each other. As between themselves, all the ordinary business between people of the same community in buying, selling and exchanging property, movable and immovable, could be lawfully carried on, except in cases where it was expressly forbidden by the United States, or where it would have been inconsistent with or have tended to weaken their authority. It was commercial intercourse and correspondence between citizens of one belligerent and those of the other, the engaging in traffic between them, which were forbidden by the laws of war and by the President's proclamation of non-intercourse. So long as the war existed all intercourse between them inconsistent with actual hostilities was unlawful. But commercial intercourse and correspondence of the citizens of the enemies' country among themselves were neither forbidden nor interfered with, so long as they did not impair or tend to impair the supremacy of the national authority or the rights of loyal citizens. No people could long exist without exchanging commodities, and, of course, without buying, selling and contracting. And no belligerent has ever been so imperious and arbitrary as to attempt to forbid the transaction of ordinary business by its enemies among themselves. No principle of public law and no consideration of public policy could be subserved by any edict to that effect, and its enforcement, if made, would be impossible. If, then, intercourse between the Conrads, father and sons, they being all enemies, was not unlawful; if between them contracts for the purchase and sale of property, in respect to which there was no special interdiction, would have been binding, the sale in the case at bar can only be impeached, if at all, by reason of the situation of the property within the Federal lines. And from that circumstance it could not be impeached, unless the sale, if upheld, in some way frustrated the enforcement of the right of seizure and confiscation possessed by the United States. It may be admitted that the right of a belligerent to confiscate the property of enemies found within its territory cannot be impaired by a sale of the property during the war, but it is not perceived that on any other ground the sale could be invalidated. A conveyance in such case would pass the title subject to be defeated if the government

should afterward proceed for its condemnation. And to declare this liability was the object of the provision in the confiscation act, enacting that "all sales, transfers and conveyances" of property of certain designated parties made subject to seizure should be null and void. The invalidity there declared was limited and not absolute. It was only as against the United States that the transfers of property liable to seizure were null and void. They were not void as between private parties, or against any other party than the United States. This was so held in the case of *Corbett v. Nutt*, reported in the 10th of Wallace. There a devise (which for the purpose of the case was treated as included within the terms "sales, transfers and conveyances") of property situated in the District of Columbia, made by a resident enemy in the State of Virginia to a person as trustee, who also resided in that State and held office under the Confederate government, was held to pass a title good against all the world except the United States. The seizure and confiscation of property of persons engaged in the rebellion, and the appropriation of the proceeds to support the army and navy, were supposed, whether wisely or unwisely is immaterial, to have a tendency to insure the speedy termination of the rebellion; and it was to prevent the provisions enacted to enforce the confiscation from being evaded by the parties whose property was liable to seizure, that sales, transfers and conveyances of it were declared invalid. As stated by the court, "They were null and void as against the belligerent or sovereign right of the United States to appropriate and use the property for the purpose designated, but in no other respect, and not as against any other party. Neither the object sought nor the language of the act requires any greater extension of the terms used. The United States were the only party who could institute the proceedings for condemnation, the offense for which such condemnation was decreed was against the United States, and the property condemned or its proceeds went to their sole use. They alone could, therefore, be affected by the sale." And the court added that any other construction would impute to the United States a severity in their legislation entirely foreign to their history. If the sale to the younger Conrads had been made after the passage of the confiscation act, it would not have prevented the title of the elder Conrad from vesting by the decree of condemnation in the United States. But having been made previously, it was not impaired by the act.

An actual delivery of the property to the vendees at the time was not essential to the validity of the sale, it having been made by public act before a notary. The Code of the State declares that an obligation to deliver an object, which is particularly specified, is perfect by the mere consent of the parties and renders the creditor the owner; and, further, that this rule "is without any exception, as respects immovables, not only between the parties, but as to all the world, provided the contract be clothed with the formalities required by law, that it is *bona fide*, and purports to transfer the ownership of the property." Art. 1914. The Code also declares that "the law considers the tradition or delivery of immovables as always accompanying the public act which transfers the property." Art. 2455; *Lallande v. Lee*, 9 Rob. 517; *Flynn v. Moore*, 4 An. 401; *Ellis v. Prevost*, 13 La. 235-237. We are of opinion, therefore, that the act of sale

made on the 6th of May, 1862, was unaffected by the subsequent confiscation proceedings and should have been admitted in evidence.

This case is much stronger than that of *Fairfax's Devisee v. Hunter's Lessee*, reported in the 7th of Cranch, which received great consideration by this court. There a devisee to an alien enemy, resident in England, made during our revolutionary war by a citizen of Virginia, and there residing at the time, was sustained, and held to vest a title in the devisee which was good until office found. "It is clear by the common law," said Mr. Justice Story, speaking for the court, "that an alien can take lands by purchase though not by descent; or, in other words, he cannot take by the act of law but he may by the act of the party. This principle has been settled in the Year Books and has been uniformly recognized as sound law from that time. Nor is there any distinction whether the purchase be by grant or by devise. In either case the estate vests in the alien, not for his own benefit, but for the benefit of the State; or, in the language of the ancient law, the alien has the capacity to take but not to hold lands, and they may be seized into the hands of the sovereign. But until the lands are so seized the alien has complete dominion over the same." And, continues the learned justice, "We do not find that in respect to these general rights and disabilities there is any admitted difference between alien friends and alien enemies. During the war the property of alien enemies is subject to confiscation *jure belli* and their civil capacity to sue is suspended. But as to capacity to purchase, no case has been cited in which it has been denied; and in *The Attorney-General v. Wheeden and Shales*, Park. 267, it was adjudged that a bequest to an alien enemy was good, and after a peace might be enforced. Indeed, the common law in these particulars seems to coincide with the *jus gentium*."

If an alien enemy can, by devise or purchase from a loyal citizen or subject, take an estate in the country of the other belligerent and hold it until office found, there would seem to be no solid reason for refusing a like efficacy to a conveyance from one enemy to another of land similarly situated. See the able and exhaustive opinion of the Supreme Court of Massachusetts in *Kershaw v. Kelsey*, delivered by Mr. Chief-Justice Gray, 100 Mass. 561. A different doctrine would unsettle a multitude of titles passed during the war between residents of the insurrectionary territory, temporarily absent therefrom whilst it was dominated by the Federal forces. Such residents were deemed enemies by the mere fact of being inhabitants of that territory without reference to any hostile disposition manifested or hostile acts committed by them. In numerous instances, also, transfers of property were made in loyal States, bordering on the line of actual hostilities, by parties who had left those States and joined the insurgents. This was particularly the case in Missouri and Kentucky. No principle of public policy would be advanced, or principle of public law sustained, by holding such transfers absolutely void, instead of being merely inoperative as against the right of the United States to appropriate the property *jure belli*; on the contrary, such a holding would create unnecessary hardship, and therefore add a new cruelty to the war.

It follows from the views expressed that the judgment of the court below must be reversed and the cause remanded for a new trial; and it is so ordered.

CONSTITUTIONALITY OF STATE PROHIBITORY LAWS AS TO CORPORATIONS AFFECTED BY.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

BOSTON BEER COMPANY, plaintiff in error, v. COMMONWEALTH OF MASSACHUSETTS.

A statute of Massachusetts passed in 1809 providing for the chartering of manufacturing corporations contained this: "Provided always that the Legislature may from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly repeal any act or part thereof establishing any corporation, as shall be deemed expedient." In 1828 the Boston Beer Company was incorporated "for the purpose of manufacturing malt liquors in all their varieties in the city of Boston," and the act of incorporation, which was passed by the Legislature of Massachusetts, provided that said company "for that purpose shall have all the power and privileges and be subject to all the duties and requirements contained in" the act of 1809 mentioned. In 1829 the act of 1809 was repealed with this provision: "But this repeal shall not affect the existing rights of any person or the existing or future liabilities of any corporation, or any members of any corporation now established, until such corporation shall have adopted this act and complied with the provisions herein contained." Held, that the repeal of the act of 1809 by the act of 1829 was not a revocation or surrender by the State of Massachusetts of the reserved power to repeal the charters of corporations, and the passage of an act forbidding the manufacture and sale of malt liquors was not an act impairing an obligation of a contract with the company mentioned and was not in violation of the Federal Constitution.

In error to the Superior Court of the Commonwealth of Massachusetts. The facts appear in the opinion.

Mr. Justice BRADLEY delivered the opinion of the court.

The question raised in this case is, whether the charter of the plaintiff, which was granted in 1828, contains any contract the obligation of which was impaired by the prohibitory liquor law of Massachusetts, passed in 1869, as applied to the liquor in question in this suit.

Some question is made by the defendant in error, whether the point was properly raised in the State courts, so as to be the subject of decision by the highest court of the State. It is contended that, although it was raised by plea, in the municipal court, yet, that plea being demurred to, and the demurrer being sustained, the defense was abandoned, and the only issue on which the parties went to trial was the general denial of the truth of the complaint. But whatever may be the correct course of the proceeding in the practice of courts of Massachusetts, a matter which it is not our province to investigate, it is apparent from the record that the very point now sought to be argued was made on the trial of the cause in the Superior Court, and was passed upon, and made decisive of the controversy, and was afterward carried by bill of exceptions to the Supreme Judicial Court, and was decided there adverse to the plaintiff in error on the very ground on which it seeks a reversal.

The Supreme Court, in its rescript, expressly decides as follows:

"Exceptions overruled for the reasons following:

"The act of 1869, chapter 415, does not impair the obligations of the contract contained in the charter of the claimant, so far as it relates to the sale of malt liquors, but is binding on the claimant to the same extent as on individuals.

"The act is in the nature of a police regulation in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even where the charter of the corporation cannot be altered or repealed by the Legislature."

The judgment of the Superior Criminal Court was entered in conformity to this rescript, declaring the liquors forfeited to the Commonwealth, and that a warrant issue for the disposal of the same.

This is sufficient for our jurisdiction, and we are bound to consider the question which is thus raised.

As before stated, the charter of the plaintiff in error was granted in 1828, by an act of the Legislature passed on the 1st of February in that year, entitled "An act to incorporate the Boston Beer Company." This act consisted of two sections. By the first, it was enacted that certain persons (named), their successors and assigns, "be and they hereby are made a corporation by the name of The Boston Beer Company, for the purpose of manufacturing malt liquors in all their varieties, in the city of Boston, and for that purpose shall have all the powers and privileges, and be subject to all the duties and requirements contained in an act passed on the 3d day of March, A. D. 1809, entitled 'An act defining the general powers and duties of manufacturing corporations,' and the several acts in addition thereto." The second section gave the company power to hold such real and personal property to certain amounts, as might be found necessary and convenient for carrying on the manufacture of malt liquors in the city of Boston.

The general manufacturing act of 1809, referred to in the charter, had this clause, as a proviso of the 7th section thereof: "Provided always that the Legislature may from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal any act or part thereof, establishing any corporation, as shall be deemed expedient."

A substitute for this act was passed in 1829, which repealed the act of 1809 and all acts in addition thereto, with this qualification: "But this repeal shall not affect the existing rights of any person or the existing or future liabilities of any corporation, or any members of any corporation now established, until such corporation shall have adopted this act and complied with the provisions hereih contained."

It thus appears that the charter of the company, by adopting the provisions of the act of 1809, became subject to a reserved power of the Legislature to make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal the act or any part thereof establishing the corporation. This reservation of the power was a part of the contract.

But it is contended by the company that the repeal of the act of 1809, by the act of 1829, was a revocation or surrender of this reserved power.

We cannot so regard it. The charter of the company adopted the provisions of the act of 1809 as a portion of itself, and those provisions remained a part of the charter notwithstanding the subsequent repeal of the act. The act of 1829 reserved a similar power to amend or repeal that act at the pleasure of the Legislature, and declared that all corporations established

under it should cease and expire at the same time when the act should be repealed. It can hardly be supposed that the Legislature, when it reserved such plenary powers over the corporations to be organized under the new act, intended to relinquish all its power over the corporations organized under or subject to the provisions of the former act. The qualification of the repeal of the act of 1809 before referred to seems to be intended, not only to continue the existence of the corporations subject to it in the enjoyment of all their privileges, but subject to all their liabilities, of which the reserved legislative control was one.

If this view is correct, the Legislature of Massachusetts had reserved complete power to pass any law it saw fit, which might affect the powers of the plaintiff in error.

But there is another question in the case which, as it seems to us, is equally decisive.

The plaintiff in error was incorporated "for the purpose of manufacturing malt liquors in all their variety," it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right, or capacity, was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State.

We do not mean to say that property, actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of *Barteneyer v. The State of Iowa*, 18 Wall. 129, was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behoved it to show that fact. But no such fact is shown, and no such point is taken. The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding, and in spite of any exigencies which may occur in the morals or the health of the community requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The Legislature had no power to confer any such rights.

Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*. And they are to be attained and provided for by such appropriate means

as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama*, 94 U. S. 650.

Since we have already held, in the case of *Bartemeyer v. Iowa*, that as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts.

Of course, we do not mean to lay down any rule at variance with what this court has decided with regard to the paramount authority of the Constitution and laws of the United States relating to the regulation of commerce with foreign nations and amongst the several States, or otherwise. *Brown v. Maryland*, 12 Wheat. 419; *License Cases*, 5 How. 504; *Passenger Cases*, 7 id. 283; *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, id. 275; *Railroad Co. v. Van Husen*, 95 id. 465; etc., etc. That question does not arise in this case.

The judgment was affirmed.

RECENT AMERICAN DECISIONS.

SUPREME COURT OF OHIO. SUPREME COURT COMMISSION OF OHIO.*

FRAUD.

1. *Equity will not relieve against mere moral wrong.*—The fraud against which equity will grant relief, notwithstanding the statute of frauds, consists in the refusal to perform an agreement upon the faith of, which the plaintiff has been misled to his injury, or the defendant has secured an unconscionable advantage, and not in the mere moral wrong involved in a refusal to perform a contract, which, by reason of the statute of frauds, cannot be enforced by action. *Watson v. Erb* (Com.).

2. *Failure to fulfill verbal agreement as to purchase of land: where equity will not interfere.*—A, in pursuance of a parol agreement for that purpose with B, who desired to become the owner of a certain tract of land adjoining his, and for personal reasons was not to be known in the transaction, but was to save A harmless from all loss or trouble, purchased the land, made a cash payment thereon, took the title in fee to himself as per the agreement, and gave to the seller his own several promissory notes and mortgage back, to secure the deferred payments. After contracting for the land, but before making the cash payment, or receiving the title, A repudiated his agency and gave notice to B that he would purchase for himself with his own money, and refused to receive from B the money to make the cash payment, but consummated the purchase for himself. *Held*, that the breach of the verbal contract to convey to B is not such a fraud upon him as authorizes a court of equity to decree a trust in the land and compel its execution. *Ib.* Decided June 5, 1878.

FIRE INSURANCE.

Condition avoiding policy in case of change of possession may be waived by verbal contract of company's agent.—A policy of insurance issued to a mortgagee

contained a stipulation that the insurance might be terminated at any time at the request of the assured, the company only retaining customary short rates; also, that if any change took place in the title or possession, the policy should be void. Without the knowledge of the company, the owner sold and conveyed the property and satisfied the mortgage. *Held*, that a subsequent assignment of the policy by the mortgagee to the purchaser, and a verbal agreement between the latter and an agent of the company, having power to make contracts and issue policies, that such assigned policy shall have the force and effect of a new policy to the purchaser, will bind the company. *Amazon Insurance Co. v. Wall* (Court). Decided June 4, 1878.

SLANDER.

1. *Evidence: charge of want of chastity: specific immoral acts.*—In an action of slander by a woman, where the alleged defamatory words impute to her a want of chastity, specific acts of sexual intercourse by her cannot be given in evidence, for any purpose, under the issue made by a general denial. *Duval v. Davey* (Com.).

2. *General reputation of plaintiff for unchastity may be shown.*—Where the slanderous words set out in the petition charging the plaintiff, a female, with a want of chastity, under such issue it is competent, in mitigation of damages, to show that plaintiff's general reputation for chastity at and prior to the speaking of the words was bad. (*Dewitt v. Greenfield*, 5 Ohio, 225, overruled.) *Ib.* Decided May 29, 1878.

STATUTE OF LIMITATION.

Does not apply to foreign judgment.—The limitation of ten years prescribed by the 18th section of the Code of Civil Procedure is not applicable to an action brought on a judgment rendered in another State or Territory. *Fries v. Mack* (Com.). Decided June 5, 1878.

RECENT BANKRUPTCY DECISIONS.

ACTION.

To obtain possession of property: inability to give bonds: injunction.—The assignee cannot maintain a suit in equity to obtain possession of property alleged to belong to the estate; the remedy is at law. Where the party in possession claims title to the property, the inability of the assignee to give the requisite bonds in an action of replevin will not entitle him to an injunction to prevent its removal. U. S. Dist. Ct., Oregon. *In re Oregon Iron Works*, 17 Nat. Bankr. Reg. 404.

CONFLICT OF LAW.

Promissory note negotiated through broker: sale to party in another State.—The bankrupts made certain notes for the accommodation of W. & Co., who placed them in the hands of brokers for sale as business paper. The brokers then wrote to the New Haven Trust Company, inclosing the notes and asking if it would take them. The Trust Company returned a check on a bank in New York for the amount of the notes less a discount of ten per cent. *Held*, that the notes were governed by the law of New York; that they had their inception when negotiated to the Trust Company and are usurious and void. U. S. Dist. Ct., S. D. New York. *In re Dodge*, 17 Nat. Bankr. Reg. 504.

* To appear in 30 and 31 Ohio St. Reports. From E. Dewitt, Esq., State Reporter.

ESTOPPEL.

Entries on books of bankrupt: making notes payable to another party: claim proved against estate.—Entries of accommodation notes in the books of the bankrupt against the payee will not estop the bankrupt nor his trustee from disputing the claim of a holder of such notes. The making of notes payable to another party has never been held to be such a representation as estops the maker from showing that they were accommodation paper, even in favor of one to whom the payee has represented them to be business paper and who took them in good faith on such representations. The trustee is not estopped from disputing the claim of the holder of the notes, by reason of his having proved them against the estate of the payee in bankruptcy, where the holder has not upon the faith thereof parted with his money or changed his position as to such notes. U. S. Dist. Ct., S. D. New York. *In re Dodge*, 17 Nat. Bankr. Reg. 504.

FRAUD.

Sale by one partner to another where firm is insolvent, not.—At the advice of one of their creditors, V. sold out his interest in the firm to his partner B., B. agreeing to pay all the firm debts and giving V. his notes for \$300. This was done upon the representation that the creditor would in that event give time. Instead of so doing, however, he immediately entered judgment upon a warrant of attorney held by him, and levied on the goods in B.'s possession. Afterward B. was adjudicated bankrupt at the petition of the firm creditors and V. Another creditor, G., who had obtained a judgment against the firm then levied upon the goods held by the sheriff under the former levy. The assignee afterward recovered possession of the proceeds of the property levied upon. In a suit by G.'s assignee to establish a lien by virtue of his levy, held, that the levy having been made after adjudication, no lien could attach unless the sale to B. was fraudulent in fact, or by necessary construction of law, so that the goods still remained firm assets and firm property. A sale of his interest for a valuable consideration by one partner to the other, where the firm is insolvent, does not of itself constitute fraud. U. S. Dist. Ct., W. D. Michigan. *Russell v. McCord*, 17 Nat. Bankr. Reg. 508.

PREFERRED CLAIM.

Debt due State.—The warden of the Clinton State Prison sold to the bankrupts certain merchandise which at the time was the property of the State, and proved the claim as a debt due him as agent and warden of the prison. Held, that the debt was in fact a debt to the State and as such entitled to priority. U. S. Dist. Ct., N. D. New York. *In re Miller*, 17 Nat. Bankr. Reg. 402.

USURY.

Expunging claim tainted with: accommodation paper: burden of proof.—Where an assignee in bankruptcy moves to expunge a claim on the ground of usury, alleging that a promissory note on which the claim is founded was made or indorsed by the bankrupt for the accommodation of another person and took its inception in the hands of the present holder, who obtained the same at a discount of more than the lawful rate of interest, held, that the assignee must show clearly that the note was accommodation paper. U. S. Dist. Ct., S. D. New York. *In re Many & Marshall*, 17 Nat. Bankr. Reg. 514.

UNITED STATES SUPREME COURT ABSTRACT.**CONSTITUTIONAL LAW.**

City ordinance forbidding steam on railroads in city: validity of.—A railroad company chartered by the State of Virginia, and permitted by the common council of Richmond to construct its road into said city and to use locomotives propelled by steam thereon, and which had made certain improvements asked for by the city as a condition and consideration for the construction and use of its road, thereafter changed its main line to another route. Thereafter the common council passed an ordinance forbidding the use of steam by said company in certain parts of the city. The charter of the company in terms subjected it to the government of the city in respect to the use of the road when constructed. Held, that the ordinance was not invalid either as impairing the obligations of a contract or as depriving the company of its property without due process of law, or as denying the company of the equal protection of the laws. Judgment of Supreme Court of Appeals of Virginia affirmed. *Richmond, Fredericksburg and Potomac Railroad Co., plaintiff in error, v. City of Richmond.* Opinion by Waite, C. J.

CRIMINAL LAW.

1. *Indictment under R. S., § 3266, for illicit distilling*—Under the provision of section 3266 of the United States Revised Statutes, an indictment charging that the defendant "did knowingly and unlawfully cause and procure to be used a still, boiler, and other vessel, for the purpose of distilling, within the intent and meaning of the Internal Revenue Laws of the United States, in a certain building, and on certain premises, where vinegar was manufactured and produced, against the peace of the United States and their dignity, and against the form of the statute of the said United States in such case made and provided," is insufficient; it is not enough to charge the offense in the words of the statute. Held, also, that it is not essential to aver in terms that the spirits distilled were alcoholic. On a certificate of division from U. S. Circuit Court, E. D. New York. Judgment against defendant. *United States v. Simmons.* Opinion by Harlan, J.

2. *Indictment under Revised Statutes, § 3281.*—One count based upon section 3281 of the United States Revised Statutes charged that the defendant "did knowingly and unlawfully engage in and carry on the business of a distiller, within the intent and meaning of the Internal Revenue Laws of the United States, with the intent to defraud the United States of the tax on the spirits distilled by him, against the peace," etc. Held, that this count contained an averment of an unlawful act and was sufficient to authorize judgment thereon. Ib.

DEFENSE.

Payment of debt due citizen of United States to Confederate government not.—In an action for goods sold in 1861, the defendant set up that from 1861 to 1865 plaintiff was a resident of Pennsylvania, one of the United States, and defendant was a resident of Virginia, which was under the government of the Confederate States, a belligerent at war with the United States. That, by a law of the Confederate States, plaintiff's debt was sequestered, and defendant, under a penalty, compelled to pay the same to the Confederate government. Held, no defense to the action. Order of Supreme Court of Appeals of Virginia reversed. *Williams, plaintiff in error, v. Bruffy.* Opinion by Field, J.

COURT OF APPEALS ABSTRACT.

APPEAL.

To Court of Appeals of case involving less than \$500: case involving title to real estate.—In order to authorize an appeal to the Court of Appeals, where the amount in controversy is less than \$500, on the ground that the action is one affecting the title to real property or an interest therein, it is not sufficient that the action relates to real property, or in some way affects it, it must itself affect the title or an interest therein. Therefore an action to have an assessment on real property declared void does not affect the title to the property, and if the amount involved is less than \$500 an appeal is not allowable. Appeal dismissed. *Nichols v. Voorhis*. Opinion per Curiam.

[Decided May 21, 1878. Reported below, 9 Hun, 171.]

BANKRUPTCY.

Discharges attachment by operation of law: attached debt paid may be recovered by assignee.—Under an attachment in a suit against one Yerkes, a debt due from defendant to Yerkes was seized. Bankruptcy proceedings had been commenced against Yerkes, but plaintiff knew nothing of them and paid the debt to the sheriff who levied the attachment. The bankruptcy proceedings were commenced within four months of the issue of the attachment. *Held*, that the bankruptcy proceedings dissolved the attachment by operation of law, and without any order of the court that the payment of the debt by defendant did not relieve him from liability therefor, and that the assignee in bankruptcy of Yerkes could recover the amount of the debt from him. Judgment below affirmed. *Duffield, assignee, v. Horton*. Opinion by Allen, J.

[Decided April 2, 1878. Reported below, 10 Hun, 140.]

CORPORATION.

Liability of stockholder: extinguishment of.—Where a stockholder in a manufacturing corporation formed under the act of 1848, loaned money upon an indorsed note of the corporation to the extent of the amount of his stock, which note was prosecuted to judgment and an execution was returned unsatisfied, *held*, that the liability of the stockholder for the debts of the company was extinguished. Judgment below affirmed. *Agate v. Sands*. Opinion by Miller, J.

[Decided May 21, 1878.]

DEED.

1. *Construction of: clause controlling details of description.*—After particularly mentioning the boundaries, etc., of a tract of land conveyed, the description in a deed closed thus: "The premises hereby intended to be conveyed being the east half-part of the farm whereon Johnson Babcock, now deceased, formerly lived," etc. *Held*, that this clause would have a controlling effect on the details of the description, and the deed would not convey any more than the east half of the farm mentioned. Judgment below affirmed. *Ousby v. Jones*. Opinion by Folger, J.

2. *Adverse possession: fence off of line.*—Where a division fence was built off the true line, but did not extend along the whole line, and there was no fence or other visible line of demarkation between the adjoining premises, *held*, that an acquiescence by the adjoining owners in the location of the fence could

not be held an acquiescence in an invisible line continued in the same course. *Ib*.

3. *Adverse possession: mere claim of title does not constitute.*—An owner of land claimed continually that the building of a neighbor was located over on to his land. *Held*, not an adverse holding of the land built on. *Ib*.

[Decided May 21, 1878. Reported below, 4 Hun, 428.]

DIVORCE.

1. *Judgment of, in courts of domicile of parties: decision of State court as to validity of its laws under its own Constitution conclusive.*—Where a court of Louisiana authorized by valid statutes of that State to entertain actions for divorce under a law of that State, passed in 1870, gave judgment of divorce for acts committed in 1869, *held*, that the courts of this State would not pass upon the question whether the law mentioned was invalid under the Constitution of Louisiana and hold the judgment void. Judgment below affirmed. *Hunt v. Hunt*. Opinion by Folger, J.

2. *Jurisdiction: State courts judges of jurisdiction under their own laws.*—Of their own jurisdiction, so far as it depends upon municipal laws, the courts of every country are exclusive judges. In pronouncing a judgment they of necessity decide in favor of their jurisdiction. It is conclusive if they have jurisdiction of the subject-matter. *Ib*.

3. *Construction of statutes of a State: decision of State courts binding on other courts.*—The decisions of the tribunals of a State as to the true construction of the laws of their own sovereignty are binding on the Federal courts and upon the courts of other States. *Ib*.

4. *Judgment: in divorce against one domiciled in State valid without personal service.*—In a suit for divorce a valid judgment in *personam* so as to effect the dissolution of the marriage contract which shall be prevalent everywhere may be rendered against a defendant not within the territorial jurisdiction during the progress of the suit, if that be the place of his citizenship and domicile, though process be served upon him only in some method prescribed by the laws of that jurisdiction as a substitute for personal service and though he has not voluntarily appeared. *Ib*.

[Decided January 29, 1878. Reported below, 9 Hun, 622.]

ESTOPPEL.

Giving undertaking for re-delivery in replevin estops denying possession.—Some stone were lying upon ground leased by plaintiff. Defendants sent men who commenced work cutting and carving the stone. Plaintiff thereupon commenced a replevin action, and the sheriff took possession of the stone. Defendants gave a statutory undertaking in which it was set forth that the stone had been taken from their possession, and asking a re-delivery of them, and they were re-delivered. *Held*, that by giving the undertaking defendants were estopped from setting up that the stone had not been in their possession. Judgment below affirmed. *Dossy v. Morgan*. Opinion by Rapallo, J.

[Decided May 21, 1878.]

FIRE INSURANCE.

Conditions in policy as to description: reference to application not in company's possession.—A policy of fire insurance upon buildings contained a provision

that applicants for insurance must state "the position, etc., of all contiguous buildings," and that the "survey, description and representations shall be taken and deemed to be a part of the policy and a warranty on the part of the insured." The policy, after stating the several amounts insured upon different buildings, and the place where situated, added, "As per application on file, No. 1234." There was no application on file in the insurance company's office, but in the office of the company's agents who issued the policy there was an old application made by the owner of the property for insurance in another company of which they were also agents. The company issuing the policy in question never had the application and knew nothing of it. *Held*, that the reference in the policy did not render the insured bound by the statements in the old application, and the company could not claim that the policy was void because of misstatements in such application. Judgment below affirmed. *Vilas v. New York Central Ins. Co.* Opinion by Miller, J. [Decided February 22, 1878. Reported below, 9 Hun, 121.]

NEGOTIABLE INSTRUMENT.

Extending time of payment: what is not: indorsement: renewal notes.—Where it appeared that renewal notes were left by the maker at a bank for the purpose of taking up an indorsed note not yet due, held by the bank, and the bank officers objected that the renewal note was not indorsed by the indorser of the other, and the maker told the bank officers to keep the notes and the indorser would come in a day or two and indorse, and the note was accepted on that condition. Subsequently a second renewal note, to take the place of the first renewal note, was left with the bank, the same promise made and the note accepted thereunder. No indorsement was made on the renewal notes. *Held*, not an extension of the time of payment of the indorsed note, nor a suspension of the right to prosecute the same so as to discharge the indorser. (*Place v. McIlwain*, 38 N. Y. 96, distinguished. Judgment below affirmed. *Auburn City National Bank v. Hensiker*. Opinion by Miller, J. [Decided January 29, 1878.]

SET-OFF.

Right of municipality to set off claim that the people of the State may sue on.—Chapter 49 of the Laws of 1875 does not deprive a municipality of the right to set off on an action a claim against the plaintiff although it may arise out of a transaction which might be the subject of a suit in behalf of the people. The act gives a right of action to the State in certain cases, but it does not deprive a municipality of a right to bring an action in the courts of this State to recover its funds or property unlawfully diverted, although proceedings in its behalf may be stayed under the provision of 2d section. Judgment below affirmed. *Wood v. Mayor of New York*. Opinion by Andrews, J. [Decided May 21, 1878. Reported below, 7 Hun, 164.]

WILL.

1. *Testamentary capacity: old age and infirmities incident thereto not want of.*—There is no presumption against a will because made by a man of advanced age, nor can incapacity be inferred from an enfeebled condition of mind or body. Therefore, where a testator of eighty-three was shown to have been subject to disease for some time before making his will, to have had poor sight and a weakness of memory, but could

transact intelligently such business as he had to do, *held*, that a want of testamentary capacity was not shown. Judgment below affirmed. *Horn v. Pullman*. Opinion by Andrews, J.

2. *Undue influence: change of testamentary intention.*—A change in testamentary intention, if made upon a reason satisfactory to the testator, although it may seem inadequate to a court investigating the question of undue influence, furnishes of itself no ground for setting aside the will. The question in all such cases is, was the will the free act of a competent testator. An old man who lived with his grandson became impressed with the idea that his children did not wish him to live with them. His children very seldom visited him, and his grandson and wife took care of him. He frequently expressed great gratitude for his grandson's care and attention and in his will gave the bulk of his property to the grandson. So far as appeared he acted freely in what he did. *Held*, that there was no ground for refusing to admit the will to probate. *Ib.* [Decided January 29, 1878.]

COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, June 18, 1878:

Carroll v. Waydell, No. 257, judgment affirmed; on opinion of court below.—*Demarest v. Mayor, etc.*, of New York, No. 248, judgment affirmed; opinion by Earl, J.—*Dunlop v. Paterson Fire Ins. Co.*, No. 417, order affirmed; opinion by Folger, J.—*Doyle v. Sharp*, No. 241, judgment affirmed; opinion by Miller, J.—*Hawks v. Winans*, No. 276, judgment affirmed; no opinion.—*Higgins v. Murray*, motion for re-argument, with \$10 costs, denied; no opinion.—*Hunn v. N. Y. C. & H. R. R. Co.*, No. 233, judgment affirmed; on opinion of court below.—In re application of Attorney-General v. *Atlantic Mutual Life Ins. Co.*, No. 402, order affirmed; costs out of the fund to each party appearing at argument; opinion by Folger, J.—In re petition of *Rector, etc.*, of St. Mark's Church, No. 407, order affirmed; no opinion.—*Kellay v. Dusenbury*, motion to dismiss appeal denied; no opinion.—*Pfohl v. Simpson*, No. 155, judgment affirmed; opinion by Folger, J.—*Randolph v. Boston & Albany R. R. Co.*, No. 266, judgment affirmed; no opinion.—*Stuart v. Palmer*, No. 141, judgment affirmed; opinion by Earl, J.—*Weller v. Hersee*, No. 256, judgment affirmed; no opinion.—*Whitton v. Spring*, No. 253, judgment reversed and new trial ordered, unless plaintiffs stipulate to reduce their recovery in the sum of \$566.21, and interest thereon from June 6, 1872, in which event judgment as so modified affirmed, without costs to either party in this court. Deductions to be made ratably from the several recoveries; opinion by Earl, J.

The following order was handed down on Friday, June 14, 1878:

Ordered, That this court take a recess on the 21st day of June instant, until Monday, the 16th day of September next, at 10 A. M., and that a new calendar be made for the session then to be held. The cases undisposed of on the present calendar will be transferred to the new calendar without further notice; in other cases notice of argument must be filed with the clerk on or before the second day of September next.

NOTES OF RECENT DECISIONS.

CONFLICT OF LAW: STATUTES HAVE NO EXTRA-TERRITORIAL FORCE.—Acting under authority of a statute of Arkansas, a probate court of that State ordered and adjudged that the disability of non-age of G. be removed, "so far as to authorize him to demand, sue for and receive all moneys belonging to him in the State of Missouri, in the hands of his curator or any other person, and to execute releases therefor in the same manner as if he was of full age." In a suit brought by G., in Missouri, against his curator, *held*, that the statute of Arkansas was inoperative in Missouri, and that the infant could not sue in his own name. Sup. Ct., Missouri, October Term, 1877. *State v. Bunce* (Cent. L. J.).

CONTRACT: PROMISE TO PAY DEBT WHEN ABLE.—A debt due plaintiff from defendant was barred by a discharge under the insolvent laws of Massachusetts. Thereafter defendant wrote plaintiff this: "Your account will certainly be paid if I live." *Held*, to be no more than a conditional promise by defendant to pay when he was able, and no action was maintainable without proof of ability to pay. Sup. Jud. Ct., Massachusetts, March, 1878. *Randidge v. Lyman*.

CONSTITUTIONAL LAW: INJURIES TO STOCK BY RAILROADS: ACT UNCONSTITUTIONAL WHICH IMPOSES LIABILITY WITHOUT REGARD TO CIRCUMSTANCES OF KILLING.—An act which fixes an absolute liability on a corporation, to make compensation for injuries done to property in the prosecution of its lawful business, without any wrong, fault or neglect on its part, when under the general law of the land, no one else is liable under such circumstances, is not "due process" of law, and is, therefore, void. Sup. Ct., Alabama, Dec. Term, 1877. *Zeigler v. S. & N. R. R. Co.*

CRIMINAL LAW: INDICTMENT: VARIANCE.—An indictment for the theft of a gelding is not sustained by proof of the theft of a ridgling, or partly gelded horse. Ct. App., Texas, May 15, 1878. *Brisco v. State* (Tex. L. J.).

CRIMINAL LAW: RAPE: FORCE NECESSARY TO CONSTITUTE.—The taking of improper liberties with a female, whereby her sexual passion is excited so as to render her unable to resist the solicitations of a man with whom she is, to allow carnal intercourse with her, no actual force being used, is not rape. Sup. Ct., California, April, 1878. *People v. Royal* (Cal. L. Rec.).

CRIMINAL LAW: ROBBERY: VENUE.—The defendant committed a robbery in Fayette county while being taken to Shelby county as a prisoner in charge of an officer, and the property was recovered from him in the latter county. *Held*, that he carried the property voluntarily into and could be lawfully indicted and tried in the latter county. Sup. Ct., Tennessee, April, 1878. *Margerum v. State* (Cent. L. J.).

CRIMINAL LAW: TRIAL: IN MISDEMEANORS WHEN PRISONER NEED NOT PERSONALLY APPEAR: BAIL.—In misdemeanor cases punishable only by fine, the defendant, if he has given bail, may appear by counsel, and the trial may proceed without his personal presence; and his counsel are not required to bring into court the money "to pay the fine and costs" to entitle him to a trial in his absence. Where a party charged with a misdemeanor punishable only by fine, appears by counsel, and not in person, a forfeiture of his bail bond cannot be legally taken. Ct. App., Texas, April 18, 1878. *Neaves v. State* (Tex. L. J.).

PROCEEDINGS OF THE REVISION COMMITTEE OF THE SENATE.

At a meeting of the special committee of the Senate of this State on the revision of the statutes, held in this city on the 17th inst., there were present Senators Samuel S. Edick, Edwin Hicks, and Charles Hughes, who constitute the entire committee.

On motion of Senator Hicks the following resolution was passed unanimously:

Resolved, First, That in the opinion of this committee it is not expedient that a new Code of Civil Procedure be enacted; but it is expedient that the Code of Civil Procedure now in force, as sought to be amended by the Legislature at the session which has just closed, be retained, with such further amendments, if any, in matters of detail, as may appear to be necessary upon a careful examination and review thereof, or as the result of the practical experience of the bench and the bar thereunder.

Secondly, That in the opinion of this committee the said Code of Civil Procedure should be completed so that it will contain the entire revised legislation of the State upon the subject of procedure in civil causes, and thereupon that the former statutes upon that subject should be repealed; for which purpose this committee will report at the next session of the Legislature a bill containing the nine supplementary chapters reported to the Legislature at the session which has just closed by the commissioners to revise the statutes, with such amendments as may appear to be expedient upon a careful examination and review thereof.

Thirdly, That for the purpose of assisting this committee in preparing such bills as may be necessary to carry out the objects above stated, the members of the bench and of the bar of this State are requested to furnish to any member of this committee any suggestions which may occur to them for amendments, either to the thirteen chapters of the Code of Civil Procedure now in force, or to the nine chapters proposed to be added thereto.

SAMUEL S. EDICK,
Chairman of the Committee.

NEW BOOKS AND NEW EDITIONS.

ORDRONAUX'S JUDICIAL ASPECTS OF INSANITY.

Commentaries on the Lunacy Laws of New York, and on the Judicial Aspects of Insanity at Common Law and in Equity, including Procedure. By John Ordranax, LL. D., State Commissioner in Lunacy, Professor of Medical Jurisprudence in the Law School of Columbia College, etc. Published by John D. Parsons, Jr. Albany, 1878.

WE have here, in a neat octavo volume of five hundred pages, a manual suitable as a text-book for students, and convenient as a work of reference on its particular topic to members of both the professions, of Law and Medicine. The book may be consulted with profit by all who have occasion to deal with questions of mental incapacity, either in the domain of civil or of criminal responsibility, or who desire, on behalf of the afflicted, to intelligently avail themselves of the restraints and safeguards which the laws of this State, in a spirit of almost paternal benevolence, throw around the persons and property of those who may be suspected or adjudged incapable of the assertion, maintenance or exercise of their own rights, or of the due observance of the rights of others, amid the excitements of every day life.

The work appropriately opens with an introduction and digest of adjudicated principles in the law of Insanity, a thing we believe never before attempted by any writer. It consists of a series of maxims of the first importance, fortified, where of a scientific nature, by citations of high medical authority, and where of a legal nature, by reference to the cases wherein the principle laid down has been judicially determined. A

good ground-work of accepted-general doctrines is thus presented to the reader at the outset.

Following this are the several chapters of the work proper. Before proceeding to speak particularly of a few of the matters discussed therein, it may not be amiss to mention their subjects as tending to give an idea of the scope and bearing of the work.

Chapter I gives a synopsis of lunacy legislation in Great Britain; chapter II, a history of lunacy legislation in New York; chapter III consists of a copy of our Revised Lunacy Statutes, with a commentary on the several sections and citations of cases; chapter IV deals with the law as affecting habitual drunkards, their status being by legislation closely assimilated to that of the insane; chapter V gives details of special acts relating to counties; chapter VI is devoted to the whole subject of procedure in Lunacy, and deals with it exhaustively; chapter VII relates to the civil disabilities of persons of unsound mind; chapter VIII to the testamentary capacity of persons of unsound mind; chapter IX is devoted to the criminal responsibility of the insane; while the tenth chapter, in the nature of an appendix, consists of Forms, including those which the Commissioner of Lunacy is by statute required to prescribe, and the observance of which is regarded as obligatory on those who undertake to certify to the fact of insanity.

At the very beginning of the work it may be observed that the author looks with favor upon what might be called the physical theory of insanity, that, namely, which regards aberration of mind as invariably associated with disease of the bodily organs, and which, therefore, suggests a resort to the knowledge and skill of physicians as aids both in the making and in the administration of the laws relative to lunacy. In his preface he says:

"It cannot be necessary to demonstrate why, under any system of jurisprudence, the Department of Lunacy must always be one dealing with problems of an exceptionally perplexing character. Nor, again, that in every age it must reflect to a high degree the prevailing ideas entertained by the medical philosophy of that day touching those mysterious physical conditions affecting both the intellect and the moral affections—

"* * * When great medical luminaries, like Mead or Sydenham, believed in the witchery of stellar influences upon the mind, or in the influence of draperies of a particular color upon the treatment of disease, or upon this or that occult and profane agency as a physical disturber, it was natural that the authority whence the dogma sprang should have given it a standing in law as well as in medicine. *

"* * And, despite exhibitions of flagrant ignorance in self-styled experts, retained under the same contract as attorneys to secure a verdict for their clients; despite the confusing opinions which often disfigure the scientific value of such testimony because of its inherent crudity, there is still a growing feeling that it is a form of evidence which, in the nature of things, cannot be dispensed with, and which, therefore, needs to be fostered by legislation or rules of procedure in such a way as to exclude the ignorant and pretentious, while, at the same time, giving to the learned and deserving a higher standing in judicature than has yet been accorded to them. Not until this be done can we expect to see justice informed by science through the agency of skilled assessors (not party witnesses), though summoned by legal fiction as experts *quoad hoc*."

And, again, at page 90, he expresses his satisfaction with the recent changes in the law as follows:

"The statute has very properly modified the common law procedure by substituting a commission of experts for a jury of non-experts. The experience of every day adds weight to the conviction that a jury

of laymen is an unsafe tribunal to which to commit an issue of insanity. So far from such a tribunal affording any protection to personal liberty it happens to operate so frequently in an opposite and oppressive direction that its findings have ceased to have any weight in the eyes of scientists. As an example of the perils to personal liberty from jury trials in issues of insanity may be cited the report of the superintendent of the State Lunatic Asylum at Utica for 1872, which shows that to this one asylum during that year *fourteen* persons were committed as lunatics upon verdicts of juries, none of whom were insane, and all of whom had to be discharged as improperly and erroneously adjudged so. In England, such trial by jury is very generally dispensed with."

While firm in the belief that the right of trial by jury is essential to the full protection of all other individual rights, and that it should be available, in some form, in all emergencies wherein a man is sought to be deprived of his liberty, we do not think it possible to controvert the proposition that, in the ordinary course of legal transactions, much greater certainty would be attainable in cases of lunacy by reference to the opinion of experts acting as a part of the court than by any other mode of adjudication. And it has occurred to us that the practice might, with appropriate modifications, be extended with advantage to other cases than merely issues of insanity. We have often thought that it was a defect in the law to submit questions of negligence, for example, in the use of certain machinery, or in the conduct of recondite processes in the arts, to a jury almost without knowledge of the meaning of the terms employed, and not capable, without special education, of a full understanding of the technical merits of the question, on the conflicting testimony of experts, who oftentimes seemed amenable to the criticism above suggested, and conscious, moreover, of the inability of the jury to determine, otherwise than by guess-work, a fact which they might choose to put in controversy. In the complicated conditions of modern society, and under a system of division of labor and a multiplication of avocations which never could have been foreseen when the institution of trial by jury was cast in its present shape, large numbers, even of the educated classes in the community, must remain in comparative ignorance of details of manufacture, and almost as incompetent to consider questions in reference to them as the average layman to interpret symptoms of an obscure disease and to group them together so as to grasp and appreciate their true significance. Why should not questions of negligence, and perhaps other questions arising in reference to such matters, be submitted to a jury of experts, on the testimony of other experts, if need be, and so placed where they could receive intelligent consideration? What reverence is due to the utterances of ignorance, even though declared oracular by express enactment or ancient precedent? The law should find means to base its decisions only upon the highest evidence and the fullest information.

In the consideration of the criminal responsibility of the insane it is apparent that, while the author treats fully the subject in the light of the adjudicated cases, without seeking to advocate any specific doctrine, he yet incidentally reveals his complacency at the ameliorations which have been introduced into our practice by considering insanity as a disease, and his regret at what he evidently regards as a defection from sound scientific views on the part of the Court of Appeals in the case of *Flanagan against The People*, 52 N. Y. 467, where it was held that "the test of responsi-

bility is the capacity of the defendant to distinguish between right and wrong at the time of, and with respect to, the act complained of, and that the law does not recognize a form of insanity in which the capacity of distinguishing right from wrong exists without the power of choosing between them."

Against this he sets the testimony of many authorities, and finally appeals to the very consciousness of those having dealings with the insane. Thus, he says:

"An hour's conversation with the insane in any asylum will suffice to show that delusions are not omnipresent, and that the knowledge of right and wrong is common in all forms of mental unsoundness outside of idiocy and dementia. All experts in insanity affirm this, and it has also been put upon record in the most emphatic manner. Thus: At the annual meeting of the British Association of Medical Officers of Asylums and Hospitals for the Insane, held in London, July 14, 1884, at which were present fifty-four medical officers, it was unanimously resolved, 'That so much of the legal test of an alleged criminal lunatic as renders him a responsible agent, because he knows the difference between right and wrong, is inconsistent with the fact, well known to every member of this meeting, that the power of distinguishing between right and wrong exists very frequently among those who are undoubtedly insane, and is often associated with dangerous and uncontrollable delusions.'"

The subject of the definition and tests of insanity, always an important one, is treated in a large and generous way, and the fallacies likely to result from an exclusive reliance upon any particular test are exposed. He cites in this connection, with approval, the declaration of Dr. Ray, to this effect:

"Jurists who have been so anxious to obtain some definition of insanity which shall furnish a rule for the determination of responsibility, should understand that such a wish is chimerical from the very nature of things. Insanity is a disease, and, as is the case with all other diseases, the fact of its existence is never established by a single diagnostic symptom, but by the whole body of symptoms, no particular one of which is present in every case."

The author does not attempt, on his own account, the oft attempted and always futile task of reducing the definition of insanity to some short, general expression, thinking perhaps as Hovenden and later authors have thought in regard to the definition of fraud, that, if it were possible, it was not desirable. And, indeed, it is difficult to see of what utility it would be except to the "cramming" student who desires to be ready with an answer to an expected question. He has occasion, however, incidentally, to refer to several definitions which have been offered. If we might suggest an impression derived from the perusal of those, it would be that insanity be declared to be any thing which was not sanity, leaving the latter to be the subject of definition. And some of the definitions suggested amount to just about this, except that they do not define sanity. Take for instance one which is cited as of the best, that of Dr. Andrew Combe, viz.: that "it is the prolonged departure, without an adequate external cause, from the state of feeling and modes of thinking usual to the individual when in health, that is the true feature of disorder in mind." To recognize the uselessness of this definition, consider the multitudinous processes through which only it could be applied to a given case.

First comes the determination of the "state of feeling and modes of thinking usual to the individual when in health." A tolerably difficult thing we should imagine it to be for a witness to testify as to the "state of feeling." The "modes of thinking" would present an even more serious obstacle; direct

testimony out of the question. Nothing but elaborate statements of conduct in all the relations of life, from which the "state of feeling and modes of thinking" could be inferred would help the definition. And when we remember how constantly from motives of policy or of passion the outward expression and acts are carefully modulated so as not to express or betray the real "state of feeling" or "mode of thinking," or so as to suggest every thing but them, some complication is added to the problem. Then, there remains the qualification expressed, "when in health," a matter possibly not within the cognizance of those who may happen to be conversant with the individual's daily walk in life. But suppose the "state of feeling and modes of thinking usual to the individual when in health" to be set forth in all their amplitude and significance, what remains? Why, only to establish that they have been departed from "without an adequate external cause!" That is, it is for whoever is to determine the fact of insanity, by this test, to pass upon the adequacy of the external causes which have led to this modification of conduct. It is apparent that in a consideration of the adequacy of causes to produce certain effects, it is understood that the operation of such causes upon an ordinary normal intellect is the standard to which we are to recur. And that would bring us to the consideration of what is normal, a matter about as difficult to define, and as much in need of definition as what is abnormal.

A few words as to the use of the phrase "external cause" and we are done with this definition. La Rochefoucauld says, "That conduct often seems ridiculous the secret reasons of which are wise and solid." A man may for secret reasons which are wise and solid choose to feign insanity, and as in such a case it is highly probable that no "adequate external cause" will be discoverable for the change in his state of feeling and modes of thinking it will come to pass that he may be adjudged insane!—a conclusion which does not seem to have occurred to the commentators upon Hamlet's "distemper."

But it is not our purpose to follow out further the indications of the opinions of the author. He has not sought to make this volume a vehicle for the advocacy of any particular theories, but has designed and completed a useful work. The cautions on pages 59 and 60 on the gravity of the trust reposed in physicians by the statute of 1874, in relation to the commitment of lunatics; on pages 63 and 64, in reference to their detention, and on pages 74, 75, 76 and 77, in reference to the forms and formalities to be observed by medical examiners, are such as no physician who deals with the subject at all can afford to disregard. J. N.

BROOKLYN, N. Y.

POLLOCK'S DIGEST OF THE LAW OF PARTNERSHIP.

A Digest of the Law of Partnership. By Frederick Pollock, of Lincoln's Inn, Esq., Barrister at Law, late Fellow of Trinity College, Cambridge; author of *Principles of Contract at Law and in Equity*. St. Louis: F. H. Thomas & Company. 1878.

This is a handy volume on the subject of partnership, giving the law relating thereto in the form of a code, similar to those in criminal law, etc., of Mr. Stephen, which have now become familiar to the profession, a principle being stated and illustrations explaining it appended. We give a single extract to show the manner in which this is done:

"Article 45. Partners must not make private gain by partnership transactions. Every partner must account to the firm for any benefit derived by him from a transaction concerning the partnership. Illustration 1: A, B and C are partners in trade. C, without the knowledge of A and B, obtains for his sole benefit a renewal of the lease of the house in which the partnership business is carried on. A and B may at their option treat the renewed lease as partnership property."

The statements of principle appear to be clear and accurate. For a student or business man desiring to become familiar with the leading principles of this important branch of the law we know of no better work, and it will also be found useful to the practicing lawyer from its convenient form.

SPALDING ON COPYRIGHT.

Handy Law Series. The Law of Copyright, affecting Administrators, Aliens, etc., with practical forms and notes. By Hugh M. Spalding, author of Spalding's Treatises upon the Law of Personal Property, etc. P. W. Zeigler & Co.: Philadelphia.

This is a summary in a brief form of the leading principles of the law of copyright, designed for practical use. It contains, in addition to a statement of the law, such forms as are necessary in securing copyrights, and also a concise statement of the practice and the forms of pleading in actions for infringement. It will be found of use to business men for whom it is chiefly designed.

BRADWELL'S REPORT OF EXAMINATIONS FOR THE BAR, VOLUME VI.

Report of the examination of Law Students for admission to the Illinois Bar, in the Appellate Court of Illinois, First District, at the April term, 1877, containing all the questions propounded by the examiners, the answers of the students, the remarks of the presiding judge, the final determination of the court, together with the rules of court regulating the admission of students. Vol. VI. By Myra Bradwell. Chicago: The Chicago Legal News Company, 1878.

To that large body of young men who are preparing themselves for admission to the legal profession the questions contained in this volume must prove of interest, as showing them what sort of an examination they are liable to undergo before they can claim the right to practice before the courts. If a student is able to answer correctly all the questions here given he need have no fear of any scrutiny as to his talents and learning to which he may be subjected. Of course the same questions precisely will not be put at other examinations, but there cannot be any very great variation. The answers to the questions cannot be relied on as correct, and a student making use of this book in preparing himself for the bar should look out his own answers. This would be an excellent way to study law, much better than reading text books.

CORRESPONDENCE.

EXEMPTION FROM JUSTICES' EXECUTIONS, AND CHAPTER 299 OF LAWS OF 1878.

To the Editor of the Albany Law Journal:

SIR: Chapter 157 of Laws of 1842, 107 of 1858, and 782 of 1866 (comprising what is often called "the \$250 exemption law"), are all expressly repealed by chapter 417 of 1877, and so far as I have been able to learn, there is nothing which applies to justices' courts to take their place. If this is so, then no property is exempt

from executions issued out of justices' courts except that mentioned in section 169 of Title 4, Ch. II, Part III of R. S. (Banks' 8th Ed., vol. 3, p. 422, § 149) unless be saved by subdivision 6 of section 3 of said chapter 417, which says that the repeal "does not affect the power or authority of a court," etc. Does this seem broad enough, and is it the intent to keep a statute alive as to some courts which has been expressly repealed?

Chapter 299 of Laws of 1878 amends section 870 of chapter 416 of the Laws of 1877, which contains but four sections. Chapter 448 of 1876 (Code of Civil Procedure) is undoubtedly intended, but is the expressed will of the Legislature sufficiently intelligible to effect the purpose sought? "FRED."

COXSACKIE, N. Y., June 18, 1878.

VETO OF THE CODE.

STATE OF NEW YORK, EXECUTIVE CHAMBER, }
ALBANY, June 14, 1878. }

Memoranda in brief of the reasons for disapproving Senate bill No. 873, entitled "An Act amending the Code of Civil Procedure."

SEVERAL acts amending single sections of the Code of Procedure have been passed and approved during the recent session. This bill contains about seventy additional amendments, and they are made in the same form in which amendments are usually made to cases and bills of exception, that is, striking out and inserting various words and sentences. They do not give the section as it will read when amended, consequently it will require two men to apply the Code as amended by this bill, one to read the sections as they stand, the other to read the amendments to them. Undoubtedly, some law book publisher will publish a compilation undertaking to insert these amendments in their proper places, but such compilation will not be law, and may not be reliable. The bill would only add to the uncertain condition in which the Code now is. The whole thing seems to me so hopeless that the more it is worked at and amended, the worse it becomes.

L. ROBINSON.

NOTES.

THE association for the reform and codification of the law of nations has issued in pamphlet form a report of its fifth annual conference, held at Antwerp in 1877. The various addresses delivered and papers read are reported either in full or sufficiently to present their important points. The report should be and we doubt not will be read by all interested in the subject of international law.

A singular case is on trial in Brooklyn, where a Mrs. Malloy brings suit against St. Peter's Roman Catholic church, of which she is a communicant, for \$10,000 damages on account of injuries received by slipping on the icy steps of the church. She argues that as she was bound to attend mass under pain of mortal sin the church was bound to keep its approaches in a safe condition.

The statutes of the State of New York for 1878 comprise 418 laws, as against 475 last year and 871 ten years ago. The number of acts signed by the governor is 417, and one (known as "the pipe-line bill") became a law without executive approval, by lapse of time. Twenty-four bills were vetoed during the session, ten were deposited in the secretary of State's office, disapproved, with memoranda of objections attached, and ninety-three failed by expiration of time.

The Albany Law Journal.

ALBANY, JUNE 29, 1878.

WITH this number the seventeenth volume of THE LAW JOURNAL is concluded. The index will be forwarded with the next number, and will be much fuller and, we trust, much better than any that have preceded it. With this number is issued the last Supplement of the General Laws, accompanied by the index, list of titles, etc. Bound copies of the General Laws, including all laws relating to the city of New York, are now ready, and will be forwarded post-free, on receipt of \$2.00. This volume contains all the General and Public Laws of the last session, beside those relating to the city of New York; and is not only issued much in advance of the session laws, but is cheaper, more convenient, and contains every thing of general importance.

CURRENT TOPICS.

THE English royal commission upon the subject of extradition has just made a report which contains an able exposition of the present English law and many valuable suggestions for its amendment. The most remarkable suggestion, and one not in accordance with the views which have usually been expressed in England, is this, that "when a man has been surrendered for one offense, proofs having been given that he has committed another extradition offense, he should be tried (if necessary) for such second offense." The views of the commission in this respect do not meet the approval of the legal journals. The *Law Times* says: "The principle enunciated has a dangerous tendency; the prisoner whose extradition is sought should be as certainly informed of the nature and character of the definite offense for which he is to be extradited as a home prisoner is of the charge of crime set forth in the indictment which he is to answer. If it is competent to charge such a man with a second offense, why not with a third and so on *ad infinitum*, and once in the hands of an outraged fatherland, charges not at all germane to the original offense might be preferred in endless variety so as to reduce the prisoner's chance of regaining his liberty to a minimum." The report recommends that the distinction between felonies and misdemeanors be abolished, and that offenses against person and property, cases of fraud, offenses against the bankruptcy laws, forgery, and offenses relating to coinage, all be subjects of extradition. It will be seen that the list is much more extensive than is embraced in any extradition treaty now in force, and

that, if the suggestions of the commissioners should be carried out, hardly any wrong-doer would find refuge in England.

The commission only proposes to authorize a trial for an offense other than the one for which a criminal may be extradited, where such offense is one for which extradition could be had; but most of the objections apply here which apply to trials for non-extraditable offenses. And this answer can always be made to such a proposition. If the government wishes the delivery of a criminal who is charged with more than one offense, it can name all the offenses it is proposed to try him for, when asking his extradition. The person whose delivery is demanded may be able, in the country from which he is taken, to prove his innocence of a given charge, but unable to do so in the country where he is to be tried on account of the fact that his material witnesses are beyond the jurisdiction of the court. There are numerous other reasons against such a course which have been set forth in numerous articles upon the subject, which have heretofore appeared in our columns.

The heirs of the late Stephen Girard do not mean to permit the claimants for the Anneke Jaus property, or the contestants of the wills of Mr. Stewart and Mr. Vanderbilt to possess all the notoriety which comes from litigations over large estates. On the 19th inst. an action was commenced in one of the courts of Philadelphia, to have the will of Mr. Girard set aside. The grounds of this proceeding are that the trustees are not carrying out the provisions of the will, and that these provisions are so uncertain that it is impossible for them to do so. We do not anticipate a very successful result for the plaintiffs, but we suppose they are differently advised or they would not have instituted their suit.

There is a vast deal more legislation in this country than is needed, but the amount of legislation which we escape from is so vast that we should be thankful. In the session of Congress just closed, only about one bill in fifteen of those introduced became a law. Nearly six thousand bills made their appearance in one house or the other. Many of these related, of course, to private claims, and some of them were similar to other bills on the same subjects already pending, but there were not a few that sought to radically change the general laws.

By chapter 347 of the Laws of this State for the present year, it is provided that it shall be unlawful "for any savings bank, directly or indirectly, to receive from any individual a deposit or deposits in excess of three thousand dollars," etc. The attorney-general, in answer to a communication from the act-

ing superintendent of the bank department, construes this to mean that any single deposit shall not exceed three thousand dollars. That this construction of the statute is contrary to the intention of the person who drew it is admitted by the attorney-general, but he thinks that if the Legislature had intended to restrict the aggregate deposits of one individual to the amount mentioned, it would have used the phraseology of Laws 1875, chap. 371, § 23, which restricts the "aggregate amount of deposits" to \$5,000. As it appears to us, the construction of the attorney-general is not correct. The object of the act was to prevent the use of savings banks by large capitalists, and, therefore, a limit was placed upon the amount which could be received from any one person. A provision that no greater deposit should be made at one time than the sum specified would accomplish nothing. Under the rule, therefore, that such construction shall be made as will suppress the mischief aimed at by the statute, and advance the remedy (*Lyde v. Bernard*, 1 M. & W. 113), if the statute will bear two constructions, as the attorney-general admits it will, the one which we have suggested should be preferred. But the statute says that a bank shall not receive "a deposit or deposits" in excess of \$3,000. By the use of the plural term, in addition to the singular, the provision is made applicable to successive deposits. Under the attorney-general's construction the words "or deposits" are surplusage. If they are read so as to mean any thing, the statute forbids deposits from one individual in excess of \$3,000 in the aggregate.

A correspondent (G. B.) writes as follows: It is perhaps now possible to make a statistical contribution toward the settlement of the much disputed questions whether the New Code is likely to produce much litigation. Of course the time is yet too short since it went into effect, to speak conclusively from actual experience. But the Code has been in force nearly ten months; and reporters have been vigilant in seizing upon decisions made under it, even at Circuit and Chambers. Hun's reports give the decisions of the October, January and March terms in the First Department, the November and February terms in the Second, the November and January terms in the Third, and the October and January terms in the Fourth Department. Questions arising upon motions since the Code took effect have, therefore, had ample time to reach a decision in the General Term. Your own JOURNAL and the Weekly Digest furnish decisions upon motions in the Court of Appeals and the Supreme Court, while Abbott and Howard have rivaled one another in industry in gathering up decisions on the New Code, wherever made. As a result I find that in 12 Hun, 13 Hun, Part 1, 54 How., 55 How., No. 1, 2 and 3,

Abbott's New Cases, 4 Abbott's New Cases, No. 1, 43 N. Y. Superior, No. 1, 16 and 17 ALBANY LAW JOURNAL, and 5 and 6 Weekly Digest, there have been published 81 decisions in which the New Code is construed or referred to. This number includes a few decisions from the New York Daily Register. These 81 decisions construe or refer to 63 sections of the New Code; 5 at least of them, however, would have arisen had the Old Code remained in force. Several of the cases contain a mere reference to the section, but can hardly be called decisions upon the Code. On the other hand, during the same time there have been published about 20 decisions on points under the Old Code, which the New Code would have prevented the necessity of. There have, moreover, been published since the New Code went into effect, 515 decisions upon questions of practice, or which are ordinarily cited as such, which still remain of present applicability, but either arose under the Old Code or do not turn upon the language of any Code. Of these, 153 are upon the 158 sections of the Old Code which remain unrepealed.

NOTES OF CASES.

IN *Davie v. Lynch*, 2 Texas L. J. 347, decided by the Court of Appeals of Texas on the 27th of March last, it is held that auctioneers in possession of personal property who sell and deliver the same without disclosing the name of their principal, are liable upon an implied warranty of title, and that evidence of a local custom will not be received to alter this rule. In *Franklyn v. Lamond*, 4 C. B. 637, it was held that the fact of selling as auctioneers was not such an indication of agency as to absolve the defendants from personal responsibility. The disposition of the courts is to apply the rule, that an agent who does not disclose his agency may be held as principal to every kind of business, even to those kinds which are of themselves agencies. In *Holt v. Ross*, 54 N. Y. 472; 13 Am. Rep. 615, it was applied to an express company. Here a draft drawn upon plaintiffs was fraudulently taken from the post-office, the indorsement of the payee forged thereon and the same intrusted by the wrong-doer to the express company for collection, and was by it presented to plaintiffs, who paid it. The company did not at the time disclose the fact that it was acting as agent. It was held that plaintiffs could recover from the company the amount paid. The court here said: "It matters not that the general business of the express company was to act as agent for others. It could have owned this draft and have collected it as principal. Knowledge in plaintiffs that defendant might have acted as agent was not enough, and it was not the duty of plaintiffs to inquire, before paying, whether the defendant was acting as principal or agent. It was the duty of defendant, if it desired

to be protected as agent, to have given notice of its agency." See, also, *Schnell v. Stephens*, 50 Mo. 379, which was an action against auctioneers, upon an implied warranty of title. The court says: "The mere fact that defendants were acting as auctioneers was not of itself notice that they were not selling their own goods, and they must be deemed to have been vendors and responsible as such for title, unless they disclosed at the time the name of their principal. See, also, *Snyder v. Hord*, 8 Tex. 101; *Canal Bk. v. Bk. of Albany*, 1 Hill, 287; *Mills v. Hunt*, 17 Wend. 333, and 20 id. 431.

In *Sprague v. Dun et al.*, decided by the Philadelphia Court of Common Pleas on the 6th of April last, the action was against a well-known commercial agency which undertakes for a consideration to procure accurate information for its customers in regard to the standing, responsibility, means and credit, of men in business in the United States and Canada. Plaintiff, who was a druggist and a customer of this agency, inquired at its office in Mobile with regard to the credit and character of one Getz. He was informed that both were good, and was also shown a book in which Getz was described as possessing a considerable amount of real and personal property, and as one who might be trusted to any reasonable amount. Plaintiff had been for some time associated in business transactions with Getz, and was in the habit of raising money with his aid and extending a like help to him. Plaintiff claimed that, in consequence of the information received, he was led to put his name to various accommodation notes which were also signed or indorsed by Getz, and discounted at the bank, and the proceeds divided between Getz and plaintiff. Getz failed not long afterward without paying any part of these notes. The plaintiff, when he made his contract with the agency, signed a stipulation that the information derived by him therefrom would be used exclusively for the "legitimate business of his establishment," and it was claimed as a defense that the floating of commercial paper was not a part of the legitimate business of plaintiff, and defendants were not liable for any loss that might happen therefrom. A further defense was that the representation as to Getz's responsibility not being in writing, signed by defendants, was void as an agreement under the statute and furnished no ground of action. The court said that the first ground of defense was tenable, but that the second was not, saying as to the latter that "it is an established rule that remedial statutes shall be read with a due regard for the object which the Legislature had in view, and this in the case of the act in question was not to relax the bonds of contract, but to guard against loose and unfounded charges of fraud—*modus et conventio*

vincunt legem—and the agreement into which the defendants entered was a waiver of the right to take advantage of the statute."

In *Smith v. Read*, 6 Daly, 33, the New York Court of Common Pleas decides that a boarding-house keeper is liable for the negligence of his servants in the care of a boarder's property. In this case the housekeeper, employed by a boarding-house keeper, negligently allowed a stranger to go alone into a boarder's room where he stole certain of the boarder's property. The court held that the boarding-house keeper was liable to the boarder for his loss. The point in the case is much discussed in *Dausey v. Richardson*, 3 El. & Bl. 144. In that case the question was whether the defendant, a boarding-house keeper, was liable for the loss of a dressing case belonging to a boarder which was placed in the hall just previous to the departure of the guest, and had been stolen by a thief who entered by the hall door that had been negligently left open by the boarding-house keeper's servants. The court were divided, and no authoritative decision was made. In *Holder v. Souby*, 8 C. B. (N. S.) 35, it was held that the keeper of a lodging-house is under no obligation to take care of his lodgers' goods, and consequently is not liable for their loss, but it is intimated in the opinion of Erle, C. J., that if the loss results from gross negligence on the part of the lodging-house keeper, he will be liable. The liability of an innkeeper is much greater, being that of an insurer, and he is bound to make good any loss, with some rare exceptions. *Hulett v. Swift*, 33 N. Y. 571. The court, in the principal case, says that every objection which can be urged against charging a boarding-house keeper for the loss of his guest's goods will, upon reflection, be found to apply with equal force to the innkeeper. And this especially since the statute of New York gives him a lien upon the goods of his guest by which he can enforce summary payment of his reasonable charges. In *Ingalsbee v. Wood*, 36 Barb. 452, the court, speaking of the innkeeper's lien, says: "The lien and liability must stand or fall together." If the boarding-house keeper possesses the innkeeper's lien he must take the innkeeper's liability, especially as he has the advantage over the innkeeper of being able to refuse, at his option, any applicant for board. The rule imposing an extraordinary liability upon an innkeeper had its origin in a peculiar state of society which does not exist at the present time, but public policy forbids a relaxation in its vigor. *Hulett v. Swift*, *supra*. In *Buddenberg v. Benner*, 1 Hilt. 84, the doctrine of the principal case is asserted, although it was assumed in that case that the defendant was an innkeeper. See, also, *Jones v. Morrill*, 42 Barb. 623.

PAYMENT OF NOTES PAYABLE AT BANK.

IT is the popular conception that a bank is bound to pay a note made by one of its customers and payable at its counter, provided it have sufficient funds of the drawer on deposit; but this, like a great many other popular notions of law, if in any respect true, is subject to numerous limitations and exceptions.

It is well settled that the deposit of money in a bank generally creates simply the relation of debtor and creditor between the bank and the depositor. *Marsh v. Oneida Central Bank*, 34 Barb. 298; *Ketchum v. Stevens*, 6 Duer, 463; affirmed, 19 N. Y. 499; *Beckwith v. Union Bank*, 5 Seld. 211; *Commercial Bank v. Hughes*, 11 Paige, 94; *Dykens v. Leather Manuf. Bank*, id. 612; *Bank of Republic v. Millard*, 10 Wall. 152; *First Nat. Bank v. Whitman*, 94 U. S. 343; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 823; S. C., 7 Am. Rep. 314; *Carr v. Nat. Security Bank*, 9 Am. Rep. 6; *Case v. Henderson*, 8 id. 590; *Re Bank of Madison*, 5 Biss. 515. And it has been, therefore, frequently held that there is no privity between the holder of a check and the bank on which it is drawn, and that, therefore, such holder has no right of action against the bank for refusing to pay the check on presentation. *Ætna Nat. Bank v. Fourth Nat. Bank*, *supra*; *Carr v. Nat. Security Bank*, *supra*; *Case v. Henderson*, *supra*, and the other cases above cited. It is held otherwise in Illinois and Kentucky, but the unbroken current of authority elsewhere is to the effect above stated. See *Union Nat. Bank v. Ocean County Bank*, 22 Am. Rep. 185, and note.

If a bank is not bound to pay the checks of its customers it is equally not bound to pay their notes drawn payable at the bank. In *Ætna Nat. Bank v. Fourth Nat. Bank*, Allen, J., delivering the judgment of the court, said: "An acceptance or promissory note thus payable [that is payable at the bank] is, if the party is in funds, that is, has the amount to his credit, equivalent to a check; and it is in effect an order or draft on the banker, in favor of the holder, for the amount of the note or acceptance."

That case shows very conclusively that a bank is under no legal obligation to a stranger holding a note payable at its counter. The facts were these: The Florence Mills having a balance of \$694 to its credit with the defendant bank, sent to it on April 2d, by mail, a check on another bank for \$4,895, with a letter containing the direction: "Please credit our account and charge us our note of \$5,000 due the 4th inst." The check was received and credited on the 3d, and on the same day the defendant paid a past due note of \$5,000 of the Florence Mills, payable at defendant's bank and charged it to the account. On the 4th the plaintiff presented the note referred to in the letter, and payment being refused, brought suit. The court held that the plaintiff

could not recover. The learned judge remarked *arguendo* that "this payment was valid as against the customer of the defendant, the maker of the note," but there may be room for doubt about that. There was a specific direction accompanying the deposit as to its application, and it is generally held that where moneys are deposited for a specific purpose with notice to the bank, or where it is accompanied by specific directions as to its application, the bank is bound to follow such directions, and cannot even apply the deposit to a debt due it. *Bank of the United States v. Macalester*, 9 Penn. St. 475; *Smuller v. Union Canal Co.*, 37 id. 68; *Farley v. Turner*, 26 L. J. Ch. 710. Thus, in *Wilson v. Dawson*, 52 Ind. 513, the principal on a promissory note due a bank, after maturity of the note, deposited and checked out more money than was sufficient to pay the note, but under a special agreement with the bank when the deposits were made that they were to be used to pay checks, and it was held that the moneys could not have been applied on the note, and that a surety thereon was not discharged. So if a depositor notify a bank not to pay a note drawn payable at its counter, it is bound to comply. *Egerton v. Fulton Nat. Bank*, 43 How. Pr. 216.

But the depositor only can sue a bank for failing to follow his directions as to the application of a deposit; no right of action exists in the holder of a note. And it may be doubted whether a bank would be liable to a depositor for failing to pay a note or check in the absence of a specific agreement so to do. In *Thatcher v. Bank*, 5 Sandf. 121, it was held that such an agreement would be implied between a bank and its customers, but must be proved as between the bank and those not regularly dealing with it.

It may be stated as a general rule that a bank has a right, in the absence of instructions to the contrary, to apply moneys on deposit, to the payment of notes and checks drawn upon it, or payable by it. *Mundeville v. Union Bank*, 9 Cranch, 9; *Griffin v. Rice*, 1 Hilt. 184. But the Supreme Court of Illinois seems to hold a different view.

In *Wood v. Merchants' Saving Co.*, 41 Ill. 267, the position seems to have been taken that a bank has no right to pay a note payable at its counter out of funds on general deposit without some special authority or direction so to do. The action was on a note payable at the banking-house of one Conrad, and the defense was that the maker had money on deposit with Conrad when the note was due; that the holder without procuring such money, as he had "the right and opportunity" to do, had the note marked "good" and departed, and that afterward the banker failed. The court said: "Had the holder this right, and had Conrad any authority whatever to pay the note, out of the funds on deposit in his bank to the credit of the makers? The custom sought to be established among bankers has nothing,

in our judgment, to do with the question. What is the effect of making a note payable at a particular place? Was it ever before heard, that the effect was to transfer, *ipso facto*, the money at the place belonging to the makers, absolutely to the holder, on his presenting the note at the place of payment? There is no such rule, in any commercial country, of which we have any knowledge. It is well-settled doctrine, in the courts of England and of this country, and of this court, that the holder of such paper is not under any obligation, even to present the note for payment when payable. The maker, in an action against him on such note, may plead, in bar of damages and costs, a readiness to pay at the time and place.

"We do not understand that the fact of making a note payable at a particular place amounts to an agreement that the maker may make a deposit at the bank of the amount of the note, and thus discharge his obligation, and that the money so deposited is at the risk of the holder of the note. It is a mere designation of the place where the note is to be paid, not of the person to whom the money is to be paid. By the terms of the note, the money was to be paid by the makers to the payee, not to Conrad, but at Conrad's banking-house. As put by appellee's counsel: "If the holder of the note was present, at the time and place of payment of the note, and the maker was there, and tendered the amount, and the holder refused to accept it," this would be no bar to a recovery by suit; and unless the tender was kept good, by bringing the money into court, it would not bar a recovery for damages and costs. This position is sustained by the case of *Butterfield v. Kinzie*, 1 Scam. 445, where the court cite *Woolcott v. Van Santvoord*, 17 Johns. 278; *Caldwell v. Cassidy*, 8 Cow. 271; *Stanton v. Bishop*, 3 Wend. 20; *Bailey on Bills*, 203; 4 Litt. 225; 11 Wheat. 171; and *Wallace v. McConnell*, 13 Pet. 136, is referred to in note by reporter, to the same effect. To the same point is the case of *New Hope and Delaware Bridge Co. v. Perry et al.*, 11 Ill. 471, citing the same cases.

"The money on deposit with Conrad belonged to the maker of the note; it was his money, and under his control. If this be so, if the holders of this note were under no obligation to present this note at Conrad's counter, does the fact that it was presented change the liability of the parties in any way?

"Wherein consisted the 'right and opportunity' of the holder to receive this money from Conrad, except by the actual payment of the money by the maker, by himself or Conrad? Conrad had no right to pay it, nor could the money be taken to pay it, except by means of the verbal order, check or draft of the maker and depositor. No one taking such paper has ever supposed the bank, at which it was made payable, was bound to pay the note on presentation, or that any obligation was imposed upon it

so to do. It is not according to the usage of banks to pay out money except upon checks or drafts drawn by its creditors having funds in the bank. No case can be found, where, in such case, a bank has been considered as authorized to pay a note made payable at its banking-house, without the express direction of the maker, or in the absence of any check or draft by him, appropriating his money deposited there to such purpose. Nor is there any obligation resting on the bank to pay, for the bank may have claims against the deposit superior to those of the holder of the note. "Holding, as we do, that neither 'the right nor opportunity' existed to the holder to receive this money at Conrad's bank, the makers of the note are not released."

An interesting question arose in *Nat. Bank v. Smith*, 66 N. Y. 271. The plaintiff, the bank, discounted and held a note drawn by a customer, payable at the bank and on which the defendant was an indorser. The note was dishonored and duly protested, and notice given to the indorser. Afterward the maker made a deposit with plaintiff of the same amount as the note but without any direction as to its application. The money so deposited was used in payment of a note of the same maker's falling due at the bank two days after the deposit. The court held that the bank was not bound to apply the money to the payment of the note held by it, and that the indorser was not discharged.

Had the bank held funds of the maker sufficient to pay the note when it fell due, it would probably have been bound, so far as the indorser was concerned, to apply them to the note. *Wright v. Austin*, 56 Barb. 13; *Gary v. Cannon*, 3 Ired. Eq. 64.

Where funds in a banker's hands have been applied to the payment of notes and acceptances made payable at the bankers, though without any further authority, that is a defense to an action by the depositor for dishonoring his checks. *Keymer v. Laurie*, 18 L. J. Q. B. 218.

The certificate of a bank where a note is payable, that it is "good," is merely information that the maker has funds in the bank. *Irving Bank v. Wetherald*, 36 N. Y. 335.

As to the right of a bank to retain and apply a deposit to a demand held by the bank against the depositor, see *Dawson v. Real Estate Bank*, 5 Ark. 283; *Ford v. Thornton*, 3 Leigh, 695; *State Bank v. Armstrong*, 3 Dev. 519; *McDowell v. Bank*, 1 Harr. 369; *Whittington v. Bank*, 5 Harr. & J. 489.

SUPPRESSIO VERI, BOTH AS A GROUND OF ACTION AND DEFENSE, EITHER IN LAW OR EQUITY.

Cum tacent, clamant.—CICERO.

A DISCUSSION of this subject and of its element, the *suggestio falsi*, would cover a large portion of the wide and varied field of fraud. Each of these branches of that great topic presents a most in

viting prospect to the student. Not only are they interesting because of the unfortunate frequency which marks the practical application of their rules, but still more on account of the admirable comparison which they tend to afford between moral and municipal law. The prevailing belief with regard to the origin of moral law is that it arises from an innate indefinable sense of right and wrong, planted in every human breast and known as conscience. Municipal law, on the other hand, is the offspring chiefly of utilitarian principles. It aims at the greatest good of the greatest number. Still we are not to suppose that no other element enters into the laws of civilized nations. Moral law has stamped its features upon the codes of continental Europe and the cognate system of England and America. A salutary distinction is everywhere upheld between *bona fides* and *mala fides*. Indeed, the best way in which we can form an idea of the sources of the civil and common law is to regard them as the results of a compromise between public economy and private virtue, in which the former element predominates. The foundation of all moral law is truth. *Suppressio veri* and *suggestio falsi* are alike condemned in the forum of conscience. On these points, however, less stringent rules have been established and recognized by legislators and judges of ancient and modern times. The exaction of perfect truth is beyond the utilitarian scope of municipal law, but, even if it were desirable upon economical grounds that falsehood should never be uttered nor implied by silence, yet it would be inexpedient to enforce such principles, for, were it undertaken, "either the law would become confessedly and by a common understanding powerless and dead as to part of it; or society would be constantly employed in visiting all its members with punishment; or, if the law annulled whatever violated its principles, a very great part of human transactions would be rendered void." 2 Pars. on Cont. 768. The jurists of the civil law recognize the difference between the rules of their codes and those of ethics. *Dolus* ("cunning" or "shrewdness") is never countenanced in the forum of conscience—the *for intérieur* of Pothier—but the civilians admit a certain amount of it under their practical rules, and this they call *dolus bonus*, while the residue, known as *dolus malus*, is condemned in all forums. Pothier des Oblig., Pt. 1, art. 3, No. 30, p. 19. This *dolus bonus* has at all times and in all countries been the debatable ground of the law of fraud. Its extent shows precisely the difference between the law of God and that of man on these subjects, and, as the consideration of truth, the foundation of the higher law, is peculiarly within the province of a discussion of fraud, it may be said that under this title we meet with the essential distinction between the two systems. This distinction is more prominent in the *suppressio veri* than in the *suggestio falsi*, as our laws are more apt to overlook concealment than misrepresentation, while conscience is as strict in the one case as in the other.

The suppression of truth affords a cause of action as follows:

(1) At law.

(a) To a party to a contract for the recovery of advances of money or of goods (*Masson v. Bovet*, 1 Denio, 60), or for damages (*Nickley v. Thomas*, 22 Barb. 652), or, it is to be presumed, for both; and

(b) To a person not a party to a contract who has sustained special damage. *Levy v. Langridge*, 4 M. & W. 337.

(2) In equity, to a party to a contract for its rescission. *Perkins v. McGavock*, Cooke, 415.

It forms a defense

(1) At law, to an action upon a contract. *Brown v. Montgomery*, 20 N. Y. 287.

(2) In equity, to an action for the specific performance of a contract. *Cathcart v. Robinson*, 5 Pet. 263. We will discuss the subject generally as applicable to all these cases, and consider the points of difference as it becomes necessary.

The first rule may be thus briefly stated: (a) *Whenever a party to a contract fails to state to the other party or parties (1) that which he is under an obligation to communicate, (2) the contract is voidable at the election of such latter party or parties.* This rule is adapted to all systems of law. The characteristics of each would be shown in the definition of the term, "obligation." It remains for us to discover what obligation a party is under at law and in equity.

(1) *A party to a contract is under an obligation to communicate to the other party or parties every (a) material fact (b) which is or should be within his knowledge, and is at the same time (c) not equally open to such latter party or parties.*

(a) Material facts only should be disclosed under this rule, and every fact the statement of which would probably have prevented the making of the contract is material. See 2 Pars. on Cont. 770, and *Young v. Green*, 4 Ga. 95. The question of materiality is always left to the jury (*Lindenau v. Desborough*, 8 B. & C. 586), but the court must often instruct it in the law. The general statement that all material facts must be divulged under the limitations in the rule requires qualification, or, to speak more correctly, the definition of materiality must be varied in one respect. A distinction is made between intrinsic and collateral facts. In the case of concealment of a collateral fact moral fraud must be shown, but when the fact is intrinsic, legal fraud is sufficient. Legal fraud exists when there is no actual fraud but a conclusive legal or equitable presumption of fraud. The contract of insurance is *uberrimæ fidei*, and in it concealment of facts, intrinsic or collateral, not known to the other party *per se*, defeats an action on the policy. *Elton v. Larkins*, 5 C. & P. 86; *Bufe v. Turner*, 6 Taunt. 338. The reason is that there is an implied contract that every statement should be true and full (*Mocus v. Haynworth*, 10 M. & W. 157), and thus extrinsic facts become intrinsic. This applies as well to the statements of the underwriter. *Carter v. Boehm*, 3 Burr. 1909. Actual fraud in these cases is not necessary (*Fletcher v. Ins. Co.*, 18 Pick. 420), and the same rules govern cases of warranty. The contract of suretyship is also peculiar. The surety should be informed of every private bargain between vendor and vendee which may vary his liability. *Pidcock v. Bishop*, 15 B. & C. 609. Cicero discusses the question whether a corn merchant who arrives at Rhodes during a famine should disclose the fact that other vessels are about to arrive with cargoes of grain. Diogenes thought that the fact might justly be concealed, but Cicero concurs with Antipater in considering it to be in bad faith. Pothier, however, agrees with Diogenes, though the civil law requires perfect good faith in relation to the subject-matter. Pothier de Vente, n. 234-5, 242; Dig. Lib. 18, tit. 1143, § 2. The common-law rule is somewhat similar to the Roman one, although Judge Story (2 Eq. 212) thinks that our law is more lenient in exacting full statements. He seems to carry the doc-

trine of *caveat emptor* to its fullest extent. The principal difference between the two systems is shown by the fact that warranty was implied in all sales under the Roman law. Kerr on Fraud, etc., 100. With us warranty may always be demanded. *French v. Vining*, 102 Mass. 135. Under the common law there is a marked distinction between *suppressio veri* as to the subject-matter and concealment of mere extrinsic circumstances. The latter does not amount to fraud at law unless there be fraud in fact (*Laidlaw v. Organ*, 2 Wheat. 195; *Nichols v. Pinner*, 18 N. Y. 205; see *Vernon v. Keys*, 12 East, 632); but whenever the former occurs, fraud in fact will be inferred. *Foster v. Charles*, 6 Bing. 403, and 7 id. 105. The other requisites of the rule which we have laid down (1) must of course enter into the case. It is often difficult to determine whether a fact is intrinsic or collateral. Insolvency of a vendee may be considered to be collateral so far as concealment is concerned (*Cross v. Peters*, 1 Me. 376; *Conyers v. Ennis*, 2 Mason, 236; *Powell v. Bradlee*, 9 G. & J. 274; *Smith v. Smith*, 21 Penn. St. 367), and actual fraud must be proved, such as is evidenced by the intention never to pay. *Bidault v. Wales*, 20 Mo. 546; see *Buckley v. Archer*, 21 Barb. 585; *Ash v. Putnam*, 1 Hill, 302. Mr. Chitty (2 Cont. 1044) says that legal fraud will not in general invalidate a contract. A classification, however, based upon our definition of legal fraud, would have shown that the exceptions which are recognized by this statement are cases of fraud as to the subject-matter, and this view appears to be upheld by the cases which he cites. Matters of opinion are not in general material (*Mooney v. Miller*, 102 Mass. 220), but such is not the case when there is a known trust or confidence. *Schaeffer v. Sleade*, 7 Blackf. 183.

(b) The facts which a party to a contract is bound to communicate under the rule are those only which either are or should be within his knowledge. There can be no doubt with regard to the fact that a man is under no obligation to communicate that which he does not know, and which he is not bound to know, and it is also true that it is his duty to disclose all that he knows under the restrictions of the rule, (1) (*Railton v. Mathews*, 10 C. & F. 934), but there are cases in which it is held that a party to a contract is not obliged to reveal those circumstances which are not within his knowledge, although his ignorance be the result of his negligence. This was held to be law in *Ormerod v. Hulth*, 14 M. & W. 651, and in *Stone v. Denny*, 4 Metc. 151, but the law as stated in *Leather v. Simpson*, L. R., 11 Eq. 406, is contrary to the opinions in these cases. It sustains our rule, which is certainly more equitable. It should not be a defense that a person does not know that which he ought to know. The party who relies upon a statement or the absence of statement has a right to trust in the knowledge as well as in the good faith of the other party. In such cases ignorance is culpable. *Munroe v. Pritchett*, 16 Ala. 785; *Snyder v. Findley*, Coxe (N. J.), 48, 1791. The question is an open one, and a standard author is opposed to the latter authorities. 2 Pars. on Cont. 774. Knowledge of facts is not required to be proved in cases of warranty, and this is consequently true of insurance (*Anderson v. Thornton*, 8 Exch. 425), but when an action is brought it must be upon the warranty, and its gravamen should not be fraud. *Howell v. Bidlecomb*, 62 Barb. 135. In cases of this kind the warrantor assumes the obligation of disclosing all mate-

rial facts, whether he knows them or not, if they are not open to the other contracting party. Warranty is implied in the sale of provisions for domestic purposes (*Van Bracklin v. Fonda*, 12 Johns. 468), and of manufactured articles for particular uses. *French v. Vining*, 102 Mass. 135. It is for the jury to determine whether a representation involves warranty or not. *Anderson v. Barnett*, 5 How. (Miss.) 165. It is not necessary to reveal that which one has heard but does not believe. *Hamrick v. Hogg*, 1 Dev. (N. C.) 350. He cannot be said to know it.

(c) The facts which a contracting party must reveal are those only which are not equally open to the other party. This principle is clearly adjudicated. *Kintzing v. McElraith*, 5 Penn. St. 467; *Sterens v. Fuller*, 8 N. H. 464; *Mellish v. Motteux*, Peake's N. P. C., overruled on another point only, 3 Campb. 154. It depends upon trust, and this trust varies with the relation of the parties to each other. The greatest good faith is required when this relation is fiduciary (*Dent v. Bennett*, 7 Sim. 539; *Carter v. Palmer*, 8 C. & F. 657), and persons who from feebleness of mind are incapable of taking care of themselves will be relieved from oppressive bargains. *Blachford v. Christian*, 1 Knapp, 77. Those who contract with them are constituted trustees, as it were, by the very fact. The law will not, however, help the negligent. *Vigilantibus et non dormientibus succurrunt jura* (*Shrewsbury v. Blount*, 2 Scott [N. R.], 593-4), and the doctrine of *caveat emptor* remains unshaken. *Horsfall v. Thomas*, 1 H. & C. 90; *N. B. Co. v. Conybeare*, 9 H. L. C. 711; *Keates v. Earl of Cadogan*, 10 C. B. 591. Under this division it is to be noted that in the case of *The Central Railway, etc., v. Kisch*, L. R., 2 H. L. 120, Chelmsford, L. Ch., makes the somewhat remarkable statement that when once it is proven that there has been any "willful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry." Even warranty does not cover an open defect (*Dyer v. Hargrave*, 10 Ves. 506; *Schuyler v. Russ*, 2 Cal. 202), and a person purchasing land in which he knows that there is a mine is under no obligation to disclose the fact to the owner. *Turner v. Harvey*, 1 Jacobs, 178; *Fox v. Mackreth*, 2 Bro. Ch. 420; *Harris v. Tyson*, 24 Penn. St. 347. The vendor's opportunities to learn the character of his property are presumably better than the vendee's, and he cannot be relieved from the effect of his ignorance. Upon the same principle conclusions of law need never be stated. *Lewis v. Jones*, 4 B. & C. 506. Every man is bound to know them. The contract of marriage is governed by its own rules. The concealment which will render it voidable must go to the substance of the case. *Scott v. Shiffeldt*, 5 Paige, 43. No fraud as to property will affect this contract. We have thus considered the obligation to reveal facts under which a party to a contract is placed. It is a duty of universal force, and it has even been held that it cannot be waived by any stipulation. *George v. Johnson*, 6 Humph. 36.

(2) The only remaining point which confronts us under the general rule (A) is the voidability of the contract, which has been obtained by concealment. We have found numerous instances in which contracts were vitiated by concealment, but no advantage can be taken of this fact by the party at fault. *Ex dolo malo non oritur actio* (*Holman v. Johnson*, Cowp. 343;

Jones v. Yates, 9 B. & C. 538; *Doe v. Roberts*, 2 B. & Ald. 367), and where both parties are in the wrong, the court will decline to interfere. *Holman v. Johnson*, *supra*. The right to disaffirm a contract may, however, be lost by neglecting so to do after discovering the fraud (*Selway v. Fogg*, 5 M. & W. 85-6), and the right is not afterward called to life by the discovery of another incident in the fraud. *Campbell v. Fleming*, 1 A. & E. 40. When the person aggrieved elects to repudiate the contract, he must place the other party so far as possible in *status quo* (*Masson v. Boret*, 1 Denio, 69; see *Frost v. Lowry*, 15 O. 200), and if he affirms the contract, he may sue for damages on account of the loss which he has sustained. *Martin v. Roberts*, 5 Cush. 126. In one case (*Queen v. Saddlers' Co.*, 10 H. L. C. 420-1) the court held that if a party has acted under a contract without knowing of fraud, his only remedy upon finding it out is an action for damages.

(B) Our second general rule is as follows: *An action on the case will lie against a person who suppresses the truth on the part of a person, not a party to a contract, who alleges special damage.* Thus in *Levy v. Langridge*, 4 M. & W. 338, Lord Denman says, quoting Baron Parke: "As there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." *Kidney v. Stoddard*, 7 Metc. 252; see *Longmeid v. Holliday*, 6 Exch. 761, and *Martin v. Morgan*, 1 Brod. & B. 289; *Corbett v. Brown*, 8 Bing. 33. The rules and definitions which we have ascertained and examined under the former title (a) will apply to this branch of the subject so far as the nature of the cases included by it admits. All that has been said of concealments in this essay is a *fortiori*, true of assent signified by silence. *Qui tacet consentire videtur*. *Pilmore v. Hood*, 5 Bing. N. C. 97, 109; *Wright v. Crookes*, 1 Scott (N. R.), 685. It is also well settled that the *suppressio veri* of an agent is chargeable to his principal (*Doe v. Martin*, 4 T. R. 18; *Hill v. Gray*, 1 Stark. 352; *Fitzsimmons v. Joslin*, 21 Vt. 129) as well as to the agent. *Arnot v. Biscoe*, 1 Ves., Sr., 95.

(C) With regard to evidence, it is never to be forgotten that the law will not imply fraud. It must be proved (*Fleming v. Stocum*, 18 Johns. 403), but this proof may be indirect. 2 Pars. on Cont. 784, 6. As fraud is naturally difficult to detect, evidence of all the circumstances may be produced in each case. *Lincoln v. Clafin*, 7 Wall. 132.

(D) According to the common law the statute of limitations runs from the time at which fraud is consummated. *Troup v. Smith*, 20 Johns. 33; *Northrop v. Hill*, 61 Barb. 136. In Massachusetts it has been held that the statute does not run until the fraud is discovered (*Turnpike v. Field*, 3 Mass. 201), while in New York the same result is partially gained by statute. Code of Civ. Proc., § 382.

(E) The measure of damages, in those cases of concealment in which damages are awarded, is easily fixed in principle, but is often uncertain in application. To sustain a claim for damages on the ground of fraud, actual injury must be shown (*Ide v. Gray*, 11 Vt. 615), but the fraud may only be the main and substantial cause of it. *Patton v. Wade*, 18 C. B. 370.

(F) All the foregoing remarks of a general character are applicable to *suppressio veri*, alike as a cause of action or a defense, at law or in equity, with certain exceptions which we will now proceed to consider.

(a) When concealment is made the basis of an action at law, moral fraud must always be alleged and proven. *Vane v. Cobbold*, 1 Exch. 798; *Hamrick v. Hogg*, 1 Dev. 350; *Hanson v. Edgerly*, 20 N. H. 343. This doctrine appears to be founded upon the maxim, *potior est conditio defendentis*.

(b) Courts of equity will always decline to interfere unless strong reasons are presented for their action. The reason is that when their jurisdiction was at first entirely discretionary, they refused to act unless some moral wrong was being perpetrated, and they are now guided in their decrees by ancient precedents. (1) Hence they are averse to the specific enforcement of contracts, when fraud is made a defense. The agreement ought to be "certain, fair and just in all its parts." *Buxton v. Lister*, 3 Atk. 385. In cases of this kind "the principles of ethics have a more extensive sway" (2 Kent's Com. 490), and it is, therefore, to be presumed that any kind of moral fraud would be a sufficient defense. (2) When the aid of a court of equity is sought to rescind a contract on the ground of fraud, we are again met by reluctance. It will not rescind without the clearest proof of fraud, and unless it is shown that the contract was based, at least, partially upon the fraud (*Atwood v. Small*, 6 C. & F. 232; *Smith v. Kay*, 7 H. L. 775), and this fraud must be moral (Lord Wensleydale in *Smith v. Kay*, *supra*), but circumstantial evidence may be successful even where it would not suffice at law. *King v. Moon*, 42 Mo. 555. Courts of equity will not generally set aside a contract unless the parties to it can be placed in the same situation which they occupied when they made the contract. *Schaeffer v. Sleade*, 7 Blackf. 178; Judge Story in *Veazie v. Williams*, 3 Story, 631; *Oakes v. Turquand*, L. R., 2 H. L. 346. It has been held that simple suppression not accompanied by anything further will not form ground for rescission in equity (*Livingston v. Peru Iron Co.*, 2 Paige, 390), but the law is different in Tennessee (*Perkins v. McGawock*, Cooke, 415), and wherever the latter case is of authority the principles which we have examined will prevail. See Fry on Spec. Perf., § 461. The case in Paige does not apparently affect the rule when concealment is accompanied by aggravating circumstances. It is by no means true that courts of equity will rescind all contracts which they will not specifically enforce. There are many cases in which they will decline to interfere and the parties are then left to find justice at law. *Willan v. Willan*, 16 Ves. 83; *Mortlock v. Buller*, 10 id. 308.

The subject of *suppressio veri* is one which might well fill volumes. Many cases involving *suggestio falsi* are of equal authority in this branch of fraud which we have discussed. These subjects are not entirely separate and distinct. The principles which govern them are not precisely fixed, and the minor points have called forth the opposing arguments of leading jurists for centuries. The writer of a short paper upon such a topic labors under manifest disadvantages. It would be as unfair to form any conception of the law of concealment from a bare statement of its rules as to judge of the beauties of a country from an outline map. We have unfortunately been unable to consider the cases under this title which enrich the reports. It is in such explorations that the reader is struck with admiration for the grand system of the common law. Then at last he finds that the principles upon which this system is founded are endowed not only with enduring firmness, but also with inexhaust-

ible adaptability, and that their remarkable universality is combined with marvelous particularity. Such rules are indeed the offspring of eternal justice, while they have been tempered by that practical wisdom which recognizes human exigencies.

ERNEST H. CROSBY.

LIABILITY OF WRONG-DOER FOR INDIRECT CONSEQUENCE OF HIS ACT.

ENGLISH HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, APRIL 15, 1878.

CLARK V. CHAMBERS.

The defendant had placed in a private road adjoining his ground a hurdle with a *chevaux de frise* on the top in order to prevent the public from looking over the barrier at athletic sports in his ground. Some one, not known, removed the hurdle to another spot without the defendant's authority, and the plaintiff, passing of right along the road, soon afterward, in the dark, and knowing the original position of the hurdle, but not that it was moved, ran his eye against the *chevaux de frise*, and lost his sight. The jury, in an action for negligence, held that the defendant's original erection of this hurdle was unauthorized and wrongful, that the *chevaux de frise* was dangerous to the safety of persons using the road, and that there was no contributory negligence. They gave the plaintiff a substantial verdict. Held, that the plaintiff's injury was not an improbable consequence of the defendant's act; that it was the defendant's duty to take all necessary precautions under the circumstances to protect persons exercising their right of way; and that the action was maintainable.

THIS was an action tried before Cockburn, C. J., in which the plaintiff obtained a verdict for £200. A rule had been obtained on behalf of the defendant for a new trial on the ground of misdirection.

The facts and the arguments upon the rule are sufficiently stated in the considered judgment of the court.

Willis, Q. C., and Glyn, for the plaintiff, showed cause.

Hannen (with A. L. Smith) supported the rule.

COCKBURN, C. J., delivered the judgment of himself and MANISTY, J. This was a case of considerable nicety, and which, so far as the precise facts are concerned, presents itself for the first time. The defendant is in the occupation of premises which abut on a private road leading to certain other premises as well as to his. It consisted of a carriage road and a footway. The soil of both is the property of a different owner; the defendant has no interest in it beyond the right of way to and from his premises. The defendant uses his premises as a place where athletic sports are carried on by persons resorting thereto for that purpose, for their own amusement. His customers, finding themselves annoyed by persons coming along the road in question in carts and vehicles, and stationing themselves opposite to his grounds and overlooking the sports, the height of the carts and vehicles enabling them to see over the fence, the defendant erected a barrier across the road for the purpose of preventing vehicles from getting as far as his grounds. This barrier consisted of a hurdle set up lengthways, next to the footpath; then two wooden barriers, armed with spikes, commonly called *chevaux de frise*; then there was left an open space through which a vehicle could pass; then came another large hurdle set up lengthways, which blocked up the rest of the road. At ordinary times the space between the two divisions of the barrier was left open for vehicles to pass which might be going to any of the other premises to which the road in question led. But at the times when the sports were going on, a pole attached by a suitable apparatus was carried across from the one part of the

barrier to the other, and so the road was effectually blocked. Amongst the houses and grounds to which this private road led was that of a Mr. Bruen. On the evening on which the accident which gave rise to the present action occurred, the plaintiff, who occupied the premises in the immediate neighborhood, accompanied Mr. Bruen, by the invitation of the latter, to Bruen's house. It was extremely dark, but being aware of the barrier and the opening in it, they found the opening, the pole not being then set across it, and passed through it in safety. But on his return later in the evening, the plaintiff was not equally fortunate. It appears that in the course of that day or the day previous, some one had removed one of the *chevaux de frise* hurdles from the place where it had stood, and had placed it in an upright position across the footpath. Coming back along the middle of the road, the plaintiff, feeling his way, passed safely through the opening in the center of the barrier. Having done which, being wholly unaware — it being much too dark to see — that there was any obstruction on the footpath, he turned on to the latter, intending to walk along it the rest of the way. He had advanced only two or three steps when his eye came into collision with one of the spikes, the effect of which was that the eye was forced out of its socket. It did not appear by whom the *chevaux de frise* hurdle had been thus removed; but it was expressly found by the jury that this was not done by the defendant or by his authority. The question is whether the defendant can be held liable for the injury thus occasioned. It is admitted that what the defendant did in erecting this barrier across the road was unauthorized and wrongful; and it is not disputed that the plaintiff was lawfully using the road. There is no ground for imputing to him any negligence contributing to the accident. The jury have expressly found, in answer to a question put to them by me, that the use of the *chevaux de frise* in the road was dangerous to the safety of persons using it. The ground of defense in point of law taken at the trial and on the argument on the rule was that, although if the injury had resulted from the use of the *chevaux de frise* hurdle, as placed by the defendant on the road, the defendant, on the facts as admitted or as found by the jury, might have been liable, yet as the immediate cause of the accident was not the act of the defendant, but that of the person, whoever he may have been, who removed the spiked hurdle from where the defendant had fixed it, and placed it across the footway, the defendant could not be held liable for an injury resulting from the act of another. On the part of the plaintiff it was contended that, as the act of the defendant in placing a dangerous instrument on the road had been the primary cause of the evil by affording the occasion for its being removed and placed on the footpath, and so causing the injury to the plaintiff, he was responsible in law for the consequences. Numerous authorities were cited in support of this position. The first is the case of *Scott v. Shepherd*, 3 Wils. 408; 2 W. Bl. 892. In that case the defendant threw a lighted squib into a market-house where several persons were assembled. It fell upon a standing, the owner of which in self-defense took it up and threw it across the market-house. It fell upon another standing, the owner of which in self-defense took it up and threw it to another part of the market-house, and in its course it struck the plaintiff and exploded, and put out his eye. The defendant was held liable, although without the inter-

vention of a third person the squib would not have injured the plaintiff. In *Dixon v. Bell*, 5 M. & S. 186, the defendant, having left a loaded gun with another man, sent a young girl to fetch it, with a message to the man in whose custody it was to remove the priming, which the latter as he thought did, but, as it turned out, did not do effectually. The girl brought it home, and thinking that the priming having been removed the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off, and injured the child. The defendant was held liable. "As by this want of care," says Lord Ellenborough — that is, by leaving the gun without drawing the charge, or seeing the priming had been properly removed — "the instrument was left in a state capable of doing mischief, the law will hold the plaintiff responsible. It is a hard case, undoubtedly, but I think the action is maintainable." In *Nott v. Wilkes*, 3 B. & A. 304, the well-known case as to spring-guns, it became unnecessary to determine how far a person setting spring-guns would be liable to a person injured by such a gun going off, even though such person were a trespasser, inasmuch as the plaintiff, having had notice that spring-guns were set in a particular wood, had voluntarily exposed himself to the danger. But both Mr. Justice Bayley and Mr. Justice Holroyd appear to have thought that without such notice the action would have lain, the use of such instruments being unreasonably disproportioned to the end to be attained, and dangerous to the lives of persons who might be innocently trespassing. Looking to their language, it can scarcely be doubted that, if instead of injuring the plaintiff, the gun which he caused to go off had struck a person passing lawfully along a path leading through the wood, they would have held the defendant liable. In *Jordin v. Crump*, 8 M. & W. 782, the use of dog-spears was held not to be illegal, but there the injury done to the plaintiff's dog was alone in question. If the use of such an instrument had been productive of injury to a human being, the result might have been different. In *Illidge v. Goodwin*, 5 C. & P. 190, the defendant's cart and horse were left standing in the street without any one to attend to them. A person passing by whipped the horse which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the horse, and not the defendant, was liable. It was also contended that the bad management of the plaintiff's shopman had contributed to the accident. But Tindal, C. J., ruled that, even if this were believed, it would not avail as a defense. "If," he says, "a man chooses to leave a cart standing in the street he must take the risk of any mischief that may be done." *Lynch v. Nurdin*, 1 Q. B. 29, is a still more striking case. There, as in the former case, the defendant's cart and horse had been left standing unattended in the street. The plaintiff, a child of seven years of age, playing in the street with other boys, was getting into the cart when another boy made the horse move on; the plaintiff was thrown down and the wheel of the cart went over his leg and fractured it. A considered judgment was delivered by Lord Denman. He says: "It is urged that the mischief was not produced by the mere negligence of the servant as asserted in the declaration, but at most by that negligence in combination with two other active causes — the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart, and so committing a

trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell on it at any length. For, if I am guilty of negligence in leaving any thing dangerous where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." And then, by way of illustration, the Chief Justice puts the case of a gamekeeper, leaving a loaded gun against the wall of playground where schoolboys were at play, and one of the boys, in play, letting it off and wounding another. "I think it will not be doubted," says Lord Denman, "that the gamekeeper must answer in damages to the wounded party. This," he adds, "might possibly be assumed as clear in principle, but there is also the authority of the present Chief Justice of the Common Pleas in its support in *Illidge v. Goodwin*. It is unnecessary to follow the judgment in the consideration of the second part of the case, namely, whether the plaintiff, having contributed to the accident by getting into the cart, was prevented from recovering in the action, as no such question arises here. In *Daniels v. Potter*, 4 C. & P. 262, the defendants had a cellar opening to the street. The flap of the cellar had been set back while defendant's men were lowering coals into it, as the plaintiff contended, without proper care having been taken to secure it: the flap fell and injured the plaintiff. The defendant maintained that the flap had been properly fastened, but also set up a defense that its fall had been caused by some children playing with it. But the only question left to the jury by Tindal, C. J., was whether the defendant's men had used reasonable care to secure the flap. His direction implies that in that case only would the intervention of a third party causing the injury be a defense. The cases of *Hughes v. Macfie and others* and *Abbott v. Macfie and others*, 2 H. & C. 744, two actions arising out of the same circumstances, and tried in the Passage Court at Liverpool, though at variance with some of the foregoing so far as relates to the effect of the plaintiff's right to recover where his own act as a trespasser has contributed to the injury of which he complains, is in accordance with them as respects the defendant's liability for his own act where that is the primary cause, though the act of another may have led to the immediate result. The defendants had a cellar opening to the street. Their men had taken up the flap of the cellar for the purpose of lowering casks into it, and, having reared it against the wall nearly upright with its lower face, on which there were cross-bars, toward the street, had gone away. The plaintiff in one of the actions, a child of five years old, got upon the cross-bars of the flap, and, in jumping off them, brought down the flap on himself and another child (the plaintiff in the other action), and both were injured. It was held that while the plaintiff whose act had caused the flap to fall could not recover, the other plaintiff who had been injured could, provided he had not been playing with the other, so far as to be a joint actor with him. *Bird v. Holbrook*, 4 Bing. 628, is another striking case, as there the plaintiff was undoubtedly a trespasser. The defendant being the owner of a garden, which was at some distance from his dwelling-house, and which was subject to depredations, had set in it without notice a spring-gun for the protection of

his property. The plaintiff, who was not aware that a spring-gun was set in the garden, in order to catch a pea-fowl, the property of a neighbor which had escaped into the garden, got over the wall, and his foot coming, in his pursuit of the bird, into contact with the wire which communicated with the gun, the latter went off and injured him. It was held, though his own act had been the immediate cause of the gun going off, yet that the unlawful act of the defendant in setting it, rendered the latter liable for the consequences. In the course of the discussion a similar case of *Jay v. Whitfield*, at p. 644, was mentioned, tried before Richards, C.B., in which a plaintiff, who had trespassed upon premises in order to cut a stick, and had been similarly injured, had recovered substantial damages, and no attempt had been made to disturb the verdict. In *Hill v. New River Company*, 9 B. & S. 303, the defendants created a nuisance in a public highway by allowing a stream of water to spout up, open, and unfenced in the road. The plaintiff's horses, passing along the road with his carriage, took fright at the water thus spouting up, and swerved to the other side of the road. It so happened that there was in the road an open ditch or cutting which had been made by contractors who were constructing a sewer, and which had been left unfenced and unguarded, which it ought not to have been. Into this ditch or cutting, owing to its being unfenced, the horses fell and injured themselves and the carriage. It was contended that the remedy, if any, was against the contractors, but it was held that the plaintiff was entitled to recover against the company. In *Burrows v. March Gas and Coke Company*, L. Rep., 7 Ex. 96, in the Exchequer Chamber, affirming a judgment of the Court of Exchequer, where, through a breach of contract by the defendants in not serving the plaintiff with a proper pipe to convey gas from their main into his premises, an escape of gas had taken place, whereupon the servant of a gas-fitter, at work on the premises, having gone into the part of the premises where the escape had occurred with a lighted candle, and examining the pipe with the candle in his hand, an explosion took place, by which the premises were injured, the defendants were held liable, though the explosion had been immediately caused by the imprudence of the gas-fitter's man in examining the pipe with a lighted candle in his hand. In *Collins v. The Middle Level Commissioners*, L. Rep., 4 C. P. 279, the defendants were bound under an act of Parliament to construct a cutting with proper walls, gates, and sluices to keep out the waters of a tidal river, and also a culvert under the cut to carry off the drainage of the lands lying east of the cut, and to keep the same open at all times. In consequence of the defective construction of the gates and sluices, the waters of the river flowed into the cut, and, bursting its western bank, flooded the adjoining lands. The plaintiff and other proprietors on the eastern side closed the culvert, and so protected their lands; but the proprietors on the western side, to lessen the evils to themselves, reopened the culvert, and so increased the overflow on the plaintiff's land, and caused injury to it. The defendant sought to ascribe the injury to the act of the western proprietors in removing the obstruction which those on the other side had placed at the culvert. But it was held that the negligence of the defendants was the substantial cause of the mischief. "The defendants," says Montague Smith, J., "cannot excuse themselves from the natural consequences of their negligence by reason of the act,

whether rightful or wrongful, of those who removed the obstructions placed in the culvert under the circumstances found in this case." "The primary and substantial cause of the injury," says Brett, J., "was the negligence of the defendants, and it is not competent to them to say that they are absolved from the consequence of their wrongful act by what the plaintiff or some one else did." "I do not see how the defendants can excuse themselves by urging that the plaintiff was prevented by other wrong-doers from preventing part of the injury." The case of *Harrison v. The Great Northern Railway Company*, 3 H. & C. 231, belongs to the same class. The defendants were bound under an act of Parliament to maintain a delph or drain with banks for carrying off water for the protection of the adjoining lands. At the same time certain commissioners appointed under an act of Parliament were bound to maintain the navigation of the River Witham with which the delph communicated. There having been an extraordinary fall of rain, the water in the delph rose nearly to the height of its banks, when one of them gave way, and caused the damage of which the plaintiff complained. It was found that the bank of the delph was not in a proper condition; but it was also found, and it was on this that the defendants relied as a defense, that the breaking of the bank had been caused by the water in it having been penned back owing to the neglect of the commissioners to maintain in a proper state certain works which it was their duty to keep up under their act. Nevertheless, the defendants were held liable. These authorities would appear to be sufficient to maintain the plaintiffs' right of action under the circumstances of this case. It must, however, be admitted that in one or two recent cases the courts have shown a disposition to confine the liability arising from unlawful acts, negligence, or omissions of duty within narrower limits by holding a defendant liable for those consequences only which in the ordinary course of things were likely to arise, and which might, therefore, reasonably be expected to arise, or which it was contemplated by the parties might arise from such acts, negligence, or omissions. In *Greenland v. Chaplin*, 5 Exch. 248, Pollock, C. B., says: "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated." Acting on this principle, the Court of Common Pleas, in a recent case of *Sharp v. Powell*, L. Rep., 7 C. P. 253, held that the action would not lie where the injury, though arising from the unlawful act of the defendant, could not have been reasonably expected to follow from it. The defendant had, contrary to the provisions of the Police Act, washed a van in the street, and suffered the water used for the purpose to flow down a gutter toward a sewer at some little distance. The weather being frosty, a grating through which water flowing down the gutter passed into the sewer had become frozen over, in consequence of which the water sent down by the defendant, instead of passing into the sewer, spread over the street, and became frozen, rendering the street slippery. The plaintiff's horse coming along fell in consequence, and was injured. It was held that, as there was nothing to show that the defendant was aware of the obstruction of the grating, and as the stoppage of the water was not the necessary or probable consequence of the

defendant's act, he was not responsible for what had happened. Bovill, C. J., there says: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but generally speaking he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows or has reasonable means of knowing that consequences not usually resulting from the act are by reason of some existing cause likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrong-doer liable to an action." And Grove, J., said: "I am entirely of the same opinion. I think the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated, or for which he is responsible. The expression the 'natural consequence' which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant; 'probable' would perhaps be a better expression. If on the present occasion the water had been allowed to accumulate round the spot where the washing of the van took place and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have been inclined to think that the defendant would have been responsible for the consequences which had resulted," and Keating, J., said: "The damage did not immediately flow from the wrongful act of the defendant, nor was such a probable or likely result as to make him responsible for it. The natural consequence, if that be a correct expression, of the wrongful act of the defendant would have been that the water would under ordinary circumstances have flowed along the gutter or channel, and so down the grating to the sewer. The stoppage and accumulation of the water was caused by ice or other obstruction at the drain, not shown to have been known to the defendant, and for which he was in no degree responsible. That being so, it would obviously be unreasonable to trace the damage indirectly back to the defendant." We acquiesce in the doctrine thus laid down as applicable to the circumstances of the particular case; but we doubt its applicability to the present, which appears to us to come within the principle of *Scott v. Shepherd*, *Dixon v. Bell*, and other cases to which we have referred. At the same time it appears to us that the case before us will stand the test thus said to be the true one. For a man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction by some one entitled to use the way as a thing likely to happen; and if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near; thus, if the obstruction be to the carriage-way, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wherever placed, it may, as was also the case here, become a source of danger from which, should injury to an innocent party occur, the original author of the mischief should be held responsible.

Moreover, we are of opinion that if a person places a dangerous obstruction in a highway or in a private road, over which persons have a right of way, he is bound to take all necessary precautions to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences. It is unnecessary to consider how the matter would have stood had the plaintiff been a trespasser. The case of *Mangan v. Atterton*, 4 H. & C. 888; L. Rep., 1 Ex. 239, was cited before us as a strong authority in favor of the defendant. The defendant had there exposed in a public market-place a machine for crushing oil cake without its being thrown out of gear or the handle being fastened, or any person having the care of it; the plaintiff, a boy of four years of age, returning from school with his brother, a boy of seven, and some other boys, stopped at the machine. One of the boys began to turn the handle; the plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheels, and the machine being set in motion, three of his fingers were crushed. It was held by the Court of Exchequer that the defendant was not liable: first, because there was no negligence on the part of the defendant, or if there was such negligence, it was too remote; secondly, because the injury was caused by the act of the boy who turned the handle, and of the plaintiff himself, who was a trespasser. With the latter ground of the decision we have in the present case nothing to do, otherwise we should have to consider whether it should prevail against the cases cited with which it is obviously in conflict. If the decision as to negligence is in conflict with our judgment in this case, we can only say we do not acquiesce in it. It appears to us that a man who leaves in a public place along which persons, and among them children, have to pass a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion. But be this as it may, the case cannot govern the present. For the decision proceeded expressly on the ground that there had been no default in the defendant; here it cannot be disputed that the act of the defendant was unlawful. On the whole, we are of opinion, both on principle and authority, that the plaintiff is entitled to our judgment.

Rule discharged.

COVENANT OF LESSEE NOT TO ASSIGN NOT A USUAL ONE.

ENGLISH HIGH COURT OF JUSTICE, CHANCERY
DIVISION, JANUARY 20, 1878.

HAMPSHIRE V. WICKENS, 38 L. T. Rep. (N. S.) 406.

The defendant entered into an agreement to take a lease of a dwelling-house in Kensington, to contain all usual covenants and provisions. The lease tendered to the defendant contained a covenant not to assign without the lessors' consent, such consent not to be withheld to a respectable and responsible tenant. In an action to enforce the agreement, *held*, that the covenant was not a usual covenant.

THIS was action to enforce specific performance of an agreement for a lease. At the date of the agreement the plaintiff was lessee of a house in Elham-road, Kensington, for the term of twenty-one years from

the 25th December, 1873, determinable by either lessor or lessee at the expiration of the first seven or fourteen years, and she held an undertaking in writing from the lessors that if she could obtain a responsible and respectable tenant for the house at the rent of one hundred guineas per annum, they would accept a surrender of the plaintiff's lease, and grant to the new tenant a lease for twenty-one years, determinable by the lessee only at the end of seven or fourteen years. On the 22d February, 1877, the defendant had an interview with the plaintiff's agent respecting the house, and on the following day the defendant wrote to the agent a letter in the following terms:

"With reference to our interview last evening, I am willing to take 43, Holland-road" (meaning 43, Elsham-road) "at the rent of 106*l.* per annum for twenty-one years, determinable at my option at seven or fourteen years, on all usual covenants and provisoes, provided the same be put into ornamental and substantial repair as arranged, and to pay 75*l.* for the fixtures and fittings mentioned in the schedule you left with me. Rent to run from the 24th March. Possession to be given on the 14th March next. I shall feel obliged by a definite reply at once, as I have other offers."

The defendant also gave the names of two referees. On the 24th February the plaintiff's agent wrote and sent to the defendant a letter as follows:

"On behalf of Mrs. Hampshire I accept the terms contained in your letter of yesterday, subject to references being approved by the landlord, which I am quite convinced in your case is simply a matter of form."

The lessors were satisfied with the defendant's references, but the defendant subsequently refused to accept the lease, and thereupon the present action was brought. The material defense was that the new lease proposed to be granted to the defendant contained a covenant on the part of the lessee "that he would not, without the previous consent of the lessors, assign, underlet, or part with the possession of the said premises, but such consent not to be withheld to a respectable and responsible tenant, and that he would not, without the consent of the lessors, put up thereon any bill for letting apartments," which was alleged not to be a usual covenant.

Chitty, Q. C., and *Creed*, for plaintiff.

J. Hume Williams, for defendant.

JESSEL, M. R. There are various objections to the contention of the plaintiff, but the chief objection, to which alone I intend to refer, arose on the defendant's agreement to take a lease of the house "on all usual covenants and provisoes." Now, the lease tendered by the lessors contains a covenant on the part of the lessee that he would not, without the lessors' consent, "assign, underlet, or part with the premises; but such consent not to be withheld to a respectable and responsible tenant;" and further, that he would not, without their consent, put up thereon any bill for letting apartments. That is clearly a very special and very unusual covenant, but it is said that it is less extensive than a general covenant not to assign at all, and that if no objection can be made to an unrestricted covenant against assignment, none can be made to a covenant in this restricted form. I think that reasoning is sound, and shall, therefore, consider whether an unrestricted covenant not to assign is or is not a usual covenant. I am of opinion that it is not. This was decided by Lord Thurlow in *Henderson v. Hay*,

sup., by Lord Eldon in *Church v. Brown*, sup., and more recently by the Court of Appeal in *Hodgkinson v. Crowe*, L. Rep., 10 Ch. 622; 33 L. T. Rep. (N. S.) 388, and by Bacon, V. C., in the same case, L. Rep., 19 Eq. 598; 33 L. T. Rep. (N. S.) 122, so that it cannot now be fairly disputed. It is true that a contrary decision of Romilly was cited. — *Haines v. Burnett*, sup. — but that case appears to me to be opposed both to principle and authority, and it must now be treated as distinctly overruled by *Hodgkinson v. Crowe*. In *Haines v. Burnett*, Lord Romilly, without any special provision having been made in the contract to that effect, held that a covenant should be inserted making the lease determinable on the bankruptcy of the lessee or on his making any arrangement for the benefit of his creditors. That was, in fact, nothing less than a variation of the contract. I cannot see any reason for holding such a covenant to be usual, and it is rather difficult, in looking at the case, to understand how it was decided. Lord Romilly seems to have thought that, in considering general covenants and all such other covenants as are usually inserted in leases of property of a similar description, some regard might be had to the peculiar nature and tenure of the property; but I cannot find any evidence on that point mentioned in the report, and it would seem that the judge, from his view of the nature of the property, inserted the clause. But, when we look at the reasoning of Bacon, V. C., in *Hodgkinson v. Crowe*, I think it is conclusive against any judge being allowed to say from his own view that such a covenant ought to be introduced. The Court of Appeal went further, and held that, under an agreement for a lease to contain "all usual and customary mining clauses," the landlord was not entitled to have inserted in the lease a proviso for re-entry except on non-payment of rent. Usual covenants may vary in different generations. The law declares what are usual covenants according to the then knowledge of mankind. Lord Eldon, in *Church v. Brown*, puts it thus: "Before the case of *Henderson v. Hay*, therefore, upon an agreement to grant a lease with nothing more than the proper covenants, I should have said they were to be such covenants as were just as well known in such leases as the usual covenants under an agreement to convey an estate." Now, what is well known at one time may not be well known at another time, so that you cannot say that usual covenants never change. I have, therefore, looked at the last edition of Davidson's *Precedents in Conveyancing* (3d ed., vol. 5, pp. 48, 49), to see whether the usage is said to have changed. He says: "The result of the authorities appears to be that in a case where the agreement is silent as to the particular covenants to be inserted in the lease, and provides merely for the lease containing 'usual covenants,' or, which is the same thing, is an open agreement without any reference to the covenants, and there are no special circumstances justifying the introduction of other covenants, the following are the only ones which either party can insist upon, namely, covenants by the lessee: 1, to pay rent; 2, to pay taxes, except such as are expressly payable by the landlord; 3, to keep and deliver up the premises in repair; and, 4, to allow the lessor to re-enter and view the state of repair, and the usual qualified covenant by the lessor for quiet enjoyment by the lessee." When he refers to "special circumstances," he means peculiar to a particular trade, as, for example, in leases of public-houses, where the brewers have their own forms of leases, the usual covenants would mean the covenants

always inserted in the leases of certain brewers. There is no mention of any other "usual covenants," and as nothing in this case has been lost for want of industry on the part of the counsel who have argued it, I am justified in saying that there is nothing in any text book or book of precedents to show that a covenant not to assign is a usual covenant. I am, therefore, of opinion that it is not a usual covenant, and the plaintiff's case fails. The action must be dismissed with costs.

LIABILITY FOR REPRESENTATIONS AS TO CREDIT OF ANOTHER.

SUPREME COURT OF PENNSYLVANIA JANUARY 7, 1878.

DUFF V. WILLIAMS.

Plaintiff, having money to loan, asked defendant if he wished to borrow it. Defendant said no, but his brother did. Plaintiff asked if the brother was solvent, and defendant, honestly believing him to be so, said he was. Plaintiff relying on this made the loan. *Held*, that defendant was not liable for a loss thereof through the brother's insolvency.

ACTION for damages arising out of an alleged deceit on the part of John C. Duff, the defendant below, whereby Robert Williams, the plaintiff below, was induced to loan money to defendant's insolvent brother, Agnew Duff.

Plaintiff, having a sum of money to loan, asked defendant if he wished to borrow it. He said no, but he thought his brother would like some. Plaintiff asked him if his brother was good for the amount and he said he was. At that time defendant believed his brother to be solvent and made the representation in good faith. Thereafter plaintiff called upon the brother and lent him the money, taking his note therefor. A few months thereafter and before the note was due, the brother made a general assignment for the benefit of creditors, and plaintiff's note was not paid in full. He then brought this action claiming that he had made the loan on the faith of defendant's representations.

At the trial defendant among other points presented these:

Fourth. To enable the plaintiff to recover, the jury must believe that John C. Duff represented his brother Agnew to be in good and solvent circumstances at the time the plaintiff applied to him; that the plaintiff, owing to his relations with the defendant, had a right to rely upon such representation; that such representation was false; that John C. Duff knew and believed, or had reason to know or believe, it to be false, and made such representation recklessly, without any just reason for making the same, and with the design and intent fraudulently and dishonestly to enable his brother to obtain the plaintiff's money. *Answer.* It was not necessary that the defendant, if he made the statements and representations, actually knew them to be false. If he made them recklessly, without sufficient reason for knowing and believing them to be true, and with the intent to enable his brother Agnew thereby to obtain the plaintiff's money, and the representations afterward turned out to be false, and damage resulted, it would be sufficient to create the liability of the defendant, without it appearing that the defendant knew or had reason to know or believe them to be false.

Fifth. If the jury believe that John C. Duff from

time to time sought information as to his brother's standing financially, and with an honest belief that he (Agnew) was solvent and could pay his debts, so represented his circumstances to Williams, the plaintiff cannot recover, even if such representations turned out afterward to be incorrect. *Answer.* This we affirm, if by "so represented his circumstances to Williams" we are to understand, giving or communicating information to plaintiff as information thus obtained merely; but the case would be different if he made the representations and statements as actual facts, as of his own knowledge.

The judgment below was for plaintiff, and defendant took a writ of error.

S. B. Wilson and Frank Wilson, for plaintiff in error.

John J. Wickham, for defendant in error.

STERRETT, J. In answer to the fourth point the learned judge said to the jury that, if the defendant made the alleged statements and representations, it was unnecessary to show that he "actually knew them to be false." If he made them recklessly, without sufficient reason for knowing and believing them to be true, or did he know that they were false? We are of opinion that the question was submitted to the jury in a manner that was calculated to lead them into an inquiry that was irrelevant and prejudicial to the defendant, and for this reason the first assignment of error should be sustained.

The defendant was entitled to an unqualified affirmation of his fifth point, in which the court was requested to say: "If the jury believe that John C. Duff from time to time sought information as to his brother's standing financially, and with an honest belief that he was solvent and could pay his debts, so represented his condition to Williams, the plaintiff cannot recover, even if such representations turned out afterward to be incorrect." This was putting the defense on its true ground—that of good faith. While the learned judge affirmed this proposition, he did so with a qualification which greatly weakened its force, by saying, "if by the words 'so represented his circumstances to Williams,' we are to understand giving or communicating information to the plaintiff as information thus obtained merely; but the case would be different if he made the representations as actual facts, as of his own knowledge." The jury would likely understand from this that the defendant was bound to inform the plaintiff that he had made inquiry as to his brother's standing, and give him in detail the information he had thus obtained, so that he might have the data from which to draw his own conclusions. Of course there could have been no objection to this mode of imparting information to the plaintiff, but it is not the only way in which it could be honestly done. He could with equally good faith state, as conclusions of fact, the inferences which he drew from the information he had obtained. If, as the result of inquiry, he came to the conclusion that his brother's financial standing was as good as his own, what would be the impropriety of honestly stating this to the plaintiff as a fact, instead of communicating to him the items of information upon which he had formed his judgment and belief? Taking into consideration all that was said and done, it must, after all, resolve itself into a question of sincerity and good faith. The principles involved are so clearly stated in *Booke v. Walker*, *supra*; *Boyd's Ex'r's*

v. Browne, 6 Barr, 310; *Huber v. Wilson*, 11 Harris, 178; *Rheem v. The Naugatuck Wheel Co.*, 9 Casey, 358; *Graham v. Hollinger*, 10 Wright, 55; and *Dilworth v. Bradner et al.*, decided at the present term, 4 Weekly Notes, 506, that it is unnecessary to pursue the subject any further.

Judgment reversed and a *ventre factus de novo* awarded.

COURT OF APPEALS ABSTRACT.

APPEAL.

1. *To Court of Appeals: order sustaining demurrer not appealable.*—An order sustaining a demurrer to a complaint and dismissing it with costs, unless the plaintiff amends and pays costs of demurrer within a specified time, cannot be reviewed in this court until after final judgment has been entered for the defendant dismissing the complaint. Appeal dismissed. *Elwell v. Johnson*. Opinion by Andrews, J.

2. *Judgment for costs not a final one.*—A judgment for costs only is not a final judgment on the demurrer so as to give jurisdiction to this court. *Ib.* [Decided June 4, 1878.]

ASSAULT AND BATTERY.

1. *Justification: resisting trespass upon land: title: evidence.*—In an action for an assault and battery it appeared that plaintiff and defendant were the owners of adjoining farms, between which a highway ran. Plaintiff had for several years cut the grass on the side of the highway next to his farm. At the time of the affray he had cut the grass and left it to dry. In his absence defendant, who claimed title to the entire highway, began to gather the grass, when plaintiff came and attempted to prevent him. In resisting such attempt the assault was committed. *Held*, that evidence on behalf of defendant that the title to the highway was in him was admissible in justification of the assault. Judgment below reversed. *Bliss v. Johnson*. Opinion by Andrews, J.

2. *Owner of land out of possession may take possession peaceably and then resist attempt to retake.*—The true owner of land wrongfully held out of possession may watch his opportunity and, if he can regain possession peaceably, may maintain it and lawfully resist an attempt by the former occupant to retake possession; nor will he be liable to be proceeded against under the statute of forcible entry and detainer. *Ib.* [Decided May 21, 1878.]

CONTRACT.

Of sale and purchase: vendor cannot enforce against assignee of vendee.—Plaintiffs by contract in writing agreed to sell to the firm of Pierce & Co., and Pierce & Co. agreed to buy a quantity of oil at a specified price. Pierce & Co. for value sold and assigned the contract to defendant, and plaintiffs received notice of the transfer. The price of oil having fallen, the firm named made an agreement whereby it in consideration of a release of all liability agreed to pay plaintiffs \$2,500, "and also to give them all over this sum that shall be realized from W. S. Dickinson (defendant), on our contracts with him." Plaintiffs having thereafter tendered the oil to defendant brought action against him for the difference between the price at which it was sold and the market price at the time of tender, less the \$2,500 paid by the firm. *Held*, that there was no privity between plaintiffs and defendant, and the contract between the firm and plaintiffs did not operate to transfer to them any claim which the firm might

have against defendant under its contract with him, and the action was not maintainable. Judgment below reversed. *Clark v. Dickinson*. Opinion per Curiam. Miller, J., dissented; Folger, J., not voting. [Decided May 28, 1878.]

EVIDENCE.

Declarations of vendor after sale not admissible against vendee.—In an action to recover the possession of property which had been sold by one Lane to plaintiffs, and which was thereafter seized by defendant, as sheriff, upon an execution against Lane, on the ground that the transfer to plaintiffs was fraudulent, declarations made by Lane after the action was commenced to a third person that he owned the property, *held*, inadmissible against plaintiffs. Judgment below reversed. *Burnham v. Brennan*. Opinion by Earl, J. [Decided June 4, 1878.]

FRAUDULENT CONVEYANCE.

Assignee may maintain action to set aside fraudulent conveyance without judgment.—An assignee in bankruptcy may maintain an action to set aside a conveyance as fraudulent without the necessity of a previous judgment and execution against the debtor who made it, as is required in the case of an individual creditor, and although none of the creditors have obtained a specific lien or have a standing in court to attack the conveyance. Judgment below affirmed. *Southard v. Benner*. Opinion by Allen, J.

2. *Chattel mortgage: on merchandise left in possession of mortgagor fraudulent.*—Advances were made by mortgagees to a mortgagor in a chattel mortgage to enable the mortgagor to carry on his business as a dealer in lumber. The entire stock of lumber was covered by the mortgage to secure the advances, and an agent of the mortgagees appointed to supervise the business and watch their interests. Sales were continued by the mortgagor as before and the avails used by him for his support and as his wants and business calls demanded. This was continued for a full year, and only such moneys as the mortgagor could spare were applied toward paying the advances. *Held*, that the mortgage was fraudulent in law as to creditors and void. *Ib.*

3. *What is fraudulent arrangement.*—An arrangement made contemporaneously with a mortgage on merchandise whereby the mortgagor is to retain possession of the mortgaged property and deal with it as his own, and using the avails, would be conclusive evidence of fraud in fact, and such an agreement may be proved by parol. *Ib.*

[Decided February 5, 1878.]

NATIONAL BANK.

Mortgage to: note of married woman binding separate estate is not.—Defendant, a married woman, indorsed a note in the following form: "I hereby charge my separate and personal estate for the payment of the within note." This note was discounted by a national bank. *Held*, that this indorsement did not become a mortgage on defendant's separate estate so as to preclude the bank from taking it under the National Banking Act. Such an indorsement creates no specific lien on any property, but only creates against the one making it a liability which can be enforced as if she was unmarried. Judgment below affirmed. *Third National Bank v. Blake*. Opinion by Earl, J.

[Decided April 9, 1878.]

STATUTE OF LIMITATIONS.

1. *Does not run as to revival of suit: action against sheriff.*—An action was commenced within the statutory term against a sheriff to recover damages for the conversion of personal property of the plaintiff therein taken by him under attachment. Pending the suit the plaintiff died, and E. was qualified as her executrix. More than eighteen months thereafter E. served an affidavit and notice of motion for leave to file a supplemental complaint reviving the action as executrix. The motion was granted and a supplemental complaint served. *Held*, that the service of the supplemental complaint was the continuance of an old action and not the commencement of a new one, and the statute of limitation (Laws 1871, ch. 733), which provides that actions against sheriffs for acts such as the one in question shall be commenced within one year, did not bar the action. Order of General Term reversed and judgment on verdict ordered. *Evans v. Cleveland*. Opinion by Earl, J.

2. Whatever the rule may be on actions in equity, in a legal action commenced before it was barred by any statute of limitations no mere lapse of time will absolutely defeat an application for its continuance in the name of the representative of a deceased party, and no statute of limitations will bar a recovery. *Ib.* [Decided February 12, 1878. Reported below, 12 Hun, 140.]

SURROGATE.

Has not jurisdiction to make legacies charge on real estate.—When, in good faith, an executor resists the charging of a legacy upon the residuary real estate in his hands, and shows that there exists a real question of fact or of law in his refusal to allow it, the surrogate has no jurisdiction to determine the matter. Laws of 1870, chap. 359, § 11, does not affect this rule. An intimation in *Harris v. Ely*, 25 N. Y. 138, 142, that a surrogate may try the validity of a release declared obiter. Decree below reversed. *Bevan v. Cooper*. Opinion by Folger, J. [Decided January 29, 1878.]

WILL.

Construction of: legacy, when not chargeable on real estate.—Where a testator, possessed of both real and personal estate, gave legacies to strangers or those remotely related to him, and set apart the residuum of his estate definitely for the support of his widow and children, describing the real and personal property distinctly; and where it did not appear that he contemplated an insufficiency of personal property to pay the legacies; and there was an insufficiency caused by the death of the testator and by his debts, and where there had been a devise of specific real estate as well as legacies, *held*, that there was no blending of the real estate with the personal into one mass, and the intention would not be imputed to the testator of charging the legacies upon the real estate, and they would not be so charged. Decree below reversed. *Bevan v. Cooper*. Opinion by Folger, J. [Decided January 29, 1878.]

NOTES OF RECENT DECISIONS.

CHATTEL MORTGAGE: FILING: LEAVING WITH PROPER OFFICER SUFFICIENT COMPLIANCE WITH STATUTE.—The word "filed," as applied to a chattel mortgage in sections 1, 2 and 3, ch. 39, Gen. Stat., does not include the indorsing and indexing prescribed by section 2, but a chattel mortgage is filed, within the

meaning of the statute relating to chattel mortgages, when it is delivered to, and received and kept by, the proper officer, for the purpose of notice mentioned in the statute. Sup. Ct., Minnesota, May 22, 1878. *Gorham v. Summers* (N. W. L. Rep.).

CORPORATION: SEWING MACHINE COMPANY MAY TAKE NOTES OF THIRD PERSONS IN PAYMENT FOR MACHINES.—When a note taken in payment of a sewing machine by a person who had purchased the machine from the company, and was not their agent, had been turned over to the company before maturity, to be applied in payment of an indebtedness from the payee to the company, and without notice of any defense, it can be collected by the company, even if there was a failure of consideration, if there was no fraud in the execution of the note. A sewing machine company may receive notes of third parties in payment of an indebtedness, although it cannot do a general banking business or discount commercial paper. Appellate Ct., Illinois, February, 1878. *Taylor v. Thompson*.

CORPORATION: STOCKHOLDER'S SUBSCRIPTION: RELEASE FROM LIABILITY.—Where a party subscribed a "prospectus" of a railroad company for shares of capital stock, contemplating an organization only after securing subscriptions for one hundred and fifty thousand dollars, a subsequent organization effected without his consent, when subscriptions for only one hundred and thirty thousand dollars had been obtained, operates to release him from further liability. Sup. Ct., Cal., May 13, 1878. *Santa Cruz R. R. Co. v. Schwarts* (Pac. C. L. J.).

CRIMINAL LAW: FORGERY: PUTTING FORGED DEED ON RECORD IS.—Putting a forged deed of real estate on record is in itself an act of uttering and publishing. Sup. Ct., Dist. Col. *United States v. Brooks* (Wash. L. Rep.).

ESTOPPEL: WHAT ESSENTIAL TO: SILENCE ALONE NOT.—A declaration, to be effective as an estoppel, must be made to him who acts upon it, and who, after the exercise of diligence, has reason to rely upon it as true, and is thereby induced to do what he otherwise would not have done. Silence alone is not estoppel, there must be encouragement. Philadelphia Com. Pl., April 6, 1878. *Mecouch v. Loughery*.

EVIDENCE: EXPERT NOT ALLOWABLE ON QUESTION OF NEGLIGENCE WITHIN GENERAL EXPERIENCE.—When the facts from which negligence is sought to be inferred are within the experience of all men of common education, the opinions of experts are inadmissible. It is for the jury to draw the inference of negligence. Sup. Ct., California, April 20, 1878. *Shafter v. Evans* (Pac. Coast L. J.).

NEGOTIABLE INSTRUMENT: WHAT IS: PLACE OF PAYMENT LEFT BLANK: USAGE.—C. made and signed two notes on printed forms, which were left blank as to the bank at which they were to be payable, and procured G. to sign his name on the back thereof, and these notes he delivered to persons under whom the plaintiffs claimed, as collateral security, under an agreement with such persons that he should deliver to them indorsed notes. It being in proof that C. and G. regarded these notes as negotiable, and that there was a usage in R., where C. and G. lived, to leave notes blank as to the bank at which they were payable, and for the holder to fill such blank, it was *held*, that said notes were to be treated as negotiable, and G., not having been duly notified of their dishonor,

was discharged. Sup. Ct. App., Virginia, March, 1878. *Woodward v. Gunn* (Va. L. J.).

NEGOTIABLE INSTRUMENT: EFFECT OF SUBSEQUENT INDORSEMENT.—Several promissory notes were executed by one H. to G., who assigned the same by indorsement to F. F. afterward assigned them by indorsement to G., who assigned them to plaintiff. Held, that F.'s liability as between himself and G. being extinguished, the plaintiff, as G.'s indorsee, could not recover of F. U. S. Circ., Ind., April, 1878. *Howe Mach. Co. v. Hadden* (Cent. L. J.)

RECENT AMERICAN DECISIONS.

SUPREME COURT OF PENNSYLVANIA.

FIRE INSURANCE.

Want of title to premises insured: when no defense.—Want of title of the insured is no defense to an action on a policy of fire insurance, if the insured entered upon his land and took his insurance in good faith, under a reasonable and honest belief that he had title, and if he did not withhold the knowledge of a dispute about his title in bad faith. *Monroe Co. Mut. Ins. Co. v. Robinson* (W. Not. Cas.). Decided April 4, 1878.

NEGOTIABLE INSTRUMENT.

Township warrants are not: warrants on township treasurer: demand.—Warrants upon a township treasurer issued to a contractor or bearer by commissioners appointed to view and open a State road, are not negotiable instruments, entitling the holder to bring suit upon them in his own name. When such warrants are to be paid out of a special tax, a demand on the township treasurer is necessary before a suit can be maintained on the warrants. *Township of East Union v. Ryan* (W. Not. Cas.). Decided March 20, 1878.

MASTER AND SERVANT.

Negligence: mining operations: responsibility of master for injuries to a servant by an accident caused by negligence of a fellow-servant: who are fellow-servants.—In order to bring a case within the rule that a master is not responsible for an injury happening to a servant through the negligence of a fellow-servant, it is not necessary that the injured and the negligent servants should be engaged in the same particular work, it is sufficient if the general scope of their employment be the same. A "driver boss" was killed in a coal mine by an explosion caused by the negligence (if any neglect there was) of the "mining boss," who had given an order to reduce the supply of fresh air. Held, that the two are fellow-servants within the meaning of the rule, and that the owner of the mine was not responsible. *Lehigh Valley Coal Co. v. Jones* (W. Not. Cas.). Decided March 15, 1878.

REAL ESTATE.

1. *Fraudulent lease: relation of landlord and tenant does not exist under.*—Where a lease is shown to be fraudulent and void, the relation between landlord and tenant under it is overthrown. *Bidwell v. Evans*.

2. *Caveat emptor: inquiry as to right of possessor of real estate.*—The duty of inquiry as to the right of

those in possession is upon the purchaser. Ib. Decided January 7, 1878.

TIME.

Computation of time: no time stated means reasonable time.—Where a contract provides for the future performance of an act without specifying any time, the legal presumption is that it shall be reasonable time; and the jury are to say what is reasonable time. *Shepler v. Scott*. Decided January 7, 1878.

USURY.

Cannot be eradicated by taking new security.—The taint of usury cannot be eradicated by the substitution of one security or one set of securities for another so long as the original debt survives. *Miller v. Irwin*. Decided January 9, 1878.

RECENT BANKRUPTCY DECISIONS.

ATTACHMENT.

1. *Levy on perishable goods: sale of conversion.*—A creditor began suit in the Supreme Court of New York against one Spaulding, and obtained from the court a warrant of attachment against the property of said Spaulding, as a non-resident, under which warrant the sheriff levied upon certain goods of Spaulding in New York; three days after the levy an involuntary petition in bankruptcy was filed against Spaulding, in Massachusetts; thereafter, but before any adjudication, and before the election of any assignee in the bankruptcy proceedings, and before the sheriff had notice of such proceedings, an order for the sale of the goods, as perishable, was obtained from the State court, and the sheriff sold the goods under the said order. Held, that the sheriff was guilty of conversion in selling the goods, and was liable in damages to the assignee in bankruptcy subsequently appointed. U. S. Dist. Ct., S. D. New York. *Long v. Conner*, 17 Nat. Bankr. Reg. 540.

2. *Title of assignee relates back to filing petition.*—Where goods are held by a sheriff under an attachment under mesne process of less than four months' standing at the time of the filing of a petition in bankruptcy, the title of the assignee in bankruptcy subsequently appointed relates to the date of the filing of the petition, and dissolves the attachment and invalidates all proceedings under it subsequent to the filing of the petition, even though such proceedings be taken without notice of the bankruptcy. Ib.

3. *Order of State court no protection.*—An order by the State court, in the attachment suit, for the sale of the goods attached as perishable, is no protection to the sheriff, when such order is made after the filing of the petition in bankruptcy, though before adjudication. Ib.

4. *Measure of damages: true market value: evidence.*—The sheriff is liable to the assignee in bankruptcy for the true market value of the property on the day of the sale, and not merely for the amount realized at the sale. In order to determine what was the market value, the jury can consider fair sales made at or about the time, or within a reasonable time subsequently. The amount received at the sheriff's sale furnishes some evidence of value; but the jury are to consider that this may have been a forced sale; where no great length of time or great amount of advertising or notice to the general public was given, the jury are to

determine whether this was a fair criterion of the actual market value. The market value of the property, rather than any injury over and above the market value which the assignee or the original owner might have suffered, is the measure of damages. *Ib.*

5. *Defense: that assignee has obtained judgment against attachment creditor none to sheriff.*—The fact that the assignee in bankruptcy has already obtained judgment against the attachment creditor in a suit for damages for the same conversion, and has issued execution on the judgment, is no defense to a suit against the sheriff; the judgment being still unsatisfied, an unsatisfied judgment against one or two joint tortfeasors is no bar to an action against the other. *Ib.*

COMPOSITION.

1. *Practice: examination of debtor: priority on.*—At an adjourned composition meeting, after waiting a reasonable length of time, the register allowed a creditor to continue his examination of the debtor, which had been taken at regularly adjourned meetings. Subsequently the attorney for another creditor appeared and asked permission to continue an examination which had previously been closed, and that all the testimony taken at such meeting be stricken out, which was denied. It appearing that his power of attorney had been revoked, he then asked permission to go on with the examination in behalf of another creditor, which was also denied. *Held*, that the register was right in refusing to suspend the examination then pending. No other creditor was entitled to priority at that time. U. S. Dist. Ct., E. D. New York. *In re Tiff*, 17 Nat. Bankr. Reg. 550.

2. *Limit of examination.*—The attorney asked permission to examine the bankrupt as to the circumstances under which the revocation of his power of attorney had been obtained, which was refused. *Held*, no error. The register refused to suspend the examination then pending until the questions certified by him could be decided. *Held*, no error. *Ib.*

EXEMPTION.

What property is not exempt: partnership property.—Within a month prior to the commencement of the proceedings in bankruptcy, and while the firm was insolvent, a large amount of the partnership property was sold and the proceeds divided between the partners, and the firm then offered to settle with their creditors at fifty per cent. One of the partners, upon receiving his share of the proceeds of said sale, immediately purchased property which was exempt under the State statute. *Held*, that under the circumstances such property was not exempt, but must be regarded as partnership assets held in trust for creditors. U. S. Dist. Ct., Minnesota. *In re Melvin & Fox*, 17 Nat. Bankr. Reg. 543.

FRAUD.

When proceedings will not be vacated for: estoppel.—C. joined in a voluntary petition with his partners and participated actively in the proceedings. After the lapse of about five months he moved to set aside the adjudication on the ground that he was induced to join in the petition by fraudulent misrepresentations of his copartners and the attorney who prepared the petition and schedules, that the firm was not in fact insolvent and that the proceedings were carried on in the interest of his copartners for the purpose of depriving him of his property. *Held*, that upon the bare

possibility that C. might, against all his laches and against all his acts of acquiescence, prove the fraud alleged, substantial justice does not require that the creditors whose rights have become fixed through his voluntary acts should be subjected to the delay and expense incident to such an investigation. U. S. Dist. Ct., S. D. New York. *In re Court*, 17 Nat. Bankr. Reg. 555.

PRIORITY.

When party is not entitled to election of remedy: articles for manufacture in bankrupt's possession.—Petitioners had, prior to the commencement of the proceedings, delivered to the bankrupt certain wool which he was to manufacture into cloth for them. The assignee, under the direction of the court, completed the manufacture of the cloth and sold it. Petitioners demanded of the assignee the unfinished cloth and yarn and wool belonging to them, offering to pay for the labor and materials expended thereon. Upon refusal they brought suit against the assignee in trover and recovered judgment for their damages with interest and costs. The recovery was afterward limited to the amount realized by the assignee on the sale, less the cost of the labor and materials put into the goods by the bankrupt and the assignee. The assets being insufficient to pay this judgment in full after payment of the fees, costs and expenses of the assignee incurred in the course of the proceedings and in his administration of the estate, petitioners ask that the judgment be paid in full or so far as the assets will go toward its payment. *Held*, that petitioners, having elected to sue in trover for damages, waived any claim they might have had to the moneys in the assignee's hands as their own moneys, and were not entitled to priority over those expenses which are expressly preferred by the statute. U. S. Dist. Ct., S. D. New York. *In re Oberhoffer*, 17 Nat. Bankr. Reg. 546.

PROVISIONAL WARRANT.

When it will be issued.—A provisional warrant issued in voluntary proceedings upon papers regular on their face, and upon proof by affidavit of facts showing that it was very necessary for the protection of the estate, will not be vacated where such facts are not disproved and it appears that the purpose of the bankrupts in making the motion is to deprive the marshal of his fees, and this whether it was one which the court had power to issue or not. U. S. Dist. Ct., S. D. New York. *In re Clark*, 17 Nat. Bankr. Reg. 554.

NEW BOOKS AND NEW EDITIONS.

INDIANA REPORTS, VOLUME LVII.

Reports of cases argued and determined in the Supreme Court of Judicature of the State of Indiana, with tables of the cases reported, and cases cited, and an index. By Augustus N. Martin, Official Reporter, Volume LVII. Containing cases decided at the May term, 1877, not reported in Vol. LVI, and cases decided at the November term, 1877. Indianapolis. John G. Doughty, 1878.

THIS volume of Indiana reports contains among others these cases of interest: *O'Dea v. State*, p. 31: A law forbidding the sale of intoxicating liquor without a license therefor held constitutional. *Dobson v. State*, p. 69: One evading the letter of a penal law is not punishable thereunder, whatever may be his motive. *City of Huntington v. Cheesbro*, p. 74:

A city ordinance forbidding peddling within the city limits without a license and prescribing a punishment for its violation, is not in contravention of either the State or Federal Constitution. *Hart v. State*, p. 103: To constitute larceny the taking must be felonious at the time. One snatching money from a person and retaining it without consent of such person is not necessarily guilty of larceny. *Vaughn v. Ferral*, p. 182: One about to purchase a promissory note exhibited the same to the maker who said it was all right, and there was no defense to it and it would be paid. *Held*, that the maker was estopped from setting up that the note was altered. *Town of Centerville v. Woods*, p. 192: A town is liable to one injured by a defect in its streets, notwithstanding such defect was caused by a third person. *Alexander v. N. W. Chr. Univ.*, p. 466: A real estate broker, acting for both vendor and vendee in the sale of property, held entitled to receive compensation from both vendor and vendee. *Western Un. Tel. Co. v. Ferguson*, p. 496: While a telegraph company may refuse to transmit an indecent message, it may not one couched in proper terms on the ground that it is in furtherance of an immoral purpose. *Pittsb., Cinc. & St. L. Ry. Co. v. Vandyne*, p. 576: A railroad company may refuse to carry a person so intoxicated as to be disgusting, offensive or annoying, though he have a ticket, but may not refuse one slightly intoxicated. The reporting is well done, the index full, and the table of cases cited carefully prepared.

COURT OF APPEALS DECISIONS.

THE following opinions were handed down Friday, June 21, 1878:

Bostwick v. Frankfield, Nos. 262-265, order affirmed and judgment absolute for defendant on stipulation, with costs; opinion by Miller, J.—Department of Public Parks, in re application of, ordered, that the remittitur be amended so as to give costs to neither party in this court; no opinion.—*Hatch*, in re petition of, No. 422, appeal dismissed, with costs to Hatch against Bowes; opinion per Curiam.—*Hebrew Benevolent Society*, in re petition of, motion denied, with \$10 costs; no opinion.—*Mead*, in re petition of, No. 416, order affirmed; opinion by Miller, J.—*Merchants' Bank of Canada v. Livingston*, No. 242, judgment reversed and new trial granted; opinion by Earl, J.—*Parker v. City of Cohoes*, No. 253, order affirmed and judgment absolute for respondent on stipulation, with costs; on opinion of General Term.—*Roe v. Conway*, No. 215, judgment reversed and new trial ordered; opinion by Miller, J.—*Woodworth v. Payne*, Nos. 131-143, judgment affirmed; opinion by Miller, J.

CORRESPONDENCE.

ENTERING JUDGMENTS.

To the Editor of the Albany Law Journal:

SIR—Since the enactment of the Code of Civil Procedure there has been considerable discussion as to the correct practice in making up a judgment roll and entering a judgment. In some cases the county clerks have, it seems to me, entirely misapprehended their

duties, inasmuch, in some counties no "judgment-book" is kept, while in others the clerks refuse to make up a roll except upon filing a judgment, and also attaching thereto a certified copy thereof. For instance, a judgment in foreclosure is granted at Special Term, the court writes at the end a direction to the clerk to enter, the clerk then makes a copy, certifies the copy, and annexes both to the other papers making the roll, but does not enter either in any book.

Bouvier's Law Dictionary says that a judgment is the decision or sentence of the law by a court, and the old Code, section 245, defined it to be the final determination of the rights of the parties.

The idea of the average county clerk is, that a judgment is something made by a court or judge, in writing, to be filed in his office. On the contrary, it is something which, having been determined by the court, is to be reduced to writing and recorded as the judgment of the court by the clerk, the same as he records a verdict, and how he shall enter or record it is shown by a written direction of the court. The court indicates the judgment and the clerk enters it, in all cases when the court is called upon to decide any thing. In other cases the law fixes the judgment and the clerk enters it.

Under the Revised Statutes I apprehend the practice was to draw what was called the record of the judgment, and, after obtaining the direction of the court, when necessary, the clerk signed and filed it, whereupon it stood "entered." 3 R. S. (6th ed.) 619, § 10. But the old Code required the clerk to keep a judgment-book (independent of the docket), and to enter all judgments therein and to annex a copy of the judgment (as entered in the book) to the roll.

Here the practice under the Revised Statutes and the Code became mixed. No judgment-book was kept, and it having been held unnecessary for the clerk to sign the judgment, he has contented himself with filing in his office the judgment (as it is erroneously called), which is usually handed him by the attorney.

The Code of Civil Procedure retains the provision that the clerk shall keep (§ 1236) a judgment-book and shall enter therein all final judgments. Sections 1237, 1276 and 1354 provide for the manner of making up the roll in different cases in each of which "a certified copy of the judgment" is required. The only distinction between the two Codes seems to be in the word *certified*.

It seems, therefore, perfectly clear that the correct practice is this: The clerk must keep a judgment-book and enter therein (*i. e.*, write out) the judgment of the court. In litigated cases the decision will inform him how he is to draw the judgment. In partition, foreclosure and the like cases, the judgment is determined by the formal direction of the court to the clerk to enter (in the judgment-book) that form of a judgment which is usually prepared and handed to the court, while upon jury trials, defaults, etc., the judgment is to be entered in the book by the clerk as each case may require. Then under the new Code the clerk must make a certified copy of the judgment so entered in the book, and attach it to the pleadings, etc., and thus make up the "roll."

In practice, the attorney for the successful party should draft a judgment (in proper cases he obtains the direction of the court to enter). He then presents it to the clerk, who copies it into the judgment-book. The judgment thus becomes "entered." Then

the clerk can affix the draft to the roll, certify it to be a copy, and the "roll" is complete. The great variety of practice and views upon this subject has induced me to jot down these notes with the hope that they may aid in establishing a uniformity of practice consistent with the law.

Yours, etc., SUBSCRIBER.

PORT RICHMOND, S. I., June 24, 1878.

NOTES.

IN the Court of Appeals on the 20th inst. Hon. Henry E. Davis, of New York, presented a memorial of the late Hon. Samuel A. Foote, which was the occasion of remarks by members of the bench and bar present.

Mr. Justice Miller of the United States Supreme Court has been quite ill recently, and has undergone a painful surgical operation. He is now better and in a fair way to recovery.

In reply to a question as to whether a failure on the part of a justice of the peace to give a bond in compliance with the act of the last Legislature, vacates his office, says that it is his opinion that no such consequence would follow such omission; but he says, "it may be argued, and is perhaps a fair construction of the act, that official duties shall not be performed by a justice in office unless he shall within sixty days give the bond required. At any rate it is a statutory duty imposed upon justices for the benefit of the public, and ought to be complied with by those officers."

The attorney-general of this State, in reply to an inquiry from the acting superintendent of the banking department, says: "In answer to your communication of this date relative to the construction to be given to the 2d section of chapter 347 of the Laws of 1878, amending the Savings Bank Law, I have the honor to say that the section probably fails to express what was intended by the person who drew it. It would seem to have been intended to limit the aggregate deposits by any individual in a savings bank to three thousand dollars; but that is not the necessary construction of the language used. It bears quite as properly the construction that any single deposit shall not exceed three thousand dollars. The language is so indefinite that, in my opinion, you will be justified in holding that aggregate deposits in excess of three thousand dollars and not in excess of the limitation prescribed by section 23 of the act of 1875 (ch. 371) will not be deemed violations of this section. The clear and precise language of the act of 1875 restricts the 'aggregate amount of deposits' to the sum mentioned in that act. If the Legislature by the section in question intended to restrict the aggregate deposits to three thousand dollars, it is fair to presume similarly accurate language would have been employed."

A novel kind of easement was claimed in the English case of *Sturges v. Bridgman*, before the Master of the Rolls on the 3d inst. The plaintiff, a physician, on the erection of a consulting-room in his garden found that the use by the defendant of two pestles and mor-

tars fixed in the wall adjoining the consulting-room by their noise caused him grave inconvenience and annoyance, and commenced an action to restrain the continuance of the nuisance. The fact of the nuisance was scarcely disputed, but the defendant's contention was that he had acquired, first, a prescriptive right to commit the nuisance, and secondly, under section 2 of the Prescription Act, a right by user for more than twenty years. The Master of the Rolls was of opinion that this was an easement incapable of interruption within the authority of *Webb v. Bird*, 13 C. B. (N. S.) 841, and one of which he could not presume a grant, and, consequently, that the defendants had not acquired a title by prescription. Until the erection of the new room there had been no nuisance; and how could the plaintiff before that time have prevented the waves of sound from passing over the garden? He could not enter on the defendant's premises, and so commit a trespass, to abate the nuisance, and there was no other way in which the acquisition of the right could have been prevented. He also thought that the easement of the passage of sound was not within the second section of the Prescription Act; it was not an easement which would "be enjoyed or derived upon, over, or from the land" of another. It was very much like the above case, where a person claimed a right to the uninterrupted enjoyment of the currents of air in motion to his windmill. The plaintiff was entitled to a perpetual injunction.

A correspondent of the *Pall Mall Gazette* writing from Valencia, says: "There still survives in this city a very ancient tribunal which has exercised jurisdiction without a break for nearly a thousand years. Just outside the city, extending eastward to the Mediterranean and southward to the Lake of Albufera, is the plain known as the Huerta de Valencia. This plain, which covers nearly ten square miles, was at one time covered by the sea, but since the time of the Arabs it has been reclaimed, and has been converted by means of irrigation into one of the most fertile spots in the peninsula. The Huerta is traversed by eight main canals (acequias), which have an infinite number of small branches; and by this means the land is provided with an abundant supply of water. There are appointed times for the supply of water to each district, the signal for opening and closing the dykes being given by the great bell in the cathedral tower of Valencia. Agents are appointed to see that these arrangements are strictly carried out, and any infraction of them is brought before the tribunal to which I referred above. This tribunal, known as the "Tribunal of the Waters," is composed of eight members, who are elected by the eight divisions of the Huerta, and holds its sittings at noon every Thursday under the porch of Valencia Cathedral, the chapter of which is bound to provide it with a bench. All disputes which may have arisen during the past week are laid before the tribunal by word of mouth, neither the complainant nor the defendant being allowed to employ counsel, and so great is the respect felt for its decisions, that since its institution by the Arabs in 920, no instance has been recorded in which the defeated party has appealed from it to the ordinary jurisdiction of the country. I may add that the Huerta contains sixty-three villages and hamlets, with a total population of nearly eighty thousand."

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